

## 'TAGGING' BILLS IN PARLIAMENT: SECTION 75 OR SECTION 76?

CHRISTINA MURRAY†

*Professor of Law, University of Cape Town*

RICHARD SIMEON★

*Professor of Political Science and Law, University of Toronto*

The South African Constitution states unambiguously that there is to be a single, united Republic of South Africa. However, under s 40, the state is divided into three 'spheres', national, provincial and local, which are 'distinctive, interdependent and interrelated'. Building on the commitment to a single<sup>1</sup> state with distinct spheres of government, the Constitution puts in place a complex system of multi-level government with 'soft boundaries' between the spheres. One of the most significant features of this system is that, rather than divide functions between the national and provincial governments, many important functions are shared. Schedule 4 to the Constitution presents a long list of 'functional areas' in which the national and provincial spheres have 'concurrent . . . legislative competence'. Provinces have exclusive legislative power only in a small number of relatively unimportant areas set out in schedule 5. Moreover, the national government is not totally excluded from even these exclusive areas of provincial competence. Under s 44(2), it may legislate on schedule 5 matters for certain, carefully circumscribed purposes.

One of the legal implications of the ample list of matters of concurrent jurisdiction in the Constitution is to reduce the number of disputes about who has jurisdiction over a matter. It means that both the national government and provinces can legislate on health services, welfare services, housing and the environment, for instance, without fear of acting unconstitutionally.<sup>2</sup>

† BA LLB (Stell) LLM (Michigan).

★ BA (British Columbia) PhD (Yale) FRSC. We wish to thank Sarah Krieg, Fritz Fiethen and Horst Risse for assistance with the German material in this article, and Sarah Hilliard for general research assistance.

<sup>1</sup> Section 1 of the Constitution of the Republic of South Africa Act 108 of 1996 refers to South Africa as 'one, sovereign, democratic state'. This reflects a determination that the Balkanization effected by apartheid should not be repeated.

<sup>2</sup> Only when national and provincial legislation on a schedule 4 matter is in conflict will a legal dispute arise. Then the question is not a jurisdictional one concerning which law is constitutional and thus valid but rather which of two valid laws prevails. Jurisdictional questions are limited to two situations: (i) cases in which provincial laws are alleged to fall outside their jurisdiction and (ii) cases in which national laws are alleged to fall under the exclusive jurisdiction of provinces and are not permitted by s 44(2).

But, the fact that many potential jurisdictional disputes are avoided by the granting of concurrent powers to provinces and the national sphere does not avoid the need to classify (or categorize) new national laws. This is because a subsequent question is whether laws that are clearly *intra vires* of the national government require provincial consent through the second chamber of Parliament, the National Council of Provinces (‘NCOP’). The Constitution prescribes two different procedures for the passage of laws through Parliament. First, s 76 of the Constitution states that bills that ‘affect’ provinces must be approved by the National Council of Provinces as well as the National Assembly. To override this veto requires a special (two-thirds) majority in the Assembly. Second, under s 75, the NCOP can accept or reject other bills but only an ordinary majority in the National Assembly is required to override the NCOP to pass them into law. The rationale is simple: the more national legislation affects the interests, concerns and capacities of the provinces, the more voice the latter should have in its content.

This is reinforced by another important difference in the treatment of s 75 and s 76 bills. When the NCOP deals with bills which directly affect the provinces, the provinces are given a clearer voice, as governing entities. On s 76 bills, each provincial delegation casts just one vote. The support of five of the nine provincial delegations is required to pass the bill.<sup>3</sup> But when the NCOP deals with a bill that does not affect the provinces — a s 75 bill — each delegate to the NCOP votes as an individual (or, of course, as a party member) and a majority of those present must support it for it to pass.

The distinction appears to be that the s 76 procedure — provinces vote as units, and a super-majority is required to trump the NCOP — is designed to reinforce the principle of multi-sphere government in the Constitution. The s 75 procedure — NCOP delegates vote individually and collectively can be overridden by a simple Assembly majority — appears designed to sensitise the law-making process to provincial concerns, even in matters that do not implicate the provinces as governing institutions, and to ensure that all bills are looked at twice.

The distinction is an important one. Hence the significance of the process for deciding into which category a bill falls.

Moreover, the differing procedures raise potential questions about the constitutional validity of legislation. The question is: was the proper voting procedure followed? If a bill is wrongly classified as one that affects provinces and is accordingly passed by the supporting vote of five delegations according to s 76, it could be argued that its adoption is not constitutional because it should have been passed by delegates voting as individuals. Conversely, if a bill is wrongly classified as a s 75 matter, again the result could be unconstitutional. In the *Liquor Bill* case, Cameron AJ comments

<sup>3</sup> Constitution, s 65(1). (Under s 60, the NCOP is made up of a ten-person delegation from each of the nine provinces.)

that the difference in voting procedure between the two NCOP procedures is material 'since whether a provincial delegation votes corporately through its head of delegation, as prescribed by s 65, or individually by each member casting a vote, as prescribed by s 75(2), may in defined circumstances be determinative as to whether the NCOP passes a Bill'.<sup>4</sup> In other words, the different processes may deliver different results. This means in turn that a decision concerning the classification of a bill and thus which procedure it should follow could affect its constitutionality.

At first blush, the scheme that ss 75 and 76 introduces may seem clear cut and decisions concerning whether or not a bill should follow the s 75 or s 76 route easy to make. In practice, however, the classification — or tagging as it is referred to in Parliament — of bills has often been very difficult. The history of other multi-level systems suggests that this is not unexpected. For instance, the Canadian Constitution Act (1867) assigns separate legislative powers to the central or federal government and to the provinces. Nevertheless, in many cases, arguments can be made for the inclusion of a law under either list. Lederman notes:

'[T]he categories of laws enumerated in sections 91 and 92 are not in the logical sense mutually exclusive; they overlap or encroach upon one another in many more respects than is usually realised. To put it another way, many rules of law have one feature that renders them relevant to a provincial class of laws and another feature which renders them equally relevant logically to a federal class of laws. It is inherent in the nature of classification as a process that this should be so.'<sup>5</sup>

And, in a frequently quoted passage in a 1941 decision of the Indian Federal Court dealing with a similar issue under the Indian Constitution, Sir Maurice Gwyer CJ said:

'It must inevitably happen from time to time that legislation though purporting to deal with a subject in one List touches also upon a subject in another List, and the different provisions of the enactment may be so closely intertwined that blind adherence to a strictly verbal interpretation would result in a large number of statutes being declared invalid because the legislature enacting them may appear to have legislated in a forbidden sphere.'<sup>6</sup>

As in Canada and India, few South African bills fall clearly and exclusively within or outside the subject matter listed in the schedules. Instead, many national bills cover matters that would usually be seen to fall under schedule 4 as well as matters that fall outside the jurisdiction of provinces. The language of the Constitution provides little assistance in classifying such bills. Section 44(1)(b)(ii) says that 'legislation *with regard to any matter within a functional area* listed in Schedule 4 and any other matter required by the Constitution' must follow the s 76 route. This wording is echoed in part in

<sup>4</sup> *Ex parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* 2000 (1) SA 732 (CC) (*Liquor Bill case*) para 26.

<sup>5</sup> W R Lederman 'Classification of laws and the British North America Act' in W R Lederman *Continuing Canadian Constitutional Dilemmas* (1981) 236 quoted in P Macklem, R C B Risk, C J Rogerson, K E Swinton, L E Weinrib & J D Whyte *Canadian Constitutional Law* 2 ed (1997) 173.

<sup>6</sup> *Subrahmanyam Chettiar v Muthuswami Goudan* AIR 1947 FC 47 at 51 quoted in *Federation of Hotel & Restaurant Association v Union of India* AIR 1990 SC 1637 para 13. See also Cameron AJ in the *Liquor Bill case* supra note 4 para 61: 'It is sufficient to say that, although our Constitution creates exclusive provincial legislative competences, the separation of the functional areas in Schedules 4 and 5 can never be absolute.'

s 76(3) which states, inter alia, that a bill that ‘falls within a functional area listed in Schedule 4’ follows the s 76 route.

This paper is concerned with the approach that should be taken to the classification of national bills. What criteria should be used to determine whether a bill should follow the s 75 or s 76 process?

Since the two different procedures for passing national legislation are rooted in the constitutional model of multi-sphere government, we start with an analysis of the framework of division of powers of which ss 75 and 76 are a part. That analysis provides a framework from which we argue that the approach currently used in Parliament is wrong and propose an alternative set of criteria for tagging bills.

#### THE DIVISION OF POWERS UNDER THE 1996 CONSTITUTION

The soft boundaries between the spheres of government are evident in a number of aspects of the model of multi-level government established by the Constitution. The concurrent jurisdiction of the national sphere and provinces over many important matters is just one example. Others include the expectation, in s 125, that provinces will usually implement national legislation that falls within functions listed in schedule 4; the responsibility that provinces and the national government share for supporting local government; the national sphere’s obligation to support provincial government, spelt out most clearly in s 125; the largely centralized revenue-raising power balanced by a constitutional requirement of equitable sharing of revenue; the criteria set out in s 146 for determining what law should prevail when national and provincial laws conflict (these assume that the national government will establish norms and standards which provinces will maintain); national powers of intervention in both the provincial and local sphere and provincial powers of intervention in local government; the establishment of a single public service;<sup>7</sup> and, perhaps most complicated of all, overlapping responsibility for policing under ss 206 and 207.

The kind of interdependence amongst governments that this system creates distinguishes South Africa from older federations such as Canada and the US in which constitution makers sought to divide power with as little overlap as possible<sup>8</sup> and in which competition between levels of government is an integral and intended part of the system. South Africa’s history and current challenges mean that economic and social development demands co-ordination and co-operation. This directed South Africa’s constitution-makers to an ‘integrated’<sup>9</sup> model, much closer to that of Germany. Under

<sup>7</sup> Section 197 (1). This s has generally been taken to require one service for provinces and the national sphere. It is not clear why the local sphere is omitted and recently the national government has suggested that it may integrate the local sector into the ‘single’ public service.

<sup>8</sup> Richard Simeon ‘Considerations on the design of federations: The South African constitution in comparative context’ (1998) 13 *SAPL* 42 at 51, noting that overlap is inevitable.

<sup>9</sup> *Ibid.*

this model, too much intergovernmental conflict or competition would be fatal. Accordingly, chapter 3 of the Constitution includes a set of 'principles of co-operative government and intergovernmental relations'.<sup>10</sup> Accompanying these principles is the stipulation that the spheres of government should avoid legal proceedings against each other. The Constitution goes further. It requires the state to establish a number of institutions with the specific task of ensuring that relationships among the spheres of government are properly managed. Thus, focussing on executive intergovernmental relations, s 41 requires an Act of Parliament to set up structures that will manage intergovernmental relations and provide mechanisms for the settlement of disputes.<sup>11</sup> On the legislative side, the NCOP is carefully designed as a key institution for ensuring co-operative government in law making and in overseeing the executive intergovernmental process. It plays a role both in the passage of national laws that fall under the list of concurrent functions and in overseeing the use of the extensive intervention powers vested in the national government and provinces.<sup>12</sup>

The NCOP is the quintessential institution of co-operative government, providing a forum for the representation of provincial interests in the national Parliament. Its role is to ensure that the institutional integrity and policy concerns of provinces are fully taken into account in the national legislative process. As a part of the national Parliament and as an (indirectly) elected body, it is designed to operate as an intergovernmental institution without the 'democratic deficit' which so often is part of intergovernmental relations.<sup>13</sup>

The nine provincial delegations which make up the NCOP are constituted by the provincial legislatures.<sup>14</sup> There are ten members from each

<sup>10</sup> *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996 1996 (4) SA 744 (CC) (Certification judgment I)* paras 288–90 says the following about the constitutional scheme:

'[The new text s] 40 defines the different levels of government as being "distinctive, interdependent and interrelated" and requires them to conduct their activities within the parameters of [the new text ss] 40 and 41. According to [the new text s] 41(1), all spheres of government and all organs of State within each sphere must adhere to the principles of co-operative government and inter-governmental relations set out in that section.

These principles, which are appropriate to co-operative government, include an express provision that all spheres of government must exercise their powers and functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere.

Inter-governmental co-operation is implicit in any system where powers have been allocated concurrently to different levels of government and is consistent with the requirement of [Constitutional Principle] XX that national unity be recognised and promoted. The mere fact that the [new text] has made explicit what would otherwise have been implicit cannot in itself be said to constitute a failure to promote or recognise the need for legitimate provincial autonomy.'

<sup>11</sup> At least three Acts contain provisions which regulate intergovernmental relations in specific sectors (the Intergovernmental Fiscal Relations Act 97 of 1997; the National Environmental Management Act 107 of 1998; and the National Education Policy Act 27 of 1996). The Intergovernmental Relations Framework Bill B3–2005, currently before Parliament, promises to regulate intergovernmental relations fairly comprehensively.

<sup>12</sup> Finally, of course, disputes between the spheres can be decided by the courts.

<sup>13</sup> See F W Scharpf 'The joint-decision trap: Lessons from German federalism and European integration' (1988) 66 *Public Administration* 239.

<sup>14</sup> Ten representatives of local government may also participate in the NCOP. They do not have voting rights (Constitution, s 67).

province. The provincial premier heads the delegation. Six delegates are 'permanent members' drawn from the legislature and nominated by the parties that are constitutionally entitled to representatives on the NCOP delegation.<sup>15</sup> Three further members must be members of the provincial legislature. These three 'special delegates' are chosen from time to time, thus enabling the province to send delegates with expertise in matters under consideration to Parliament. Section 61(3) states that provincial delegations must represent minority parties 'in a manner consistent with democracy'.

Thus the institutional design integrates the national and provincial legislative institutions and builds the concept of multi-sphere government directly into the parliamentary process. This principle carries over to the decision-making process in the NCOP.

As we have seen, on s 76 matters, 'ordinary Bills affecting provinces', each provincial delegation casts a single vote. This vote must be cast on the instruction of the provincial legislature. For example, when the NCOP considers national bills that fall under schedule 4 or when it oversees a national intervention in a province, provincial legislatures have a direct say in how their delegation votes. In practice this means that provincial legislatures must discuss national legislation that comes before the NCOP. They must then brief their delegation on the views of the province so that these views can be raised in committee deliberations in the NCOP. Later, the provincial legislature must give its delegation precise instructions on how the province wishes it to vote (or what amendments should be proposed).<sup>16</sup> The requirement that delegations to the NCOP be mandated by their provincial legislatures (i) demands close links between the provinces and their delegations in the NCOP; (ii) means that members of each provincial legislature (MPLs) and members of each province's executive council (MECs) must engage with national bills that fall under s 76 and the various other matters before the NCOP;<sup>17</sup> and (iii) provides an opportunity for provinces to draw citizens into deliberations on issues before the NCOP. Through this process, the NCOP plays its role as an institution of intergovernmental relations, with a strong democratic element, linking national and local politics.

Most bills that fall under s 76 concern matters over which the provinces also have law-making power under schedule 4 and are bills that the

<sup>15</sup> Note that parties represented in the provincial legislature are entitled representation on the provinces delegation in a manner proportionate to their representation in the legislature (Constitution, s 61(1)). Provinces may also recall delegates (Constitution, s 62(4)(c)).

<sup>16</sup> The process is described fully in Christina Murray & Richard Simeon 'From paper to practice: The National Council of Provinces after its first year' (1999) 14 *SAPL* 96. For a description of the manner in which this process works at present see Christina Murray, Yoni Hoffinan-Wanderer & Karla Saller *NCOP Second Term 1999-2004: A Review* (2004) part 4.

<sup>17</sup> Formally, of course, the mandate is given by the legislature. However, although it is the provincial legislature that instructs the NCOP delegation, the parliamentary system which operates with a strong system of party discipline, ensures that the executive of a province will have substantial influence in the mandating process.

Constitution anticipates the provinces will implement.<sup>18</sup> But s 76 also includes, under subsecs (3) to (5), a number of national laws which fall outside the legislative capacity of provinces but which nevertheless clearly affect matters for which provinces do share responsibility.

To become law, these s 76 bills must usually be supported by at least five of the nine provincial delegations in the NCOP.<sup>19</sup> Working optimally, the s 76 process means that provincial legislatures and executives will review these bills carefully before instructing their delegations how to vote. If, for instance, the provincial executive realises that it does not have the capacity to implement certain provisions of a national bill that falls under schedule 4, it can ensure that the provincial NCOP delegation is instructed to raise this in the NCOP and to withhold support for the bill unless it is amended to accommodate the province's needs. Similarly, if the provincial executive or legislature believes that a bill fails to deal adequately with the particular problems of a province, or is designed without taking its special needs into account, the mandating process gives them an opportunity to voice these concerns in the national sphere. Problems that certain provinces found in the 2003 National Environmental Management: Protected Areas Bill<sup>20</sup> provide a good example of the role the NCOP can play. One province costed the Bill and found that it could not afford its implementation in the timeframe that the Bill stipulated. The province also realised that some provisions for controlling access to natural areas would be unworkable for certain natural areas in the province because of the size of the areas and the number of people living in them. These concerns, which were shared by at least one other province, are precisely the type of concerns that the national Parliament needs to be aware of in passing national legislation intended to be implemented by provinces.<sup>21</sup>

The opportunity that the s 76 procedure in the NCOP gives to provincial executives to convey concerns to the national government both through the mandating process in the provincial legislature and through its participation in the provincial delegation is perhaps the most significant formal way in which co-operative government is protected in the Constitution. Certainly, provincial executives are also able to voice concerns in forums of executive intergovernmental relations. However, these forums are generally closed to the public, involve members of the national and provincial executives and bureaucracies, but not ordinary MPs or MPLs, are dominated by the national

<sup>18</sup> See s 125(2)(b).

<sup>19</sup> As already noted, if the NCOP rejects such a bill, it must be passed by a two-thirds majority in the National Assembly to become law. Generally it seems unlikely that a bill that cannot muster the support of five provinces will be passed with a two-thirds majority in the National Assembly. Both numerical and political considerations are likely to militate against this. See C M Murray 'NCOP: Stepchild of the Bundesrat' in Bundesrat *50 Jahre Herrenchieser Verfassungskonvent 'Zur Struktur des deutschen Föderalismus'* (1999) 262.

<sup>20</sup> Now Act 57 of 2003.

<sup>21</sup> The Gauteng MEC for Environmental Affairs attended the NCOP Select Committee deliberations on the Bill to present these concerns. However, an extraordinary insistence on formalities by the NCOP committee chairperson prevented the MEC from making the submissions and the pressure on the legislative process before the 2004 elections led to the Bill being passed in its original form.



executive which sets the agenda and the decisions that they take, and do not offer the multiparty representation secured in the delegations to the NCOP.<sup>22</sup> When executive intergovernmental-relations forums such as MinMECs work well, provincial executives may have no need to use the opportunity that the NCOP provides. But when they do not work well or when more debate in the provincial legislature raises concerns ignored in the IGR forums, the NCOP process is critical. It gives provinces a say in the national laws that they will implement; it also provides an antidote to the closed forums of executive intergovernmental relations, enhancing political accountability.

The preceding discussion focuses on the responsibilities of the NCOP in relation to schedule 4 bills. Very similar issues arise in relation to the other laws that s 76 covers. For instance, the national sphere has exclusive legislative power over matters relating to the public service. The Constitution requires a single public service. This has limited the control that provinces have over the structure of their public service and gives them no control over pay despite the fact that salaries account for the single largest provincial expenditure.<sup>23</sup> Section 197(4) of the Constitution also requires provinces to manage human resources within ‘a framework of uniform norms and standards applying to the public service’. Provincial participation through the NCOP in the adoption of laws governing the public service compensates to some extent for this central control. Similarly under s 76(4)(b), a bill ‘envisaged in Chapter 13’ of the Constitution, which deals with public finance, and which ‘includes any provision affecting the financial interests of the provincial sphere of government’ must follow the s 76 process in Parliament. Again the NCOP’s role is clear. These bills may include provisions concerning the division of revenue amongst provinces (s 214), treasury norms and standards that apply to provinces (s 216(1)), procurement processes (s 217), and controls on provincial taxes (s 228), amongst other things. All of these matters concern the administration of provinces and, if the democratic role that the Constitution envisages for provinces and their responsibility for the administration of national and provincial laws is to have any substance, their involvement in the adoption of these laws is obviously important.

But not all bills in Parliament must follow the s 76 route. For those that do not, the role of the NCOP is very different from that described above. Here,

<sup>22</sup> See generally, Norman Levy & Chris Tapscott (eds) *Intergovernmental Relations in South Africa: The Challenges of Co-operative Government* (2001); Department of Provincial and Local Government of the Republic of South Africa in collaboration with the School of Government, University of the Western Cape and the Institute of Government, University of Fort Hare *Intergovernmental Relations Audit: Towards a Culture of Co-operative Government Final Report* (December 1999); and Scharpf op cit note 13. See also the Intergovernmental Relations Framework Act 13 of 2005 which reflects the current top-down approach.

<sup>23</sup> See National Treasury, Republic of South Africa *Report of the Select Committee of Finance on Trends in Intergovernmental Finances: 2000/1–2006/7* (August 2004) Table 2.4 at 17 (for figures giving the compensation of employees as a percentage of aggregate provincial budgets from 2000–2006/07).



in effect, parties, not provinces, control the passage of the bill.<sup>24</sup> The laws for which the Constitution prescribes the s 75 process are, like all national issues, important to the citizens of provinces, but they are not laws that concern provincial government as such.

One might argue that the interests of the provincial electorates on national matters are attended to adequately in the composition of the National Assembly as 200 of the 400 seats in the Assembly are allocated regionally and that the s 75 process is redundant.<sup>25</sup> But the link that National Assembly politicians have to provinces is not the same as that of NCOP delegates and s 75 gives representatives drawn from provincial legislatures an opportunity to consider these national bills. Here we see constitutional concern that provincial views should not be neglected in any aspect of the national legislative process. It is likely too that the NCOP's role under s 75 also draws on a quite different but common conception of the role of second chambers — that of a check on hasty and perhaps highly politicized decision making in the other house. This is the dominant role of second chambers such as the House of Lords and the US Senate. In these systems, the delay and opportunity for 'sober second thought' that the second house introduces are considered valuable aspects of the system of checks and balances.<sup>26</sup> Thus, through the s 76 and s 75 procedures the Constitution ensures that all bills will be considered from a provincial perspective and that no bill will be passed too hastily.

Seen in the overall context of the Constitution, s 75 captures an important but nevertheless subsidiary role of the NCOP. When following the s 75 procedure, the NCOP is no longer performing a function essential to the operation of the complex system of co-operative government that the Constitution establishes. It no longer offers the 'direct consultation with provincial interests' provided under s 76 but instead what the Constitutional Court has referred to as 'a mere indirect engagement'.<sup>27</sup> Under the s 76 process its influence is significant; under s 75 it may prompt the National Assembly to revisit previous decisions but it can exert little pressure on it to do so. As Cameron AJ notes in the *Liquor Bill* case, the views of the NCOP on s 75 matters carry less weight and are relatively easily overridden by the National Assembly.<sup>28</sup> Similarly, in the second *Certification Judgment* the Constitutional Court described the NCOP's power under s 75 as a 'no more

<sup>24</sup> Of course, provincial mandates are also informed by party concerns and, as in Germany, party views dominate. Nevertheless, the s 75 process shifts the focus from the views expressed in provincial legislatures and captured in the mandate to the views of individual delegates.

<sup>25</sup> In national elections South Africans have just one vote. However, the Constitution states that half the members of the National Assembly must be drawn from 'regional lists submitted by the respective parties' and one half from national lists (Item 2 Schedule 2 of the Interim Constitution of the Republic of South Africa Act 200 of 1993 retained in the 1996 Constitution). National Assembly politicians often argue that this means that the National Assembly represents regions.

<sup>26</sup> See Meg Russell *Reforming the House of Lords: Lessons from Overseas* (2000) 21–2.

<sup>27</sup> *Certification judgment I* supra note 10 para 419.

<sup>28</sup> *Liquor Bill* case supra note 4 para 25.

than a delaying power'.<sup>29</sup> This reading of the function of the NCOP under s 75 as subordinate to its s 76 role is supported by s 44(1) of the Constitution in which a significant shift in language reflects different roles: under s 44(1), the NCOP is to 'pass' s 76 legislation but to 'consider' s 75 legislation.

There is convincing evidence that the NCOP is not yet working as the Constitution envisages.<sup>30</sup> Its focus is too often on national debates and it pays limited attention to provincial concerns. Provincial legislatures often fail to contribute meaningfully when national bills come before them. Thus the NCOP's role in drawing provincial concerns to the attention of the national government is not fulfilled. There are many reasons for this. The newness of the system is one; the lack of capacity of many provincial legislatures another; and the dominance of one party across the whole system a third. But there is also a growing awareness in some provinces that their role in implementing national legislation gives them a responsibility to participate in its passage. In the past provincial politicians often saw themselves as agents of the national government. However, some now realise that the electorate will lay responsibility for the poor implementation of national laws at their feet. It is thus in their interest to ensure that national laws can be implemented by the province.

Despite its current weaknesses, the NCOP and, in particular, the s 76 process for the adoption of national laws, potentially enhance democracy because they give provincial legislatures, and thus the citizens of provinces, a say in laws that directly concern them, and provide a counterweight to processes of executive intergovernmental relations. The NCOP enhances effective government because it provides an opportunity for provincial executives to engage with bills and ensure that they can be properly implemented. Thus, just as whether judges interpret federal or provincial powers narrowly or broadly can greatly influence the nature of decentralization in a federal system, so whether s 76 is interpreted narrowly or broadly will have major consequences for the integrity, effectiveness and influence of the provinces.

## TAGGING BILLS

Two distinct although interrelated issues face Parliament in tagging bills. One is the ambit of the various 'functional areas' listed in schedules 4 and 5 to the Constitution (eg does liquor licensing include regulation of manufacturers of liquor?). The other is the subject matter of the bill to be tagged — is it or is it not a bill 'with regard to any matter within a functional area listed in Schedule 4' (s 44(1)(b)(ii))<sup>31</sup> or, to use the words of s 76(3), does it 'fall within a functional area listed in Schedule 4'?

<sup>29</sup> *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996 1997 (2) SA 97 (CC) (Certification judgment II)* para 64: 'In substance the NCOP has no more than a delaying power, and if its support is not secured, the legislation can be passed by a simple majority in the NA.'

<sup>30</sup> See, for instance, *Intergovernmental Relations Audit* op cit note 22. For a more recent assessment see Murray et al op cit note 16.

<sup>31</sup> Or another matter listed in s 76.

As we have already noted, these issues are familiar to systems in which power and responsibility is divided between different levels of government. Thus, in grappling with the disputes concerning the power of one or another level of government to pass legislation, courts in Australia, Canada, India, Malaysia and Spain have discussed the need to determine the ambit of the constitutional grant of power that underpins the jurisdiction of the law-making body and the separate question whether a particular piece of legislation falls within its ambit. In discussing the two step process that Canadians follow to deal with these two issues, Hogg comments:

‘The process is, in Laskin’s words, “an interlocking one, in which the British North America Act and the challenged legislation react on one another and fix each other’s meaning”. Nevertheless, for the purposes of analysis it is necessary to recognise that two steps are involved: the characterisation of the challenged law (step 1) and the interpretation of the power-distributing provisions of the Constitution (step 2).’<sup>32</sup>

This article is primarily concerned with just one of the two interlocking issues. It does not attempt to grapple with the interpretation of the functional areas in the schedules but instead focuses on the characterization of bills.<sup>33</sup> It is concerned with the way one determines whether or not a bill is ‘with regard to any matter within a functional area listed in Schedule 4’.<sup>34</sup> The question is how to determine whether or not a national bill should follow the s 75 or s 76 route through Parliament.

Some bills are easy to tag. In South Africa these include bills that clearly deal with a schedule 4 matter (such as housing or education, for instance), bills that fall under one of the constitutional provisions listed in s 76(3); and bills that fall under s 44(3) of the Constitution. (Section 44(3) states that ‘Legislation with regard to a matter that is reasonably necessary for or incidental to, the effective exercise of a power concerning any matter listed in Schedule 4 is, for all purposes, legislation with regard to a matter listed in Schedule 4’.) Similarly, bills that do not encroach in any way on matters listed in the schedules and do not deal with any other matters listed in s 76(3) are easily tagged as s 75 bills. But, as noted above, many laws concern more than one matter. The National Water Act<sup>35</sup> is an example. It deals with the management of water (a national issue) but contains extensive provisions that relate to the environment and that seek to protect water supplies from

<sup>32</sup> Peter W Hogg *Constitutional Law of Canada* loose-leaf ed (2003) para 15.4 at 15–6, quoting Bora Laskin ‘Tests for the validity of legislation: What’s the ‘Matter’?’ (1955) 11 *University of Toronto LJ* 114 at 127. Abel has argued that the process is actually a three-step one: ‘identification of the “matter” of the statute, delineation of the scope of the competing classes, and then a determination of the class into which the challenged statute falls’ (Macklem op cit note 5 at 151 referring to Albert S Abel *Laskin’s Canadian Constitutional Law* 4 ed (1975) 97). See also Anthony Blackshield & George Williams *Australian Constitutional Law and Theory: Commentary & Materials* 3 ed (2002) 648–53 where the impact of the second step on the first step is emphasized.

<sup>33</sup> The determination of the ambit of areas listed in the schedules is itself a formidable task as both the *Liquor Bill* case supra note 4 and *Mushavha v President of the Republic of South Africa* 2004 (12) BCLR 1243 (CC) demonstrate.

<sup>34</sup> It is also not concerned with the jurisdictional questions that arise when, for instance, a provincial law is challenged for falling outside the law-making power of provinces or when it is claimed that a national law intrudes on the schedule 5 functions reserved exclusively for provinces.

<sup>35</sup> Act 36 of 1998.

pollution (environment and pollution control are schedule 4 matters). A different type of example is provided by the Nonprofit Organisations Act.<sup>36</sup> This Act establishes a regulatory framework for all NGOs, thus obviously covering an area that far exceeds the jurisdiction of provinces under schedule 4. Provinces argued, however, that as welfare services are a schedule 4 matter and as the law would have a substantial impact on welfare organizations, it should follow the s 76 procedure. The KwaZulu Cane Growers’ Association Act Repeal Act<sup>37</sup> presented yet another type of problem. This four-section law abolishes the KwaZulu Cane Growers Association and provides for the assets of the Association to be transferred to a trust and used for the development of the small cane growers who paid levies to the Association. The KwaZulu-Natal government argued that the bill should be classified as a s 76 bill because it had a direct impact on the cane growers in the province and thus on agriculture, a schedule 4 matter. But parliamentary law advisers viewed it as a bill concerned with the disestablishment of a company and because companies fall outside schedule 4, recommended that it follow the s 75 procedure.<sup>38</sup> The most recent tagging controversy was very similar. It involved the Communal Land Rights Act<sup>39</sup> which was tagged ‘s 75’ because Parliament concluded that it concerns land and security of tenure. Others argued that it should have followed the s 76 process because of the impact it has on traditional leadership and customary law.

Each bill that is introduced in Parliament includes in its attached memorandum a statement of the way in which the state law advisers believe that it should be tagged. But the decision must be taken by Parliament itself. Accordingly, the Joint Rules of Parliament establish a process.<sup>40</sup> A Joint Tagging Mechanism (JTM) comprising the Speaker and Deputy Speaker of the National Assembly and the Chairperson and permanent Deputy Chairperson of the NCOP is responsible for tagging. Every bill that comes before the JTM is accompanied by a legal opinion, usually provided by the parliamentary law advisers.<sup>41</sup> If the members of the JTM cannot agree, a second legal opinion is secured and the Rules then expect the JTM to reach a conclusion. Should this not be possible the matter must be referred to the National Assembly and the NCOP and, as a last resort, to the Constitutional Court.

<sup>36</sup> Act 71 of 1997.

<sup>37</sup> The KwaZulu Cane Growers’ Association Act Repeal Bill B48–2001 became the KwaZulu Cane Growers’ Association Act Repeal Act 24 of 2002.

<sup>38</sup> The Disestablishment of South African Housing Trust Limited Bill B3–2002, now the Disestablishment of South African Housing Trust Limited Act 26 of 2002, was similarly treated as a bill concerning a company and not the schedule 4 matter ‘housing’.

<sup>39</sup> B67–2003, which became Act 11 of 2004.

<sup>40</sup> The procedure is set out in Joint Rules of Parliament (January 2003), rules 151–158.

<sup>41</sup> The state law advisers and the parliamentary law advisers must be distinguished. By practice, the state law advisers, based in the Department of Justice, are required to certify every bill that is tabled in Parliament by the executive. Through this process they indicate that, in their opinion, the bill is constitutional and technically in order. At the same time they give an opinion on its tagging. The parliamentary law advisers are employed by Parliament and are quite separate from the executive.

Over the past eight years since the establishment of the NCOP, the parliamentary law advisers and JTM have developed various criteria to guide their tagging decisions.<sup>42</sup> Most important (and troublesome) in this context is the way in which Parliament deals with bills containing provisions that relate both to a matter listed in s 76 as well as to a matter that is not referred to in s 76. In such cases, Parliament first asks ‘what is the pith and substance of the bill?’ or, to use the words of the Privy Council, ‘what is the “true nature and character” of the bill?’<sup>43</sup> If the answer to that question is, say, housing or agriculture or another matter that is included in schedule 4, the bill will be tagged ‘s 76’ and any sections in it that touch on matters outside provincial jurisdiction will be considered incidental and thus not impact on the tagging decision. Conversely, if the ‘pith and substance’ of the bill is a matter which falls outside those matters referred to in s 76, the bill will be tagged ‘s 75’ and provisions touching on s 76 matters will be considered incidental and irrelevant to the tagging decision. But, if the bill cannot be said to have a single ‘pith and substance’ and is deemed to cover both s 76 and other matters it will be classified as a mixed bill<sup>44</sup> and, under the Joint Rules, declared impermissible. Then it *must* be divided into two — one part to follow the s 75 process, the other the s 76 process.

Splitting bills creates numerous problems.<sup>45</sup> For instance, in some cases a s 75 bill will be passed with blank sections. The Act is then ‘completed’ by a subsequent bill passed according to the s 76 process. Parliamentarians and the public are confronted with fragmented proposals. Law advisors and parliamentary staff face formidable challenges in ensuring consistency between the two, making sure that amendments to one are carried through to the other. Provinces are expected to provide mandates on bills that are patently incomplete, telling only half the story. The process obviously does

<sup>42</sup> For instance, if the Constitution expects national legislation on a matter, Parliament will tag that legislation ‘s 75’ unless s 76 specifically states that it should follow the s 76 procedure. It is not clear that this is correct.

<sup>43</sup> *Russell v The Queen* (1882) 7 App Cas 829 at 839.

<sup>44</sup> Rule 1(1) of the Joint Rules *supra* note 40 defines a ‘mixed s 75/76 Bill’ as one ‘that contains provisions to which s 75 and s 76 apply’. A bill such as the Children’s Bill (B70B–2003, in its original consolidated version) which is currently in Parliament shows some of the difficulties that the system introduces. Its focus (and perhaps its pith and substance) is the protection of children. This is presumably a s 75 matter. But as it was originally introduced, it contained many matters relating to child care facilities. These matters were considered to be more than ‘incidental’ to the pith and substance and to belong in a s 76 bill. The bill was split and processed in two parts. Whether or not a bill is a ‘mixed bill’ is obviously a fuzzy issue. The questions that it raises seem similar to those raised in Canada in connection with the ‘double aspect’ doctrine. On this see Hogg *op cit* note 32 para 15.5(c) at 15–11ff; and *idem loc cit* note 52.

<sup>45</sup> One aspect of this problem was resolved by the 2003 amendment of s 76(4) (by the Constitution of the Republic of South Africa Amendment Act 3 of 2003). Originally s 76(4) stipulated that a bill was to follow the s 76(1) procedure if it ‘provides for legislation . . . (b) envisaged in Chapter 13, and which affects the financial interests of the provincial sphere of government’. At the insistence of parliamentary law advisors bills with only some provisions that affected provinces were split and the ‘provincial’ provisions and ‘national’ provisions were passed separately by the s 76 and 75 procedures respectively. The National Treasury found this procedure far too cumbersome and prompted the amendment of the section. It now requires bills with ‘any provision affecting the financial interests of the provincial sphere of government’ to follow the s 76(1) route, whether or not the bill is predominantly ‘provincial’.

not contribute towards the accessible legislative process to which the Constitution is committed.<sup>46</sup>

Recognizing the clumsiness of this process, new Joint Rules of Parliament, currently awaiting implementation, propose a different approach. It is that those 'mixed bills' that do not threaten to cause disputes need not be split but should instead be passed twice in the NCOP, once by a vote of the provinces and once by the vote of the individual delegates. But this is a fair weather provision. Should there be disagreement between the houses, either over the bill as introduced or over any proposed amendments, or if either the provinces or the individual delegates fail to pass it, the Rules continue to provide that the bill must be split.<sup>47</sup>

However, this article is not concerned with bills that are classified as 'mixed' but those which are classified under the 'pith and substance' test. The following sections examine this test and argue that it is not appropriate in the South African context. In concluding it proposes another approach.

#### THE PITH AND SUBSTANCE TEST

The term 'pith and substance' was first developed as a way to characterize legislation by the Privy Council in cases arising in Canada under the British North America Act of 1867.<sup>48</sup> As noted above, the attempt in that Act to provide two exclusive lists of powers for the federal and provincial governments respectively inevitably gave rise to disputes concerning whether or not particular laws fell within the legislative power of the legislature that enacted them. In many cases, challenged laws contained provisions that fell under both the federal and provincial lists. Hogg describes the problem in the context of a provincial statute which imposes a direct tax on banks:

'One feature of this law is "direct taxation" which comes within a provincial class of subject. . . ; but another feature of the law is banking which comes within a federal class of subject. . . . If the law is in relation to direct taxation it is good, but if it is in relation to banking it is bad.'<sup>49</sup>

To resolve such disputes, the Privy Council sought to establish the '[t]he true *nature* and *character* of the legislation. . . in order to ascertain the class of subject to which it *really* belongs'.<sup>50</sup> Soon courts started using the phrase 'pith and substance' to describe what one needed to determine to establish the 'matter' of a law and thus to be able to classify it.<sup>51</sup>

Hogg gives the following description of the process followed when laws

<sup>46</sup> The discussion of the German system below suggests another problem with splitting bills. It confuses the allocation of political responsibility for them. This is hardly important when the provinces and National Assembly are in accord as is the case at present. It would become significant were the NCOP and National Assembly to reflect differing political views.

<sup>47</sup> Joint Rules *supra* note 40, rules 191–201.

<sup>48</sup> Blackshield & Williams *op cit* note 32 at 649.

<sup>49</sup> Hogg *op cit* note 32 para 15.5(a) at 15–8.

<sup>50</sup> *Russell v The Queen* *supra* note 43 at 839–40.

<sup>51</sup> Hogg *op cit* note 32 at 15–7 footnote 20 suggests that the phrase was 'first used in this context *Union Colliery Co. v Bryden* [1899] AC 580, 587 per Lord Watson'.

are susceptible to two different classifications (as in the banking and taxation example referred to above):

'How does the court make the crucial choice? Logic offers no solution: the law has both the relevant qualities and there is no logical basis for preferring one over the other. What the courts do in cases of this kind is to make a judgement as to which is the most important feature of the law and to characterise the law by that feature: that dominant feature is the 'pith and substance' or 'matter' of the law; the other feature is merely incidental, irrelevant for constitutional purposes.'<sup>52</sup>

Over time the Privy Council and the Canadian Supreme Court developed several rules to deal with the categorization of laws.<sup>53</sup> But the central elements of the system for dealing with overlap are the 'pith and substance doctrine' and its perhaps necessary corollary, the doctrine of federal paramountcy. As Hogg comments: 'It is important to recognise that this "pith and substance" doctrine enables one level of government to enact laws with substantial impact on matters outside its jurisdiction.'<sup>54</sup> In other words, the impact of the test is to broaden the competence of the legislatures substantially. This creates the possibility of conflicts between federal and provincial laws because it means that it is possible for a federal and provincial law to deal with the same matter. When such conflicts occur, the judicially developed doctrine of federal paramountcy applies. It states that in the case of conflict, the federal law prevails.

The pith and substance rule for characterizing laws was developed to resolve jurisdictional disputes in a system with a constitutional framework that expected watertight divisions between legislative powers allocated to the federal government and those allocated to provinces. It deals with the inevitable overlaps. The test has also been used in federal systems in which concurrency is recognized. A pith and substance test derived from Canadian cases before the Privy Council is used in India, for instance. However, here as in Canada, it is used to manage the exclusive powers of the national (or central) government and the states.<sup>55</sup>

The Indian courts use the pith and substance test to decide whether or not laws that encroach on the exclusive jurisdiction of another level of government are constitutional. The language of their judgments is very close to that of the Canadians. As Pandey comments:

'If the "pith and substance" of law, i.e. the true object of the legislation or a statute, relates to a matter

<sup>52</sup> Hogg op cit note 32 para 15.5(a) at 15–8.

<sup>53</sup> These include the idea of 'double aspect'. The double aspect doctrine means that, despite lists intended to allocate exclusive powers to each level of government, certain laws could be enacted by both the Dominion (federal) and the provinces. This is because, as the Privy Council put it in 1883, 'subjects which in one aspect and for one purpose fall within s. 92 [and within the jurisdiction of the Federal Parliament], may in another aspect and for another purpose fall within s.91 [and be within the jurisdiction of provincial legislatures]' (*Hodge v The Queen* [1883] 9 App. Cas. 117, 130 quoted in Hogg op cit note 32 para 15.5(c) at 15–1).

<sup>54</sup> Hogg *ibid*.

<sup>55</sup> India has three lists allocating legislative powers. List I sets out powers that fall within the exclusive jurisdiction of the central government; List II sets out the exclusive powers of the states; and List III sets out concurrent powers — powers that may be exercised by either the centre or the states. A separate constitutional provision reserves residual powers to the centre. The Constitution dictates that conflicts between central and state laws that fall under List III are to be resolved in favour of the central government (in other words, as in Canada, there is a paramountcy clause).



with[in] the competence of Legislature which enacted it, it should be held to be *intra vires* even though it might incidentally trench on matters not within the competence of Legislature. In order to ascertain the true character of the legislation one must have regard to the enactment as a whole, to its objects and to the scope and effect of its provisions.<sup>56</sup>

Seervai notes that in an early case, *Prafulla Kumar Mukherjee v Bank of Khulna*, it was argued that the doctrine of pith and substance should not apply to India because the lists had been designed specifically to avoid overlap.<sup>57</sup> Quoting the passage by Gwyer CJ in *Chettiar* extracted above, the Privy Council rejected this argument. The Indian courts now correctly recognize that overlap is inevitable and, under the pith and substance test, allow a law that is substantially concerned with a matter that falls within the jurisdiction of the enacting legislature to contain incidental matters that encroach on fields that fall outside the legislature’s jurisdiction.

The Australians have been less enthusiastic about the doctrine of pith and substance. The term ‘pith and substance’ was famously rejected in 1948 by Latham CJ in *Bank of NSW v Commonwealth*.<sup>58</sup> At the same time Judge Latham noted that the constitutional grant of power to the Commonwealth to make laws ‘with respect to’ listed matters is very broad. The context is important to understanding the difference between, say, Canada and Australia on these matters. Unlike the Canadian and Indian Constitutions, the Australian Constitution does not provide separate lists of powers for the States and the Commonwealth (central) government. Instead it lists only those subjects on which the Commonwealth Parliament may legislate. The Constitution then stipulates that State constitutions and the law-making capacities of the States that existed at federation are to ‘continue’.<sup>59</sup> This means that concurrency is the norm in Australia. With certain express limitations,<sup>60</sup> the Australian States may legislate both on unlisted subjects *and* on subjects that appear on the list of Commonwealth law-making powers. At the same time, the absence of a list of exclusive State powers means that there is no natural brake on the extent of the Commonwealth power. For this reason and on the basis of the language of the grant of Commonwealth power in s 51 of the Australian Constitution, courts do not see their role as one of reining in the power of the Commonwealth. After describing the role characterization of laws plays in Canada, Evatt J explained the situation in Australia in the following way in *Huddart Parker Ltd v Commonwealth*:

‘The task is essentially different under the Australian Constitution. The question is still one of construction; but it is construction of the express powers conferred upon the central Parliament. No doubt the powers of the States are very important, but their existence does not control or predetermine

<sup>56</sup> J N Pandey *Constitutional Law of India: Incorporating the Constitution (76th Amendment) Act 1994* 27 ed (1994) at 442.

<sup>57</sup> H M Seervai *Constitutional Law of India: A Critical Commentary* vol 1 4 ed (1991) at 210 para 2.78 (*Prafulla Kumar Mukherjee v Bank of Khulna* (1947) 74 IA 23, 43 (1947) APC 60). The argument in the case was that the Government of India Act of 1935 foresaw the problem of overlap and, accordingly, created three lists to cover the whole field. See also on categorization Arvind P Datar *Datar on Constitution of India* (2001) 1207ff.

<sup>58</sup> (1948) 76 CLR 1. (The *Bank Nationalisation* case).

<sup>59</sup> Section 107.

<sup>60</sup> For example, ss 52, 112 and 114.

those duly granted to the Commonwealth. The legislative powers of the States are only exclusive in respect of matters not covered by specific enumeration of Commonwealth powers. It is the grant to the Commonwealth that must first be ascertained. Whatever self-governing powers remain belong exclusively to the States.<sup>61</sup>

In the *Bank Nationalisation* case Dixon J said similarly: ‘The purpose of enumeration of powers in s 51 is not to define or delimit the description of law that the Parliament may make upon any of the subjects assigned to it. Speaking generally, the legislative power so given is plenary in its quality.’<sup>62</sup> The impact of the constitutional design is not limited to the interpretation of the power granted to the Commonwealth but extends to the way the courts approach the characterization of laws. Thus, in discussing the *Bank Nationalisation* case Blackshield and Williams comment that the question is not whether the law is ‘on’ a listed matter: ‘[t]he question posed by the opening words of s 51 is whether the law is one “with respect to” the specified topic — a broader and looser question. Moreover, in answering this question, the Court does not demand to be satisfied that the challenged law is a law “with respect to” the relevant topic, but only that it can *fairly be described* in that way.’<sup>63</sup>

The consequences of the Australian approach are different from those in Canada with exclusive lists and the pith and substance doctrine. The *Tasmanian Dam* case<sup>64</sup> provides a dramatic example. At issue was the validity of certain provisions of the Australian World Heritage Properties Conservation Act<sup>65</sup> which sought to manage natural heritage sites under, inter alia, the Commonwealth government’s s 51 power to ‘make laws with respect to trading corporations’.<sup>66</sup> The effect of the Act was to prevent the Tasmanian Hydro-Electric Commission from building a dam in a particular water system in Tasmania. Mason J acknowledged directly that the Act concerned conservation, not corporations:

‘[T]he object of s 10 [of the Act] is to protect the Western Tasmania wilderness Area. The Parliament has exercised the corporations power to achieve this end, not for some overriding purpose having a connexion with trading and foreign corporations. But the point is that the legislative power with respect to trading and foreign corporations is not, on the view which I have expressed, in any sense purposive. It is enough that the law has a real relationship with the subjects of the power; it matters not, when the power is not purposive, that the object of the exercise is to attain some goal in a field that lies outside the scope of the Commonwealth power.’<sup>67</sup>

Mason J’s approach to the characterization of Commonwealth laws is very generous to the centre and not all judges support it. However, it is important for the purposes of this paper because it reflects a very different way of

<sup>61</sup> (1931) 44 CLR 492 at 527 quoted in Michael Crommelin ‘Federalism’ in P D Finn (ed) *Essays on Law and Government* (1995) 168 at 178.

<sup>62</sup> *Supra* note 58 at 333.

<sup>63</sup> Blackshield & Williams *op cit* note 32 at 652.

<sup>64</sup> *Commonwealth v Tasmania* (1983) 158 CLR 1.

<sup>65</sup> Act of 1983 (Cth).

<sup>66</sup> Commonwealth of Australia Constitution Act, s 51(xx).

<sup>67</sup> At 152–3. For a suggestion that South Africa may follow a different approach see *Ex Parte Speaker of the KwaZulu-Natal Provincial Legislature: In Re KwaZulu-Natal Amakhosi and Iziphakanyiswa Amendment Bill of 1995; Ex Parte Speaker of the KwaZulu-Natal Provincial Legislature: In Re Payment of Salaries, Allowances and Other Privileges to the Ingonyama Bill of 1995* 1996 (4) SA 653 (CC) para 16.

dealing with jurisdictional issues to the one used by Canadian and Indian courts. It seems at least likely that under a pith and substance test the Australian World Heritage Properties Conservation Act would be found to be invalid for, in substance, it deals with matters that fall outside the jurisdiction of the Commonwealth and which are, accordingly, reserved to the States.<sup>68</sup> Nevertheless, it was upheld. In short, Australia's different constitutional framework and different constitutional history dictate very different results. The same is true of the United States where courts have developed an entirely different approach to interpreting the limited powers of Congress.<sup>69</sup>

South Africa has yet another constitutional framework and a different historical context within which to interpret the constitutional relationship between provinces and the national government. In particular, when we make tagging decisions we are not concerned with whether or not a law can be said to fall within the jurisdiction of one or another level of government. Nor is the decision one intended to protect the law-making power of different level of governments by ensuring that legislative schemes that intrude on areas within the jurisdiction of another level of government are not immediately disallowed.<sup>70</sup> Instead, in the tagging process in South Africa, the question is how the law should be considered by the provinces in the NCOP. In assessing the role of the pith and substance test here, the usual concern about imports (reflected in the Australian response to the pith and substance test and emphasized by the South African Constitutional Court on a number of occasions<sup>71</sup>) is doubly relevant as not only is the test an import but it is being put to a very different use from that for which it was first designed.

In this context the South African system most closely resembles the German one. Although there are differences between the relationship between the centre and Länder in Germany and the South African model of multi-level government, as in South Africa the German law-making process requires laws to be classified (or 'tagged') and Länder have more influence over some than others.

German federalism is very different from the 'classic' model of the United States and Canada. Elsewhere Simeon describes the German model as one of integrated federalism because 'it is designed to integrate and pull together

<sup>68</sup> For a more recent statement of the Australian approach see *Re Dingjan; Ex Parte Wagner* (1995) 183 CLR 323 para 4ff per McHugh J.

<sup>69</sup> See, for a discussion, Lawrence H Tribe & Ralph S Taylor *American Constitutional Law* vol 1 3 ed (2000) 789ff.

<sup>70</sup> Legal opinions used by Parliament often overlook this point. As a result they rely on a statement by Chaskalson P in the *KwaZulu-Natal Amakhosi and Iziphakanyiswa Amendment Bill* case supra note 67 in which he refers to the need to consider the substance of legislation including its purpose and effect in determining whether a bill falls under an item in the schedules. However, the case does not deal with tagging but whether or not certain bills fell within the jurisdiction of a provincial legislature (para 19). For reliance on this case for tagging decisions by Parliament see, for instance, 'Memorandum to the Chairperson of the NCOP from the Legal Services Office Subject Communal Land Rights Bill' 11 February 2003.

<sup>71</sup> For example, *S v Makwanyane* 1995 (3) SA 391 (CC) para 37; *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC) para 26.

central and provincial politics at all levels. . . . Instead of watertight compartments there are wide areas of concurrency or shared responsibility.’ The system is complex but, broadly speaking, most legislative power lies with the federal government while, in an arrangement echoed in s 125 of the South African Constitution, administering federal laws is the main responsibility of the Länder. The German second or federal chamber in the national legislature, the Bundesrat, plays an important role in managing the shared competencies because it has an absolute veto over certain federal bills identified in the German constitution, the Basic Law, and a ‘suspensive’ veto over all the rest. On those matters over which the Bundesrat may exercise a suspensive veto, the lower house, the Bundestag, can override the Bundesrat by a majority vote.<sup>72</sup> But, the Bundestag cannot override the Bundesrat when it has an absolute veto.<sup>73</sup> Most of the laws requiring Bundesrat approval fall under art 84(1) of the Basic Law. These are laws through which the federal government regulates the Länder in their administration of federal law. As Currie notes: ‘Because such regulations plainly impinge on the interests of the Länder, they may be enacted only with Bundesrat consent.’

Inevitably decisions that a bill does or does not require Bundesrat approval have been controversial and, on a number of occasions, the matter has come before the Bundesverfassungsgericht (the Constitutional Court). In early decisions the court decided that if any provision of a law fell under art 84, the entire law required Bundesrat approval.<sup>74</sup> The compelling idea behind these decisions is that the bill is a technical unit and needs to be considered in its entirety. By giving its consent, the Bundesrat takes political responsibility for the entire piece of legislation.<sup>75</sup> This is referred to as the unity theory (Einheitstheorie). Although the approach is apparently based on the language of the Basic Law, the Court has also noted that it would produce ‘insuperable difficulties’ if Bundesrat consent was required for some provisions and not others.<sup>76</sup> But the unity theory works in reverse also. If the Bundestag decides to divide a bill into two, one containing provisions that require the consent of the Bundesrat and the other containing those provisions that do not require Bundesrat consent, it can avoid the Bundesrat’s veto on controversial provisions without undermining the constitutional requirement that the Bundesrat agree to laws which set out the administrative responsibilities of the Länder.<sup>77</sup>

<sup>72</sup> Basic Law for the Federal Republic of Germany, art 77. Note that if the Bundesrat rejects a law with a majority of two-thirds, a two-thirds majority is required in the Bundestag to override it.

<sup>73</sup> Although it was initially anticipated that the Bundesrat would have an absolute veto in a small percentage of cases, over the years the percentage of cases over which the Bundesrat exercises a veto has grown to well over half. Currie comments that this growth in the power of the Bundesrat is partly attributable to the fact that many constitutional amendments grant the Bundesrat a veto ‘to mitigate [an] incursion on state authority’ (David P Currie *The Constitution of the Federal Republic of Germany* (1994) 62–3).

<sup>74</sup> 8 BVerfGE 274 referred to in Currie op cit note 73 at 63.

<sup>75</sup> For this description of the operation of the German system we are indebted to Horst Risse of the Bundesrat secretariat. See 24 BVerfGE 197; 55 BVerfGE 319 at 326.

<sup>76</sup> 8 BVerfGE at 265 quoted in Currie op cit note 73 at 63n161.

<sup>77</sup> The Bundestag’s power to split bills has been confirmed by the German Constitutional Court (105 BVerfGE 338). Legislation allowing homosexual partners to register with certain legal consequences

The German Constitutional Court’s insistence that Bundesrat approval is required where the administrative responsibilities of Länder are altered was clear in the 1978 *Conscientious Objector II* case.<sup>78</sup> The law in question simply changed the process for applying for an exemption from military service, removing a requirement that applicants appear before a board and allowing decisions to be made on the basis of a letter alone. Because the new provisions changed the responsibility of the Länder the consent of the Bundesrat was required.<sup>79</sup>

A few years earlier, in 1975 in the *Bundesrat* case, the Constitutional Court tackled the difficult question of whether every amendment to a law that required Bundesrat consent also required consent. It decided that it did not, but also said:

‘[T]here are a number of cases in which the Bundesrat’s consent is necessary for the amendment of a law that itself requires such consent. This is apparent when the amending law contains new provisions which in their own right require consent. The same is true when the amendment affects those provisions of the amended statute that caused that statute to require Bundesrat consent. Also included is the case in which a statute amends another statute requiring consent and containing substantive norms as well as provisions respecting states’ administration. To be sure [the amending statute may be] confined to substantive matters but nevertheless make such changes in this realm as to give an essentially different meaning and scope to the administrative provisions it does not expressly amend.’<sup>80</sup>

Kommers sums up the position:

‘The upshot of these and related cases is that any law containing provisions extending or prolonging the administrative procedures of state agencies requires the consent of the Bundesrat even though the law as originally enacted had already received its required consent. Even if a subject matter is clearly within the federation’s exclusive legislative authority, and even if the law in question is silent with respect to local administrative procedures, the Bundesrat’s consent may nevertheless be necessary if the law substantially affects those procedures or effectively requires the *Länder* to change them in order to effectively administer the federal law.’<sup>81</sup>

As one might expect, these decisions are not always easy and the German court has been divided in a number of important cases including the *Bundesrat* case. What seems relevant for South Africans is the attention that the court pays to developing the role of the Bundesrat as a chamber that protects the interests of the *Länder* within the particular model of multi-level government established by the German Basic Law.<sup>82</sup>

provides a recent example of splitting. The Bill required the consent of the Bundesrat because it contained certain administrative provisions. The Bundesrat vetoed the bill because it believed that it undermined marriage. The Bill was then split into two parts by the Bundestag. The Bundesrat’s objection to the first Bill, which contained the substantive provisions, was overridden by the Bundestag. The second Bill dealt with the administration of the law and required the consent of the Bundesrat. This was not given. The overall outcome was that the Länder were obliged to regulate the administration of the law themselves.

<sup>78</sup> 48 BVerfGE 127 cited in Donald P Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany* 2 ed (1997) 97.

<sup>79</sup> But also see 75 BVerfGE 108 referred to in Currie op cit note 73 at 65n166: ‘The extension of existing social insurance programmes to include self-employed artists, the court concluded, did not require Bundesrat approval; a mere qualitative increase in the caseload of state agencies was not enough, because the new statute did not regulate agency organization or procedure.’

<sup>80</sup> *Pension Insurance Amendment Case* (‘*Bundesrat Case*’) 37 BVerfGE 363 as quoted in Kommers op cit note 78 at 99.

<sup>81</sup> Kommers op cit note 78 at 98.

<sup>82</sup> See, for example, 55 BVerfGE 274 at C-II-1.a.

## WHAT TEST SHOULD THE SOUTH AFRICAN PARLIAMENT AND COURTS USE IN TAGGING NATIONAL BILLS?

We have argued that two related factors make the pith and substance test unsuitable for determining whether or not a national bill should follow the s 75 or s 76 process. The first is that the test was developed to determine whether or not a law fell within the jurisdiction of the level of government that had enacted it. Secondly, it was developed in a system in which a constitution listed the powers of two levels of government and thus required an 'either or' determination of whether a particular law was or was not within the jurisdiction of the federal government or the provinces.

Conventional wisdom is that provinces in South Africa have limited powers and that they can be overridden by the national sphere with ease under the provisions of ss 146 and 44(2). But, as we explain in the introduction to this article, chapter 3 of the Constitution provides another vision. It anticipates that all power will be exercised within a framework of co-operative government which will allow legitimate provincial autonomy to be respected while recognizing the constitutional role of the national government in directing transformation and guiding development. It suggests that the emphasis should not be on how much power a sphere of government has or how easily the national overrides can be invoked. Instead, the emphasis should be on recognizing the integrity of each sphere, and encouraging their co-operation as envisaged in chapter 3. To neglect these principles in a system of shared powers will undermine effective government.<sup>83</sup>

Section 76 ensures that the principles set out in chapter 3 will be respected in the national law-making process. It allows the benefits of a provincial system to be realized, without the costs of competition, provincial blockages to national programmes or reduced democratic participation. Decisions about what legislation should follow the s 76 route need to be made within this broad framework.

### *The Liquor Bill case test*

Cameron AJ provides a starting point for determining a test that is consistent with South Africa's constitutional model in an obiter dictum in the *Liquor Bill* case. He says:

'This subsection [s 76(3)] requires that a Bill must be dealt with under the procedure established by either s 76(1) or s 76(2) . . . "if it falls within a functional area listed in Schedule 4". It must be borne in mind, moreover, that s 76 is headed "Ordinary Bills affecting provinces". This is, in my view, a strong

<sup>83</sup> This point is made in a different context by the Constitutional Court in *Ex Parte Western Cape Provincial Government: DVB Behuising (Pty) Ltd v North West Provincial Government* 2001 (1) SA 500 (CC) para 17: 'In the interpretation of those Schedules there is no presumption in favour of either the national Legislature or the provincial legislatures. The functional areas must be purposively interpreted in a manner which will enable the national Parliament and the provincial legislatures to exercise their respective legislative powers fully and effectively.'

textual indication that s 76(3) must be understood as requiring that any Bill whose provisions in substantial measure fall within a functional area listed in Schedule 4 be dealt with under s 76.<sup>84</sup>

This passage does not use the language of the pith and substance test as it is used in Canada or India. As shown above, in both those jurisdictions, the focus is on the contested law itself and the question is ‘what is the substance of that law?’ An answer to that question might show that the law falls within the jurisdiction of the national government. But, it does not rule out the possibility that ‘in substantial measure’ provisions of the law fall within the jurisdiction of another level of government. Instead, in the *Liquor Bill* case, Cameron AJ indicates a test that is much more attuned to our constitutional scheme. Drawing on the clue provided in the heading to s 76, he suggests that the question is not ‘what is the heart (or pith and substance) of the contested law?’ but ‘to what extent do provisions of the law encroach on concurrent functions?’ The shift in focus from a general assessment of the law to an assessment of the degree to which it encroaches on (or ‘affects’) a schedule 4 matter encapsulates the different concerns that faced Canadian and Indian courts in developing the pith and substance test and those that the South African Parliament confronts when it tags national laws. It reflects the concern of chapter 3 of the Constitution that the exercise of shared powers by the national sphere of government should be accompanied by consultation and respect for the integrity of the provinces. It also acknowledges implicitly that the power of the national sphere to make laws is not at stake here. It is the process by which they are made that matters.

The *Liquor Bill* test will produce different outcomes from the pith and substance test. For instance, Parliament tagged the National Water Act<sup>85</sup> ‘s 75’ because its pith and substance was water, an exclusively national matter. But, as we note above, although the law deals primarily with water, a substantial part of it concerned the environment. On the *Liquor Bill* test, it should have followed the s 76 route through Parliament. Similarly, the ‘pith and substance’ of the KwaZulu Cane Growers’ Association Act Repeal Act may relate to an association which the new law converted into a trust. On this approach it falls outside the jurisdiction of the provinces. Nevertheless, its concern with farmers in KwaZulu-Natal means that the bill concerns agriculture and thus, to use the wording of s 76(3), ‘falls within a functional area listed in Schedule 4’ and ‘affects’ provinces (or in this case, a specific province) in the sense captured in the heading to s 76.

This approach also casts doubt on one of the most controversial early tagging decisions, that of the Recognition of Customary Marriages Act.<sup>86</sup> In a decision that has provided a precedent for later cases, the bill was tagged ‘s 75’. The opinion backing up this decision acknowledged that the bill established ‘a new dispensation for spouses who have entered or will enter

<sup>84</sup> Supra note 4 para 27. See also Seervai op cit note 57 at 247 para 2.153 who, drawing on Canadian case law, argues that a law may ‘affect’ a matter although it is not a law ‘in relation to’ or ‘in respect of’ that matter.

<sup>85</sup> Bill B34–98, which became Act 36 of 1998.

<sup>86</sup> Bill 110–98, which became Act 120 of 1998.



into marriages under traditional rites', a matter of customary law and thus a schedule 4 matter. However, because the bill's 'dominant and most important characteristic is really the creation of a new, just and discrimination-free matrimonial system' it was tagged 's 75'. The implications of the pith and substance test are spelt out in one of the concluding paragraphs of the opinion:<sup>87</sup>

'It is true that in exercising this [the bill's] mandate and power, . . . previous customs will be affected. These effects, it is suggested, are incidental when compared to the more direct relationship with the (exclusive) national mandate which is exercised here.'

On a test that asks whether provisions of the law fall in a substantial measure under schedule 4, the outcome would be different. Even if one accepts the rather tenuous argument that, because the law modernized a marriage system and introduced equality in substance, it falls within the residual powers of the national government, the fact that the bill had a substantial impact on customary law would suggest that the s 76 procedure was the correct procedure. On this approach, the pith and substance of the bill is not the central issue in tagging. What is important is the degree of its impact on a matter over which provinces share responsibility with national government.<sup>88</sup>

The same argument applies to the Communal Land Rights Act.<sup>89</sup> As we note above,<sup>90</sup> it was tagged to follow the s 75 process because the parliamentary law advisers concluded (probably correctly) that its pith and substance is 'the provision of legal security of tenure by transferring communal land to communities, or by awarding comparable redress'. The law advisers commented that substantive provisions in the bill that referred to customary law did not 'render the Bill a s 76 Bill' but, at most, were 'matters incidental to the "pith and substance" of the Bill'.<sup>91</sup> But the Act has a direct impact on matters relating to traditional leadership and customary law.<sup>92</sup> Moreover, a bill cannot escape being tagged 's 76' simply because its ends fall outside schedule 4. This point was made clearly in the *Liquor Bill* case, albeit

<sup>87</sup> See Gerhard Erasmus 'Opinion: Classification of the "Recognition of Customary Marriages Bill"' 28 October 1998 at 11. After setting out the pith and substance test as the applicable test, the opinion states that the bill 'is about a new dispensation for spouses who have entered or will enter into marriages under traditional rites. In this sense the Bill deals with customary law'. However, apparently viewing justice and modernization as outside the ambit of either customary law or the provinces, it continues to say that the 'Bill endeavours to bring about a more just and modern dispensation for people married under customary law' (para 25) and that 'the achievement of equality is clearly one of the dominant features of the Bill' (para 26). This together with the fact that the Bill of Rights required national legislation to rectify the inequalities in customary law (para 29) and the fact that the bill contributes towards fulfilling our international law obligations (para 30), tipped the scales in favour of s 75. (The view that any national legislation that the Constitution requires must be s 75 legislation is widely held but does not seem to have a constitutional basis.)

<sup>88</sup> This approach also means that the s 76 process is not reserved for bills which the provinces could also pass. For instance, it may be arguable that provinces could not change the customary law matrimonial regime but because customary law is an issue that is a responsibility of provinces under schedule 4, provinces should participate in the passage of laws that change it.

<sup>89</sup> Act 11 of 2004.

<sup>90</sup> See text accompanying note 39.

<sup>91</sup> Legal Opinion to the Speaker of Parliament dated 4 February 2004.

<sup>92</sup> See, for example, for the centrality of land allocation to customary law, T W Bennett *Customary Law in South Africa* (2004) 370ff.

in a slightly different context, where Cameron AJ found that the means used in the national bill (a liquor licensing system) were decisive in its classification although the purpose of the bill (regulating the liquor industry) could have been achieved in other ways.<sup>93</sup>

*Beyond the Liquor Bill case*

Cameron AJ’s comment in the *Liquor Bill* case that if the provisions of a bill ‘in substantial measure fall within a functional area listed in Schedule 4’ the bill should be dealt with under s 76 provides a useful guide to tagging laws like the National Water Act, the Recognition of Customary Marriages Act and the Communal Land Rights Act. But it does not claim to address the question of how to tag bills which have a less substantial impact on schedule 4 matters but which nevertheless affect the constitutional jurisdiction of provinces. Following the *Liquor Bill* case approach, in dealing with such bills one must take one’s lead from the wording of the Constitution and interpret it in the context of the model of multi-level government and the role of the NCOP that the Constitution establishes.

As argued above, the constitutional scheme establishes the NCOP as the central institution of intergovernmental relations between the national sphere of government and the provinces.<sup>94</sup> Its single most important function in representing the provinces ‘to ensure that provincial interests are taken into account in the national sphere of government’ as required by s 42(4) of the Constitution is to participate in the passage of national legislation that affects the provinces. In doing this it both protects the integrity of the provinces and promotes the constitutional value of effective government. It is under the s 76 process that it is most effective in fulfilling this role.

The wording of the Constitution supports an approach in terms of which Parliament and the courts are vigilant in ensuring that laws that have an impact — whether substantial or not — on the constitutional jurisdiction of provinces are considered by the provinces in the NCOP under s 76. As Cameron AJ notes, the heading to s 76 is broad and prompts the question ‘does the bill in question “affect” provinces?’<sup>95</sup> The text of s 76(3) may seem less expansive but remains very general in its reference to bills that fall ‘within a functional area listed in Schedule 4’. Section 44(1)(b) is equally broad when, in para (ii), it states that the NCOP has the power ‘to pass, in accordance with s 76, legislation with regard to any matter within a functional area listed in Schedule 4’.

<sup>93</sup> *Liquor Bill* case supra note 4 para 70.

<sup>94</sup> And, to a lesser extent, local government.

<sup>95</sup> It is clear both from Cameron AJ’s comment and the context in which this heading appears that whether or not a bill ‘affects’ the provinces is a constitutional question. NCOP politicians routinely argue that all bills affect the citizens of provinces in one way or another. This would mean that the wording of the heading is so vague as to be meaningless. But this interpretation ignores the constitutional context in which the heading appears. It is those bills which concern the constitutional jurisdiction of provinces or their constitutional responsibilities that ‘affect’ provinces.

A reading of ss 44 and 76 in context suggests that the following questions would help determine when a bill should be passed according to s 76.

1. *Does the bill expect provinces to implement any part of it under s 125(2)(b) of the Constitution? If so, the bill should follow the s 76 procedure.*

This question addresses what is perhaps the most important function of the NCOP. That is to give provinces a say in the laws that they will implement. This is important to ensure that administrative capacity exists in the provinces and that provincial budgets are adjusted appropriately to accommodate new responsibilities.<sup>96</sup> Provincial engagement in the NCOP also promotes longer-term accountability. The provincial legislature plays the most important accountability function here as it must hold the provincial executive to account for its implementation of national laws as well as provincial ones. If the provincial legislature has had no role in the passage of the laws, its interest in checking on the performance of the provincial executive will be limited. Where a bill imposes obligations on provincial executives that concern schedule 4 functions, whether or not these provisions form a substantial part of the bill seems irrelevant. The important thing is that the provinces should be engaged in the passage of the bill.

2. *Does the bill contain provisions that would normally fall for implementation by the provinces under s 125(2)(b) but over which the national government retains the responsibility for implementation? If so, the bill should follow the s 76 procedure.*

Recognizing that a bill covers an issue that provinces could implement under s 125(2) may seem to provide a less compelling reason to require that the bill follow the s 76 procedure than exists when a bill actually places obligations on the provinces. However, the scheme of the Constitution is clearly that provinces will usually implement national legislation falling under schedule 4. There will be many legitimate reasons for the national government to consider implementing such legislation itself. Sometimes, however, a decision to retain the responsibility to implement schedule 4 legislation will have significant budgetary consequences for provinces. For instance, its effect might be to withdraw a responsibility, which has implications for staffing in the province. Such a change will not often be easy to accommodate quickly. The s 76 process gives provinces an opportunity to explain such problems. On other occasions, a decision to retain implementation in the national sphere may mean that infrastructure developed by provinces becomes redundant. Again, it is important for this to be discussed openly as Parliament needs to be fully aware of the costs of such a decision.

The role of provincial delegations in the NCOP in these examples is primarily practical. It is to examine decisions regarding whether or not provinces should implement national legislation falling under schedule 4

<sup>96</sup> Two fiscal responses are required when new responsibilities are placed on provinces. First, the equitable share allocated to provinces under s 214 of the Constitution needs to be adjusted to take account of the new demand on provincial resources. Secondly, provincial budgets need to appropriate funds for the responsibility.

properly and openly. But the NCOP has another role here too. That is to oversee the scheme of co-operative government that the Constitution establishes. Should the national sphere of government without good reason undermine the constitutional understanding reflected in s 125 that provinces will implement schedule 4 legislation, provinces can use their influence in the NCOP and restrain the national sphere.

Generally then, the fact that a national bill might affect the administration of a province should be a trigger for the s 76 process.<sup>97</sup> Of course, in this context, the s 76 procedure may play another role as well. It provides an opportunity for the national government to explain to provinces its decision that national legislation should be implemented nationally.

In cases covered under questions 1 and 2, the provincial role in the NCOP does more than provide a 'provincial perspective' which individual delegates might be able to do under the s 75 process. It combines two more concrete things. These are, first, a hard-headed sense of provincial administrative capacity (which includes issues of human resources and budget) that the NCOP delegation provides through the participation of members of the provincial executive; and, second, the understanding that the elected provincial politicians of the provinces have of the needs and desires of their constituents on matters which fall within the jurisdiction of the province.

3. *Could this law, in the future, conflict with a provincial law? Or, in other words, are there provisions in this law that deal with matters over which a province has jurisdiction? If so, the bill should follow the s 76 route.*

This question may overlap with questions 1 and 2. It is intended to draw attention to the NCOP's role in pre-empting (and avoiding) conflicts between provincial and national laws.<sup>98</sup> As already discussed, the NCOP fulfils this role by giving provinces an opportunity to engage collectively in the passage of legislation which falls within their jurisdiction under schedule 4. The emphasis that the Constitution places on avoiding disputes and, should disputes occur, using processes outside the court system to resolve them, suggests that the s 76 process in the NCOP could not be limited to those bills 'whose provisions in substantial measure fall within a functional area listed in Schedule 4'.<sup>99</sup> Nor does Cameron AJ suggest this in the *Liquor Bill* case.

Instead, unless the encroachment on a schedule 4 area is trivial, our constitutional framework suggests the s 76 route should be followed and the engagement of the provincial governments in the passage of the laws secured whenever a future conflict is possible. Of course, neither executive institutions of intergovernmental relations nor the NCOP can resolve all

<sup>97</sup> Of course, ideally such problems will have been raised in executive intergovernmental forums before the bill is introduced into Parliament. However, there is no way of ensuring that this happens and, in any event, the fact that matters can be raised in the NCOP should remind members of the national executive to seek to resolve them before the bill is introduced. If there is no chance of NCOP engagement, the incentive to use executive intergovernmental forums to their full is reduced.

<sup>98</sup> A constitutional obligation clearly set out in s 41(1)(h) of the Constitution.

<sup>99</sup> *Liquor Bill* case supra note 4 para 27.

conflict or avoid future conflict. The fact that laws can be passed by the NCOP with the support of just five of the nine provinces acknowledges this. In addition, provincial governments may change and develop new policies in the future which bring them into conflict with the national government. But, provincial buy-in when national legislation is adopted can help avoid later conflicts.

4. *Does the bill have implications for any policy or law which provinces are already implementing or may implement? If so, the bill should follow the s 76 procedure.*

Questions 1 and 2 direct attention to laws which the provinces may implement and which thus potentially have a clear impact on provincial governments and their resources. But national laws may affect provinces less directly. For instance, schedule 4 covers 'Education at all levels, excluding tertiary education'. A national law concerned with universities might have an impact on standards in high schools and, thus, an impact on secondary education. Or a national law introduced by the Department of Justice and dealing with Children's Courts (an exclusively national matter) may impinge on social services in the provinces and thus warrant the engagement of provincial governments in the NCOP.<sup>100</sup> On a narrow reading of ss 44 and 76, these laws may be said to fall outside schedule 4. However, if the role of the NCOP is understood in the context of the constitutional commitment to co-operative government, in all but cases of trivial engagement of schedule 4 matters, which is discussed under question 5 below, the s 76 procedure seems the right one.

5. *Is the intrusion of the national bill on a Schedule 4 matter trivial? If so, the bill should follow the s 75 route.*

Each of the preceding four questions seeks to ensure that matters which affect provinces are considered by the provinces thorough the NCOP. If legislation follows the s 76 route in the circumstances that they indicate it should, it will not be possible for the National Assembly to avoid the opposition of the NCOP by placing matters that concern the provinces in a larger piece of legislation. Nevertheless, there will be national laws that touch on schedule 4 matters in so minor a way that the s 76 process is not appropriate. This is the concern of the current question, which is perhaps the most difficult one.

In dealing with questions 1 to 4 we have argued that bills that intrude in even relatively small ways on the concurrent functional areas should be considered under s 76. But not every mention of a schedule 4 matter can change a bill into a s 76 bill. The key considerations identified under questions 1 to 4 are intended to ensure that bills that may impose burdens on provinces or bills that may, now or in the future, be the subject of conflicts with provincial laws should follow the s 76 process. Others should not, as it is

<sup>100</sup> As happened with the Children's Bill — see note 44 above. Another example would be a national law which requires places of safety for children awaiting trial. These would be implemented by provincial welfare departments which must provide adequate accommodation even if the standards are part of a policy developed by the national Department of Justice.

not appropriate to load the s 76 process (and thus also the provincial legislatures) with matters that do not fall within the constitutionally defined jurisdiction of provinces.

So, it would not be appropriate to pass a bill dealing with judicial education under s 76 merely because it deals with ‘education’.<sup>101</sup> Other examples might relate to the type of reference to a schedule 4 matter. For instance, a reference to the environment in a law relating to defence that requires the national Department of Defence to take provisions of relevant environmental legislation into account when it implements the law would not trigger the s 76 process. But, the intrusion on a schedule 4 matter by a bill dealing with the expropriation of land that has an impact on housing (a schedule 4 matter) would not be trivial if the expropriation policy was likely to impact on provincial plans for the development of housing. In other words, a determination of triviality does not depend on the amount of attention which is paid to a schedule 4 matter or on the centrality of the matter to the scheme in the national bill. It should be concerned with the impact the provision has on the jurisdiction of the provinces.

In summary, each of the enquiries suggested by the preceding questions seeks to determine the impact of a particular bill on provincial government. The overarching point is that if a law is likely to have an impact on matters with which provinces are concerned, the s 76 route should be followed.

The strongest argument against this approach is hinted at by Cameron AJ in the *Liquor Bill* case<sup>102</sup> and often raised by parliamentary law advisors. It is that such an approach favours the s 76 process at the expense of the s 75 process. Parliamentary law advisors are concerned that a bill that contains many provisions that do not ‘affect provinces’ and that cannot be construed as ‘incidental’ to the schedule 4 matters will be invalid if it is passed under s 76 because provincial delegations and not individual delegates passed the provisions.

## THE APPROPRIATE USE OF THE S 75 PROCESS

It is clear that the Constitution does not intend all bills to follow the s 76 process. If that were the case, s 75 would be redundant. Thus, any approach to tagging must take account of the appropriate role of the s 75 process. Nevertheless, the design of the Constitution and the role of the NCOP as an institution of legislative intergovernmental relations indicate that most important decision is whether or not a bill should fall under s 76. This decision needs to be taken in a way that ensures that all matters of importance

<sup>101</sup> Two arguments support the tagging of such a bill as a s 75 bill. First, the interpretation of ‘education’ under schedule 4 would not usually include judicial education. Secondly, because justice and the court system are exclusively in the jurisdiction of the national government, provinces would not become involved in judicial education and therefore their engagement with such a bill under s 76 would not contribute in any real way to effective government.

<sup>102</sup> *Supra* note 4 para 26.

to provinces are properly discussed and decided upon in the NCOP under the s 76 process. The alternative process set out in s 75 is for other matters.

In the *Liquor Bill* case, Cameron AJ points out that there are situations when a bill might be approved by the NCOP under the s 76 process but not approved if it were to be considered under s 75 and visa versa. But the low threshold required for the National Assembly to overrule s 75 decisions in the NCOP suggests that this is not very significant — as the Constitutional Court said in the first *Certification judgment*, the ‘NCOP has no more than a delaying power’ under s 75.<sup>103</sup> One might also argue that delegates to the NCOP speak with a different voice when they consider legislation under the s 75 process — they are no longer accountable to their legislatures but instead, as they vote individually, they are accountable to their parties.<sup>104</sup> But the ‘voices’ heard here are not silenced in the s 76 process as delegations must always reflect the party composition of the provincial legislatures. Certainly, if a numerical majority of the delegates to the NCOP oppose a law it is likely that their concerns will be heard clearly whatever process is followed.

In fact, the only situation that might give rise to concern would occur when the provinces block legislation under the s 76 process which might have passed had it followed the s 75 route. Under these circumstances the national sphere could see its interests thwarted by the provincial delegations in the NCOP. There are two constitutional answers to this concern. The first is obvious. It is that the Constitution envisages such a situation and stipulates that, if the national sphere cannot muster a two-thirds majority in the National Assembly in such cases, it must capitulate to the provinces — this possibility is inherent in our system of multi-level government, however unlikely it is at present. The second answer takes account of a more nuanced complaint by the national sphere. The complaint might be that the bill contains many provisions that do not concern provinces and that, therefore, the tagging was incorrect — a provision or provisions that incidentally touch on the jurisdiction of the provinces should not draw the entire bill into the s 76 process. But here the solution lies entirely in the hands of the national government — or the National Assembly. As in Germany, they have the discretion to split the bill and to pass those parts that have no link to provincial concerns separately from those that do encroach on the concurrent jurisdiction of the national sphere and the provinces.<sup>105</sup>

## CONCLUSION

This paper has argued that the tagging of bills before the NCOP matters. For this reason it is critical to get the procedures and criteria involved clear and

<sup>103</sup> *Supra* note 10.

<sup>104</sup> It is unrealistic to suggest that in these circumstances delegates are entirely free agents. Party discipline which is a feature of most parliamentary systems and South Africa’s system of proportional representation combined with a prohibition on floor crossing tie politicians closely to their parties.

<sup>105</sup> As the discussion earlier in the paper suggests, when splitting is chosen an approach needs to be adopted that does not mean that two incomplete pieces of legislation are passed as public participation in law making is not facilitated when incoherent bills are considered.



precise. It matters in two senses. First, as a technical question, parliamentarians and their legal advisers need clarity to guide their choices as to which of two quite different procedures will be used in NCOP votes. This is important to assure the constitutionality of legislation.

Second, it matters in the broader sense of the role of the provinces in the South African constitutional order. The NCOP is the provinces’ House. It provides the forum for provinces to consider and exercise influence national legislation that affects their constitutional powers, or that calls on them to implement national legislation. The very existence of two distinct procedures — s 75 and s 76 — underlines that on matters in which they are most directly affected provinces are expected to exercise significantly greater influence.

Moreover, the very existence of the NCOP represents a fundamental trade-off in the design of multi-level government. Provinces have few independent powers; are in many respects administrative arms of the central government; are fiscally dependent on the centre; and are subject to numerous central controls. Without the capacity to exercise a significant check on the national government, their capacity to play any role in South African governance would be severely compromised. So the trade-off is: ensure that the provinces are represented effectively within the national parliament itself. To the extent that South Africa’s three-sphere model encapsulates federal ideas, it is at least as much through ‘intra-state’ federalism, as ‘inter-state’, or government to government federalism. This is not simply a matter of federalist abstractions. The more national government depends on provinces for policy implementation, the more necessary it is that the provinces be able to inject information about their capacities, needs, and priorities into the process. And the more sweeping the national government’s powers to shape public policy for the whole country, the more necessary it is that a strong provincial voice at the centre is able to express regional and local interests.

Section 75 does give some weight to provincial legislators in the national Parliament. But s 76 is obviously a much more powerful tool, because under this process, legislation is considered within the provincial legislatures themselves; the provinces vote as a unit, under a mandate provided by the legislature; and because it is more difficult for the National Assembly to override an NCOP veto.

For these reasons, we argue that the pith and substance test is inappropriate for tagging bills. Instead, as indicated by Cameron AJ in the *Liquor Bill* case, the test must focus on the impact of the bill on the provinces. This means that instead of an approach which seeks to withdraw national bills from provincial influence whenever possible (as the pith and substance test does), our approach should be broader, alert to the need for provinces to be properly engaged in all matters that affect them. Given the deep interdependence built into the constitutional design and expressed directly in chapter 3 of the

Constitution, more rather than fewer bills are likely to affect the provinces than is currently thought.<sup>106</sup>

There are two obvious objections to this argument. The less important one is that if greater numbers of bills are dealt with according to s 76 procedures, provincial legislatures will be overloaded with the difficult task of examining national legislation in order to define a mandate. This is indeed a problem. But it can be mitigated by procedures in the provinces and in NCOP to identify and highlight those provisions which most directly implicate the provinces, and then to focus the scrutiny on those elements.

More important is the possible fear that using s 76 procedures could allow an assertive NCOP more scope to frustrate and constrain the national legislative agenda. Such a concern reflects the deep scepticism of many South Africans about decentralization, separation of powers and checks and balances, all seen as limits on the concentration of authority needed to address the legacy of apartheid, deep inequalities, and the challenge of development. There are a number of responses to this concern. First, as a practical matter, use of the NCOP to frustrate the will of the National Assembly is unlikely for the foreseeable future. This is because of the large ANC majority in the Assembly, which gives it ample power to override NCOP objections, and because the ANC control of all provincial governments makes it highly unlikely major challenges are like to come from provincial governments. In the longer run, it is conceivable that a number of provinces could be won by alternative parties, and thus could become centres of opposition to the national government. On occasion this has indeed happened in Germany, where the partisan majority in the Bundesrat has differed politically from that in the Bundestag.

In the unlikely event that this were to happen there would indeed be tougher negotiations between the Assembly and the NCOP. There would of course be tougher negotiations within the Assembly as well, since any scenario that envisages alternative parties winning power in the provinces would also imply a much stronger opposition, perhaps even minority government, in the Assembly. In any case, if such a turn of events were to happen, it would of course be an expression of South African democracy, the most fundamental principle underlying the Constitution. The Constitution is clear that the NCOP is not to be a rubber stamp to the Assembly or the government. Section 68 states that: 'In exercising its legislative power', the NCOP may 'consider, pass, amend, propose amendments to or reject any legislation before the Council', and may initiate legislation falling under Schedule 4 or the wide range of matters listed in s 76 (3).

Finally, the interpretation of the scope of the s 76 procedure suggested here is fully consistent with the idea of cooperative government set out in chapter 3 of the Constitution. Section 76 procedures ensure that, as s 41(1)

<sup>106</sup> The following statistics reflect the number of bills that followed the s 76 process in relation to the total number of bills passed by Parliament — 1999: 5 out of 23; 2000: 20 out of 70; 2001: 11 out of 58; 2002: 10 out of 65; 2003: 14 out of 45; and 2004: 6 out of 13 (Murray et al op cit note 16).

requires, intergovernmental relations will be conducted with ‘mutual trust and good faith’, and that each sphere, including the national sphere, must respect ‘the geographical, functional [and] . . . institutional integrity’ of the others. This is a central purpose of the NCOP; and s 76 is its most effective tool.

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#### NATURAL LAW

‘Genuine natural law, which posits the free will in accord with reason, was the first to reclaim the justice that can only be obtained by struggle; it did not understand justice as something that descends from above and prescribes to each his share, distributing or retaliating, but rather as active justice of below, one that would make justice itself unnecessary. Natural law never coincided with a mere sense of justice’.

Ernst Bloch *Natural Law and Human Dignity* translated by DJ Schmidt (1988) xxx.

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