

CHAPTER 2: THE NATIONAL LEGISLATURE

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1. INTRODUCTION

The national legislature (often referred to simply as ‘Parliament’) is the elected body of representatives of the South African people. As such, it is the primary driver of democracy in our country.¹ By voting in national elections and choosing a particular party to take up seats in Parliament, citizens provide that party with a mandate to govern. The party for whom the most citizens voted usually forms the government. Thus, Parliament represents the idea of majority rule.

Majority rule, however, may also pose a threat to a rights-based constitutional dispensation because of the phenomenon that JS Mill termed the ‘tyranny of the majority’.² This is the situation where the majority of an electorate pursues its own interests at the expense of the rights and interests of minority groups. In such a situation, the laws made by Parliament might be so oppressive to minorities that Parliament could be said to be like a tyrant or despotic leader. Thus, of the three branches of government, a powerful Parliament with majority support often poses the greatest threat to constitutional rights.

With these dangers in mind, the Constitution takes care to balance the need to give the national legislature the necessary power to give effect to the popular will of the people, with the need to ensure that Parliament does not abuse its powers or act in a way that threatens the Constitution. Thus, Parliament is bound by the Constitution, and must act in accordance with, and within the limits of, the Constitution.³ The

¹ M Bishop & N Raboshakga ‘National legislative authority’ in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (RS 6, 2014) at 1.

² JS Mill *On Liberty* (1859) at 8.

³ Section 44(4) of the Constitution.

Constitution also uses the national legislature as a tool to preserve the separation of powers and to ensure accountable government by allowing it to oversee the actions of the national executive.⁴

Parliament is governed by Chapter 4 (sections 42–82) of the Constitution.

2. THE COMPOSITION AND POWERS OF PARLIAMENT

South Africa has a bicameral Parliament which consists of two chambers or Houses — the National Assembly (NA) and the National Council of Provinces (NCOP).⁵ The two Houses have unique (but complimentary) roles, are constituted differently, and have distinct processes.

The National Assembly is elected to represent the people and to ensure government by the people.⁶ It does this by passing legislation, choosing the President, providing a national forum for public consideration of issues and by scrutinising and overseeing executive action.⁷ The National Council of Provinces represents the provinces to ensure that provincial interests are taken into account in the national sphere of government. It performs this task mainly by participating in the national legislative process — described in more detail later — and providing a national forum for public consideration of provincial issues.⁸ Both Houses currently sit in Cape Town.

⁴ Section 42(3) of the Constitution.

⁵ Section 42(1) of the Constitution.

⁶ Section 42(3) of the Constitution.

⁷ Section 42(3) of the Constitution.

⁸ Section 42(4) of the Constitution.

Both Houses of Parliament have the power to determine and control their own internal arrangements, proceedings and procedures.⁹ They also enjoy other powers over and above their legislative ones, including the power to summon any person — including the President and cabinet ministers — to appear before them to give evidence under oath and to produce documents.¹⁰

The NA consists of between 350 and 400 (currently 400) members elected through an electoral system based on a national common voters roll and which gives effect to proportional representation.¹¹ Proportional representation entails that parties are represented in Parliament in proportion to the votes they received as a percentage of the total number of votes cast in the election.

The NA is elected for a maximum term of five years,¹² but may be dissolved by the President before the expiry of its term if a majority of its members vote to do so.¹³ When its term expires or the NA is prematurely dissolved, the President must, by proclamation, call an election, which must be held within 90 days.¹⁴ A Presidential proclamation of this nature may be issued before or after the expiry of the term of the NA.¹⁵

⁹ Sections 57(1) and 70(1) of the Constitution; P de Vos & W Freedman (eds) *South African Constitutional Law in Context* (2014) at 113.

¹⁰ Sections 56 and 69 of the Constitution; de Vos & Freedman *op cit* note 9 at 113.

¹¹ Section 46(1) of the Constitution.

¹² Section 49(1) of the Constitution.

¹³ Section 50(1)(a) of the Constitution.

¹⁴ Section 49(2) of the Constitution.

¹⁵ Section 49(2) of the Constitution.

In exercising its national legislative power, the NA may consider, pass, amend or reject any legislation.¹⁶ Members and committees of the NA can prepare and introduce any Bill other than a money Bill.¹⁷ The NA is the dominant legislative power: if the NCOP objects to, or rejects, a Bill (which doesn't affect the provinces) after considering it, the NA may pass the Bill again, either with or without amendments.¹⁸ If the Bill does affect the provinces, the NA still enjoys legislative dominance in that even after mediation between the two Houses has failed, it can pass a Bill to which the NCOP has objected by a two-thirds majority.¹⁹ It can also veto any legislation passed by the NCOP.²⁰

Committees are an important part of the functioning of the NA and play a crucial role both in Parliament's legislative and oversight functions.²¹ Minority parties must be allowed to participate on these committees.²² Thus, the rules of the NA provide that parties are to be represented on committees in proportion with their share of seats in the House.²³

The NCOP consists of delegations of ten members from each of the nine provinces: ninety members in total.²⁴ The members of each delegation are selected

¹⁶ Section 55(1)(a) of the Constitution.

¹⁷ Section 55(1)(b) of the Constitution; see section 77 of the Constitution for provisions related to money Bills.

¹⁸ Section 75(1)(c) of the Constitution.

¹⁹ Section 76(1)(i) of the Constitution; Bishop & Raboshakga op cit note 1 at 3.

²⁰ Bishop & Raboshakga op cit note 1 at 3; section 76(2)(a)(i) of the Constitution.

²¹ Ibid at 4.

²² Section 57(2)(b) of the Constitution.

²³ Bishop & Raboshakga op cit note 1 at 4.

²⁴ Section 60(1) of the Constitution.

by each provincial legislature and are chosen on the basis of proportional representation.²⁵ Each province's delegation casts one vote when voting on resolutions (on legislation that affects provinces) before the NCOP.²⁶ A resolution can only pass through the NCOP when it enjoys the support of five of the nine provinces.²⁷ Thus, the NCOP is a 'council of provinces and not a chamber composed of elected representatives.'²⁸

Similarly, to the NA, the NCOP and its committees enjoy broad powers to summon any person to appear before it to give evidence under oath or affirmation or to produce documents. The NCOP may also require any institution or person to report to it; compel any person or institution to comply with a summons; and receive petitions, representations or submissions from any interested persons or institutions.²⁹

3. FUNCTIONS OF PARLIAMENT

According to de Vos & Freedman, the two Houses of Parliament can be said to perform four main functions:³⁰

- providing a forum for debate on important issues;
- holding the national executive accountable;
- exercising an oversight function over the exercise of national authority and over other organs of state; and

²⁵ Section 61(1) of the Constitution.

²⁶ Section 65(1)(a) of the Constitution; Bishop & Raboshakga op cit note 1 at 5.

²⁷ Section 65(1)(b) of the Constitution.

²⁸ Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa ('Certification II') 1997 (2) SA 97 (CC) at para 61

²⁹ Section 69 of the Constitution.

³⁰ De Vos & Freedman op cit note 9 at 143.

- passing national legislation.

As mentioned above, the primary function of Parliament is to enact national legislation. The process by which legislation is passed in South Africa is explored in the following section.

Parliament provides a forum for debate on important issues by holding sittings, at which various elected members from different political parties may speak to the issues before the House. It also provides a platform for debate on issues of national importance, as a forum for the discussions and deliberations of its members, who represent the various political parties.³¹ These debates are often reported on by the media or televised, and this allows the public to engage with issues of national importance in a way that affirms democracy.³²

The mechanisms by which Parliament may hold the national executive to account are explored in more detail in the next chapter. In essence, Parliament has two mechanisms available to it by which executive action may be checked.³³ First, it may use its power to summon any person, including members of the executive like cabinet ministers, to give evidence on oath or affirmation or to produce documents. Lying to Parliament under oath may give rise to a criminal offence which could include jail time for the offender. Secondly, the NA is empowered to pass a motion of no confidence in the President and/or the cabinet,³⁴ and to impeach the President on the grounds of a serious violation of the Constitution or the law, serious misconduct, or inability to perform the functions of office.³⁵

³¹ Ibid at 142.

³² Ibid at 143.

³³ Ibid at 144–5.

³⁴ Section 102 of the Constitution.

³⁵ Section 89 of the Constitution.

Parliament's oversight function is related to, yet distinguishable from, its accountability function.³⁶ Oversight is maintained over the exercise of national executive authority, including over the implementation of legislation as well as any other organ of state.³⁷ The mechanisms through which Parliament performs its oversight function are the various parliamentary committees.³⁸ A number of avenues are available to committees for garnering information about the affairs of organs of state, including requesting briefings, fact-finding visits, consideration of annual reports, and the consideration of reports prepared by the Auditor-General.³⁹

Finally, it is important to note that while the two Houses of Parliament do not perform identical functions, there is considerable overlap in this regard. This is illustrated in the table below.

Functions of the Houses of Parliament	
National Assembly	National Council of Provinces
To provide a national forum for public consideration of issues — section 42(3).	To provide a national forum for public consideration of issues facing the provinces — section 42(4)
To pass national legislation — sections 42(3) and 55(1)	To pass national legislation — section 68(a)
To hold the executive organs of state in the national sphere of government to account — section 55(2)(a)	The Constitution does not provide for analogous powers for the NCOP. However, section 92 states that

³⁶ De Vos & Freedman op cit note 9 at 148.

³⁷ Section 55(2)(b) of the Constitution.

³⁸ De Vos & Freedman op cit note 9 at 148.

³⁹ Ibid.

<p>To exercise an oversight function over the exercise of national executive authority and any organ of state — section 55(2)(b)</p>	<p>members of the Cabinet are accountable to Parliament, not just the National Assembly. This suggests members of the Cabinet are accountable to both Houses of Parliament.</p>
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4. LIMITS ON PARLIAMENT'S POWERS

We have seen that both the NA and NCOP both have extensive powers to perform their constitutional functions, according to rules and procedures upon which they, themselves, decide.⁴⁰ This does not mean, however, that Parliament's powers are infinite and unrestricted. According to de Vos & Freedman, there are three main ways in which Parliament's powers are curtailed by the Constitution:⁴¹

- **Openness and transparency.** Both Houses are required to conduct their business in an open and transparent manner, and neither may create rules that would interfere with this.
- **Parliamentary privilege.** Members of Parliament, as well as members of Cabinet who appear before them, enjoy certain privileges which cannot be curtailed by Parliament or anyone else.
- **Public involvement.** Parliament is required to facilitate public involvement in its legislative and other processes.

⁴⁰ Ibid at 114.

⁴¹ Ibid.

(a) Openness and Transparency

Both the NA⁴² and NCOP⁴³ must conduct their business in an open manner and hold their sittings (and those of their committees) in public. However, reasonable measures may be taken to regulate public access, including access of the media to sittings of the Houses and their committees. Also, both Houses may take reasonable measures to provide for the searching of any person, and where appropriate, to refuse entry or remove any person. Parliament is, furthermore, forbidden from excluding the public, including the media, from a sitting of a committee unless it is reasonable and justifiable to do so in an open and democratic society.⁴⁴

In the case of *Doctors for Life* (discussed in detail below), the Constitutional Court said *obiter dictum* that non-compliance with the public access requirements in the sections referred to in the paragraph above 'would have grave implications for the validity of any conduct that passes a law.'⁴⁵

(b) Parliamentary Privilege

Of fundamental importance to a democratic system in which the will of the people is expressed through their elected representatives, is the ability of those representatives to freely speak their minds while in Parliament. Members of Parliament and Cabinet ministers accordingly enjoy parliamentary privilege, so they are able to perform their functions without outside hindrance or interference.⁴⁶ The

⁴² Section 59(1)(b) of the Constitution.

⁴³ Section 72(1)(b) of the Constitution.

⁴⁴ Sections 59(2) and 72(2) of the Constitution.

⁴⁵ *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC) at para 300; quoted in de Vos & Freedman op cit note 9 at 115.

⁴⁶ De Vos & Freedman op cit note 9 at 116.

most important reason for parliamentary privilege is that individual members of Parliament are potentially threatened with interference as a result of the vast powers of the executive and the courts.⁴⁷ Parliamentary privilege ensures that free and honest debate can take place in Parliament without members fearing reprisal in the form of criminal charges being laid against them, for example.

Members of Parliament and Cabinet members have freedom of speech in Parliament and its committees, subject to each individual House's rules and orders.⁴⁸ Furthermore, these individuals are not liable to civil or criminal proceedings, arrest, imprisonment or damages for anything they have said in, or submitted to, Parliament or its committees.⁴⁹ This is not a closed list of privileges — other parliamentary privileges and immunities may be prescribed by national legislation.⁵⁰

Democratic Alliance v Speaker of the National Assembly and Others

2016 (3) SA 487 (CC)

Facts

On 12 February 2015, President Jacob Zuma delivered his annual State of the Nation Address at a joint sitting of Parliament. A member of the Economic Freedom Fighters (EFF) interrupted proceedings by rising to ask the President a question relating to whether he was to pay back money spent on non-security upgrades to his private residence at Nkandla, in line with a report by the Public Protector.

⁴⁷ Bishop & Raboshakga op cit note 1 at 93.

⁴⁸ Sections 58(1)(a) and 71(1)(a) of the Constitution.

⁴⁹ Sections 58(1)(b)(i) and 71(1)(b)(i) of the Constitution.

⁵⁰ Sections 58(2) and 71(2) of the Constitution.

The Speaker responded to this interjection, saying that the State of the Nation Address was not the occasion to ask questions of that nature. Dissatisfied with this response, other members of the EFF proceeded to interrupt proceedings by continuing their colleague's previous line of questioning. Eventually, the Speaker asked members of the EFF to leave the parliamentary chamber. After the members refused to leave, the Speaker ordered that they be removed in terms of section 11 of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act. This section read as follows:

A person who creates or takes part in any disturbance in the precincts while Parliament or a House or committee is meeting, may be arrested and removed from the precincts, on the order of the Speaker or the Chairperson or a person designated by the Speaker or Chairperson, by a staff member or a member of the security services.

Members of the South African Police Service (SAPS) entered the chamber and forcibly removed members of the EFF. The leader of the Democratic Alliance (DA) addressed a point of order to the Speaker, opining that the forced removal of members from the House was unconstitutional and amounted to a breach of the separation of powers doctrine. Members of the Democratic Alliance then left the chamber voluntarily.

The DA sought a declarator that section 11 is constitutionally invalid, insofar as it allowed the arrest and removal of members of Parliament, as well as non-members.

The issue to be decided was whether this section infringes the privilege of freedom of speech of members of Parliament and impinge on the parliamentary privilege of free speech guaranteed in sections 58(1) and 71(1) of the Constitution.

Judgment

Free speech is fundamental to the correct functioning of Parliament, especially in light of South Africa's history of hard-won constitutional democracy. By nature, Parliament is a deliberative body. For deliberation to be meaningful, and for members to effectively carry out Parliament's deliberative functions, it is necessary for debate

not to be stifled. Unless all enjoy the right to full and meaningful contribution to Parliamentary debate, the very notion of constitutional democracy is warped.

The word 'person' in section 11 undoubtedly includes members of Parliament. The consequences of this section are that members of Parliament could be deprived of participation in parliamentary proceedings.

We can only be assured of the best-possible legislative outcome when Parliament makes laws if everyone is heard. This is because the greater the number of contributions, the better guarantee we have of a refined product. Moreover, Parliament is tasked with overseeing the executive. Even in democracies, the state (controlled by the executive branch of government) may use state organs, including the police and security services, to suppress opposition and quash dissent. Thus, for Parliament to freely exercise its oversight functions, without fear, its members must be protected from arrest, prosecution and harassment.

Section 11 makes taking part in or causing a disturbance in Parliament a criminal offence. The prospect of being arrested, detained and charged with a crime as a result of their actions in Parliament may well discourage members from engaging in robust debate. This is a limitation on free speech of members, guaranteed by s 58(1)(a) and s 71(1)(a) of the Constitution. Moreover, section 11 directly infringes the immunities from criminal proceedings, arrest and imprisonment enjoyed by members in terms of s 58(1)(b) and s 71(1)(b) of the Constitution.

Is the section's limitation on free speech permissible? The free speech of members of Parliament protected by s 58(1)(a) and s 71(1)(a) is subject to the 'rules and orders' of the relevant House of Parliament and nothing else. It cannot, therefore, permissibly be limited by an Act of Parliament.

Section 11 is therefore constitutionally invalid to the extent that it applies to members of Parliament. The constitutional defect is to be remedied by reading in the words, 'other than a member' after the word 'person' in this section. Thus formulated, the section continues to apply to non-members and is constitutionally compliant.

(c) Public Involvement

The Constitution establishes a system of democratic government that has both representative and participatory elements.⁵¹ The representative element appears from the fact that Parliament is elected to represent the people and ensure government by the people.⁵² When Parliament makes laws, it does so because citizens have given it democratic legitimacy to do so by voting in national elections. The participatory element appears from the Constitution's requirement that Parliament should facilitate public involvement in the legislative and other processes of Parliament.⁵³ Parliament cannot validly make law without considering the need to facilitate some form of public participation.⁵⁴

Various forms of public participation in the processes of Parliament are possible. The following are examples of strategies for public participation:⁵⁵

- **Public hearings.** Usually convened by Parliamentary committees, public hearings allow members of the public to make both written or oral submissions on the matter for which the hearing has been convened.
- **Lobbying.** The targeting of decision-makers by organised civil society groups in the interests of influencing their positions on a given issue, usually through well-reasoned arguments conveyed through written submissions.
- **Petitions.** The signing of documents by numerous members of the public that express a particular point of view on an issue, usually

⁵¹ De Vos & Freedman op cit note 9 at 119.

⁵² Section 42(3) of the Constitution.

⁵³ Sections 59(1)(a) and 72(1)(a) of the Constitution; de Vos & Freedman op cit note 9 at 119.

⁵⁴ De Vos & Freedman op cit note 9 at 119.

⁵⁵ Ibid at 120.

presented to Parliament as a whole and not through an individual decision-maker.

The case of *Doctors for Life*,⁵⁶ illustrates the fundamental importance of public participation in our legislative process. The case's rather lengthy judgements also address a number of other crucial questions relating to the structure of our system of constitutional government. They are worth exploring in some depth. The majority judgment of Ncgobo J is summarised below, with particular emphasis on the duties of the NCOP.

Doctors for Life International v Speaker of the National Assembly and Others 2006
(6) SA 416 (CC)

Facts

Parliament enacted four health statutes: the Choice on Termination of Pregnancy Amendment Act, the Sterilisation Amendment Act, the Traditional Health Practitioners Act and the Dental Technicians Act.

The National Assembly fulfilled its constitutional obligation (in terms of section 59(1)(a) of the Constitution) to facilitate public involvement in connection with the health statutes by inviting members of the public to make written submissions to the National Portfolio Committee on Health and also by holding public hearings on the legislation. The National Council of Provinces, however, did not invite written submissions, nor did it hold public hearings on the legislation.

⁵⁶ *Doctors for Life* op cit note 45.

The applicant, a South African NPO opposing inter alia abortion and euthanasia, alleged that the NCOP had failed to discharge the duty, required of it by the Constitution, to facilitate public involvement in the legislative process.

Majority judgment — Ngcobo J

The public involvement requirements

The NCOP's public involvement requirements are contained in section 72 of the Constitution and are identical to the public involvement requirements in respect of the National Assembly (section 59) and the provincial legislatures (section 118). They impose a duty on the various Houses to 'facilitate public involvement' in their 'legislative and other processes'.

The meaning, nature and scope of the duty to facilitate public involvement must be construed in the light of:

- the role of the NCOP in the national legislative process;
- the right to political participation under international and foreign law; and
- the nature of our constitutional democracy.

The role of the NCOP in the national legislative process

The NCOP plays a unique and fundamental role in our constitutional democracy. It ensures that the provinces are involved in national legislative processes and policymaking, and also that national government is responsive to provincial interests. The NCOP's constitutional role reflects the principle of co-operative government which underlies our constitutional system. The basic structure of our government demands partnerships between the national, provincial and local spheres of government, and each three of these spheres must perform their functions in consultation and co-ordination with the other spheres.

The members of the nine NCOP delegations (one from each province) vote on the basis of mandates given to them by their respective provincial legislatures. Provincial legislatures must study and deliberate on national legislation in order to give

informed mandates to their delegations. In doing so, the provincial legislatures take part in the national legislative process.

The right to political participation under international and foreign law

The right to political participation is a fundamental human right and is set out in a number of international human-rights instruments, including the International Covenant on Civil and Political Rights (ICCPR), to which South Africa is party. The ICCPR guarantees not just the 'right' but the 'opportunity' to take part in the conduct of public affairs. This imposes a duty on states to facilitate public involvement.

While the right to political participation can be achieved in multiple ways, at the very minimum, it requires that governments provide for a meaningful exercise of choice in public participation by permitting public debate and dialogue with elected representatives.

The duty to facilitate public involvement in the legislative process under our Constitution must be understood in light of the international law right to political participation.

The nature of our constitutional democracy

Public involvement in political processes reflects the idea of government based on the will of the people. This idea is fundamental to our Constitution. Furthermore, our Constitution's commitment to accountability, responsiveness and openness shows that our constitutional democracy is not only representative in nature, but also has participatory elements. The nature of our democracy must also be understood in light of our history, in which the majority of people were denied a say in the laws which governed them.

The meaning and scope of the duty to facilitate public involvement

The plain meaning of the facilitation of public involvement requirement is taking steps to ensure that the public participate in the legislative process. This construction is consistent with the participative nature of our democracy.

Our Constitution requires the achievement of a balanced relationship between the participatory and representative elements of our democracy. How best to achieve this balance is largely left to the legislature's discretion. But the ultimate question is whether there has been the (minimum) degree of public involvement that is required by the Constitution. A court may adjudicate on this question, notwithstanding the discretion granted to the legislature.

What is required by section 72(1)(a) will vary from case to case. In all cases, however, the NCOP must act reasonably in carrying out its duty to facilitate public involvement in its processes. Whether the NCOP has acted reasonably in discharging its duty will depend on a number of factors, most importantly, the nature and importance of the legislation and the intensity of its impact on the public. The court will also take into account what Parliament itself considered to be appropriate public involvement in light of the circumstances.

Ultimately, the question is whether the NCOP has taken steps to afford the public a reasonable opportunity to participate effectively in the law-making process. Thus, there are two requirements for reasonableness in this context:

1. providing meaningful opportunities for public participation; and
2. taking measures to ensure that people have the ability to take advantage of the opportunities provided.

Did the NCOP comply with the public-involvement provisions?

There is no evidence that the NCOP held public hearings or invited written representations on any of the Bills. Moreover, most of the provincial legislatures failed to hold hearings on the Bills or invite written representations on them. In these circumstances, the failure by the NCOP to hold public hearings or invite written representations was unreasonable.

Remedy

The Constitutional Court's remedy, in light of its duty to protect the Constitution, must not only be effective but must also be seen to be effective. The obligation to facilitate public involvement is a fundamental requirement of the law-making process

under the Constitution. Failure to comply with such a fundamental requirement renders the resulting legislation invalid.

The declaration of invalidity is, however, to be suspended for a period of 18 months to allow Parliament to re-enact the legislation in a way that meets the Constitution's requirements.

5. THE LEGISLATIVE PROCESS

(a) Overview

Individual members of the NA, even those from opposition parties, may initiate legislation in the form of private members' Bills.⁵⁷ The vast majority of Bills, however, are initiated and introduced by members of the national executive (Cabinet members), on issues pertaining to their portfolios.⁵⁸ The Minister of Health, for example, would usually be the person responsible for initiating a piece of legislation related to the governance of hospitals and clinics.

When legislation is initiated by the executive, the legislative process usually begins as follows.⁵⁹ Policy is formulated by the executive, usually through the ruling party's internal discussions and the deliberations of the Cabinet. A Green Paper is sometimes drafted by the government department dealing with a particular issue. This is a broad policy statement that is published, so interested parties can comment and add ideas. A more detailed policy document — a White Paper — sometimes follows the Green Paper. Submissions are once again invited. A draft Bill is then compiled, which is approved by Cabinet. The Cabinet minister to whose portfolio the Bill is

⁵⁷ Sections 55(2) and 73(2) of the Constitution; de Vos & Freedman op cit note 9 at 151; *Oriani-Ambrosini, MP v Sisulu, MP Speaker of the National Assembly* 2012 (6) SA 588.

⁵⁸ De Vos & Freedman op cit note 9 at 153.

⁵⁹ Ibid at 156.

relevant introduces the Bill in the NA, and sometimes in the NCOP. This is known as the first reading.

What unfolds thereafter depends on the kind of Bill under consideration. The Constitution provides for four different legislative processes: amendments to the Constitution, Bills affecting the provinces, Bills not affecting the provinces and money Bills.⁶⁰ Since each of these processes have different requirements, it is necessary for Parliament to establish at the outset which process applies to the proposed legislation at hand. Voting on a Bill can only commence once Parliament knows what kind of Bill has been tabled, and thus which process applies to it. The determination of which process applies to a Bill is known as 'tagging'.⁶¹ The Constitutional Court confirmed the necessity of tagging in the case of *Tongoane and Others v National Minister for Agriculture and Land Affairs*.⁶² More on tagging and the *Tongoane* case follows later in this chapter.

After a Bill is tagged, and duly passed in terms of the procedure that correctly applies to it, it is submitted to the President for assent. The President must either assent to and sign the Bill or, if he has reservations about the constitutionality of the Bill, refer it back to the NA for reconsideration.⁶³ If, after reconsideration, the Bill fully accommodates the President's reservations, he must assent to and sign the Bill. If it does not, the President may elect to either assent to and sign the Bill anyway, or refer

⁶⁰ Bishop & Raboshakga op cit note 1 at 14.

⁶¹ Ibid.

⁶² 2006 (10) SA 214 (CC).

⁶³ Section 79(1) of the Constitution.

it to the Constitutional Court for a decision on its constitutionality.⁶⁴ If the Constitutional Court decides that the Bill is constitutional, the President must assent to and sign it.⁶⁵

A brief overview of the four legislative processes follows. Note that only the basic outline of each process is presented; in certain circumstances, different requirements may exist within each of these processes, depending on the nature of the proposed legislation.

(b) Specific Legislative Processes

(i) Bills amending the Constitution (section 74)

Constitutional amendments must be introduced in the National Assembly. 30 days before the Bill is introduced to the House, particulars of the amendment must be published in the *Government Gazette* to allow public comment.⁶⁶ These particulars must also be submitted to the provincial legislatures for their views.⁶⁷

The size of the majority in the NA required to pass a constitutional amendment Bill, and whether the NCOP must also pass the Bill, depends on which section of the Constitution the Bill seeks to amend. For example, on the one hand, a Bill that seeks to amend section 1 of the Constitution must be passed by the NA with a supporting vote of at least three quarters of its members and must also be passed by the NCOP with a supporting vote of at least six provinces.⁶⁸ Consider, on the other hand, a Bill that seeks to amend a section of the Constitution other than section 1 or 2, and which

⁶⁴ Section 79(4) of the Constitution.

⁶⁵ Section 79(4) of the Constitution.

⁶⁶ Section 5(a) of the Constitution.

⁶⁷ Section 5(b) of the Constitution.

⁶⁸ Section 74(1) of the Constitution.

does not relate to a matter affecting the NCOP or the provinces. Such a Bill requires the support of a two-thirds majority of the NA and need not be passed by the NCOP.

(ii) Bills affecting the provinces (section 76)

Section 76 provides a special procedure for certain categories of Bills that affect the provinces.⁶⁹ Of these, the most noteworthy are those Bills relating to the functional areas of legislative competence listed in Schedule 4 of the Constitution.⁷⁰

While Bills affecting the provinces may be introduced in either House of Parliament, a Bill passed by one House must be referred to the other House.⁷¹ The second House may then pass the Bill, amend it into a new version, or reject it. If both Houses pass the same version of the Bill, it is submitted to the President for assent.⁷²

If the two Houses are unable to agree on a single version of a Bill, the matter is referred to the Mediation Committee.⁷³ The Mediation Committee is comprised of nine representatives of the NA, and nine representatives of the NCOP — one for each province.⁷⁴ If the Mediation Committee agrees on a version of the Bill, the Bill is referred back to the Houses, or to the House that has not yet agreed to that version. If the Bill is then passed, it is submitted to the President for assent.⁷⁵ If it is not, the Bill

⁶⁹ Bishop & Raboshakga op cit note 1 at 22.

⁷⁰ Ibid; section 76(3) of the Constitution.

⁷¹ Bishop & Raboshakga op cit note 1 at 23.

⁷² Sections 76(1)(b) and 76(2)(b) of the Constitution; *ibid*.

⁷³ Sections 76(1)(d) and 76(2)(d) of the Constitution.

⁷⁴ Section 78(1) of the Constitution.

⁷⁵ Sections 76(1)(g) and (h) and 76(2)(g) and (h) of the Constitution. Bishop & Raboshakga op cit note 1 at 23.

lapses. The Bill can, however, be passed again by the NA, provided it receives the support of two-thirds of its members.⁷⁶

(iii) Bills not affecting the provinces (section 75)

Bills that do not seek to amend the Constitution and that do not affect the provinces may only be introduced in the NA.⁷⁷ If passed by the NA, the Bill must be referred to the NCOP and dealt with according to the procedure laid out in section 75(1). In this procedure, the NA enjoys a large degree of legislative superiority over the NCOP. This is because even if the NCOP rejects the Bill or proposes amendments to it, the NA may still pass the Bill, with or without amendments.⁷⁸ All the NA is required to do is to 'reconsider' the Bill, and 'take into account' any amendments thereto proposed by the NCOP.

(iv) Money Bills (section 77)

A Bill is a money Bill if it appropriates money, affects national taxation in certain ways, or authorises direct charges against the National Revenue Fund.⁷⁹ The procedure for passing money Bills is largely the same as the procedure for passing Bills not affecting the provinces (section 75 Bills), with a few differences.⁸⁰ Most importantly, money Bills may only be introduced by the Minister of Finance,⁸¹ and are

⁷⁶ Section 76(1)(g) and (h) and (2)(i) of the Constitution; Bishop & Raboshakga op cit note 1 at 23.

⁷⁷ Bishop & Raboshakga op cit note 1 at 26; sections 73(1) and 73(3) of the Constitution read with section 76(3).

⁷⁸ Section 75(1)(c)(i) of the Constitution.

⁷⁹ Section 77(1) of the Constitution.

⁸⁰ Bishop & Raboshakga op cit note 1 at 27.

⁸¹ Section 73(2) of the Constitution.

limited in their legislative scope to the kinds of provisions explicitly listed in section 77(2).

*Tongoane and Others v Minister for Agriculture and Land Affairs and
Others*

2010 (8) BCLR 741 (CC)

Facts

Four communities stood to have their land rights affected by a new piece of legislation, the Communal Land Rights Act 11 of 2004 ('CLARA'), and thus sought to attack the legislation's validity. The communities all alleged that their use of their land was regulated by indigenous law land administration systems, which would be replaced by a new system envisaged by CLARA. For various reasons, they were concerned that this would undermine the security of tenure they enjoyed, and that some people would be divested of the ownership of their land.

Amongst other arguments, the communities contended that the manner in which CLARA was enacted was incorrect. In passing the legislation, Parliament used the procedure relevant to Bills not affecting the provinces (section 75), rather than the procedure required for passing a Bill that affects the provinces (section 76).

Judgment

When a Bill is introduced in Parliament, both the sponsor of the Bill and Parliament itself must classify the Bill.

In the *Liquor Bill*⁸² case, the Constitutional Court formulated a test for the classification of Bills: when a Bill's provisions in substantial measure fall within a functional area listed in schedule 4, it must be dealt with under section 76. This is also the correct test to be applied when tagging Bills. The test focuses on all the provisions

⁸² Ex Parte President of the Republic of South Africa: In re *Constitutionality of the Liquor Bill* 2000 (1) SA 732.

of the Bill in order to determine the extent to which they substantially affect functional areas listed in Schedule 4.

The 'substantial measure' test that applies to tagging stands in contrast to the 'pith and substance' test used to determine whether a given legislature has competence to legislate on certain subject matter. The latter test ignores provisions that fall outside of the main 'substance' of the Bill. The former test, however, takes all the provisions of the Bill into account.

The purpose of tagging is to determine the nature and extent of the input that the provinces must have on the contents of legislation. That this is so is illustrated by section 76(3): all the legislation mentioned in that section is legislation that substantially affects the interests of provinces. Underlying this are the principles of co-operative government which are a defining feature of government under our Constitution. These include the requirement that each sphere of government (national, provincial and local) must respect the roles, functions and powers of the other spheres and co-operate with each other by co-ordinating their actions and legislation with one another. The NCOP is an important institution that facilitates co-operative government in the legislative process.

The 'pith and substance' test is inappropriate in light of the need to promote co-operative governance as it undermines the role of provinces in legislation in which they should have a meaningful say. It does this by disregarding provisions which fall out of the main substance of a Bill as irrelevant. Therein lies the problem with applying this test to tagging: if a provision, which affected the provinces, was nevertheless regarded as irrelevant for the purposes of classification, this would mean that provinces would be unable to contribute to the legislative process on issues that affect them.

Applying the substantial measure test in the present case, it is clear that CLARA, in substantial measure, deals with indigenous and customary law, a functional area listed in Schedule 4. It also deals with traditional leadership in substantial measure, which is also a functional area listed in Schedule 4. It follows, therefore, that CLARA was incorrectly tagged as a section 75 Bill and the section 76 procedure should rather have been followed.

The consequences of Parliament's failure to follow the correct procedure are that the resulting legislation is invalid. CLARA is thus unconstitutional in its entirety.

6. QUESTIONS

1. The Constitution establishes a bicameral Parliament in South Africa. What are the two Houses of Parliament known as? Which is the upper house, and which is the lower?
2. An electoral system is a set of rules governing how elections are conducted and how their results are determined. Members of the National Assembly are elected in terms of a 'party-list proportional representation' system. How does this differ from the 'first-past-the-post' system used in the United States?
3. What, do you think, are the advantages and disadvantages of a proportional representation system?
4. How are members of the National Council of Provinces selected?
5. What is tagging and why is it important? Refer to case law in your answer.
6. Describe the powers of Parliament. How do the powers of the National Assembly differ from those of the National Council of Provinces?
7. Party government is a system of government in which political parties have a large degree of influence on the way in which a government is composed, on the actions of the elected representatives in the legislature, and on the country's legislative agenda. Do you think that our Constitution establishes a system of party government? Why or why not?
8. Who makes the rules that govern the Houses of Parliament?
9. Describe the constraints and limitations that the Constitution places on the powers of Parliament. Refer to case law in your answer.

10. JS Mill referred to the problem of the 'tyranny of the majority'. To what extent does our Constitution protect minorities from the tyranny of the majority?
11. There are two situations in which an election for the National Assembly could be held before its five-year term has elapsed. Describe both.
12. Section 69 of the Constitution gives the NCOP and its committees broad powers. Are these powers different to those of the National Assembly?
13. The Minister of Health wants to enact new legislation governing the administration of hospitals in rural areas. Describe the process he would have to follow to ensure the legislation is validly enacted. Refer to case law in your answer, and advise the Minister regarding what the effects will be if the correct procedure is not followed.
14. What are the mechanisms through which Parliament can hold the national executive to account?

7. ANSWERS

1. The two houses of parliament are the National Assembly and the National Council of Provinces. The National Assembly is the lower house. This label is misleading as generally the NA wields more power than the NCOP. In most legislatures the lower house is the one with more members and better representation as they are elected by the public.
2. In the closed list proportional representation system, each party nominates a list of candidates before an election and ranks them, usually based on their seniority and loyalty to the party's aims. During the election, the public votes for a political party and not the individuals on the party lists. Seats are then assigned in parliament based on the proportion of votes received by each party. If a party receives 25% of the votes in the election, they will be given 100 of the 400 seats in Parliament. Even if a party gets less than 10% of the vote they will be given seats in parliament in proportion to their performance during the elections. Members of parliament are assigned seats based on their ranking on the party list.

The first-past-the-post system (also known as the winner-take-all system or the plurality system) in contrast tends towards majority rule. It enables the majority party to pursue its governance strategy with very little opposition, by giving the majority party a disproportionate number of seats in relation to the number of votes received. In this system the country is divided into geographical single-member constituencies or wards. The public vote for the candidate of choice in their ward, and the candidate with the most number of votes takes the seat in parliament for that constituency. The party with the majority of seats in parliament will form the government. Minorities are not well represented and the majority party is usually over-represented and given a large number of seats, even if they received less than 50% of the votes. However, according to De Vos and

Freedman, the main aim of this system is effective governance and not minority representation.

3. The closed list proportional representation system is more reflective of the voting population as a whole because the seats are assigned in proportion to the number of votes received. The minority parties are also represented in parliament. This in turn leads to a more inclusive legislature as minority groups and previously disadvantaged groups are given representation, even if it is a small number of seats. This is in line with the aims of our Constitution which values diversity and inclusiveness. Gerrymandering, a problem often associated with the plurality system, involves the manipulation of constituency boundaries to weaken support for certain parties. This problem is avoided in the proportional representation system as the public vote for a political party and not within their constituency boundaries. Another advantage is that this system is not as vulnerable to “pork-barrel” politics where individual members of parliament push certain projects and improvements for their constituency in order to buy votes, regardless of whether their constituency needs these improvements or if the funds could be better spent elsewhere. Lastly, the proportional representation system is known to be easier to administer as it is a simpler system.

There are three main disadvantages of the proportional representation system, put forward by De Vos and Freedman. Firstly, there is not a strong link or relationship between the voters and their elected representatives as they have only voted for the party and not the individual that is representing them. This can also lead to a lack of responsiveness on behalf of the members of parliament to the concerns of their voters as they are not directly accountable to the people, rather their political party is accountable to the public at the next election. This leads onto the second disadvantage, being that MP’s tend to be more accountable to their political party than to their voters as it is the leaders of the party that decide who goes on the party list as well as the ranking of the candidates. The strict party discipline in South Africa is an example of how the proportional representation system can result in the degradation of the democratic process because MP’s, when faced with the choice of keeping their position in parliament or voting with their conscience, understandably favour the

will of the party. The last disadvantage is that this system can lead to a volatile and ineffective government when no party gains a majority. In such an instance, parties will have to form a coalition government in order to get a majority. If the parties have differing ideas, it may be difficult to implement a consistent and effective governance strategy.

4. The appointment of members to the NCOP is governed by section 60 to 62 of the Constitution. The NCOP is made up of 90 members, 10 members from each of the nine provinces, appointed by the provincial legislatures. The members of these provincial delegations are appointed in proportion to the number of seats each party has in the provincial legislature. If the DA has 60% of the seats in the Western Cape legislature, then they would have 6 delegates representing the Western Cape in the NCOP. These 10 members are further classified into permanent or special delegates. Each delegation consists of four special delegates and 6 permanent delegates. The special delegates are comprised of the Premier (who heads the delegation) and three other delegates from the provincial legislature, who are simultaneously members of the NCOP and the provincial legislature. The Premier can nominate another delegate from the provincial legislature to take her place if she is not available. Special delegates are not permanent or appointed for a fixed term. This flexibility allows for different delegates to be present at the sitting of the NCOP to deal with specific issues according to their skills and experience.

The 6 permanent delegates are appointed based on party affiliation in terms of proportional representation. Permanent delegates cannot simultaneously be members of NCOP and the provincial legislature and are therefore selected from party members not appointed to the provincial legislature, or they have to step down from the provincial legislature. The 6 permanent members provides stability for the NCOP by ensuring that at least 6 of the members of the delegation are always present at the sitting of the NCOP.

5. The Constitution provides for four different processes for passing legislation, depending on the type of Bill under consideration. These legislative processes relate to: amendments to the Constitution (section 74), Bills affecting provinces (section 76), Bills not affecting provinces (section 75), and money Bills (section 77). Each process has different requirements. It is important to ensure that the correct process is performed, otherwise the Bill may not be validly passed, which could result in the legislation being struck down as unconstitutional, as was the case in *Tongoane*. The process of determining the type of Bill and its legislative process is called “tagging”. Tagging must be distinguished from the “pith and substance test” used to determine which legislature has the competence to legislate on a particular matter. The *Liquor Bill* case formulated the “substantial measures” test for the classification of Bills for the purpose of tagging. If a Bill’s provision, in substantial measure, falls within a functional area listed in schedule 4, it must be dealt with under section 76. This test focuses on all the provision of the Bill when determining if it substantially affects the provinces. The “pith and substance” competency test in contrast is concerned with the main aim of the Bill. (*Tongoane*)

The purpose of tagging is to determine the nature and extent of the input of the provinces in the legislative process. Any legislation which could have an effect on the provinces, must be enacted according to section 76, which accords a greater role for the NCOP in the legislative process. (*Tongoane*) This is in conformity with the principles of co-operative government underlying the Constitution.

6. The NA has the power, in terms of section 55(1), to consider, pass, amend or reject any legislation before the Assembly and initiate or prepare any legislation, with the exception of money Bills. It must also put in place mechanisms to ensure that all executive organs of state in the national sphere of government are accountable to it. In addition, it must provide for mechanisms of oversight of the exercise of national executive authority which includes the implementation of legislation, as well as any organ of state.

The NCOP, in terms of section 68 has the power to consider, pass, amend or reject any legislation before the Council. It also has the power to initiate and prepare any legislation falling within a functional area listed in schedule 4 or other legislation referred to in section 76(3), with the exception of money Bills.

Both Houses have similar roles and powers, however they are constituted differently and have distinct processes. The NA and the NCOP have the power to summon any person, including the President and cabinet ministers, to appear before them to give evidence under oath and attend question and answer sessions. The NA is the more dominant house with more power as they elect the President and also have the power to remove the President through a vote of no confidence or impeachment. The NCOP does not have this similar power. In terms of legislative power, the NA is the more dominant House because it can pass legislation rejected by the NCOP, and after mediation, if it achieves a 2/3 majority. Both Houses have the power to determine and control their own internal arrangements, proceedings and procedures.

7. There may be various aspects of the Constitution that have helped to exacerbate this problem, such as the closed list proportional representation system, however it is largely the culture inherited from British rule that has entrenched the party government in South Africa.

We inherited our parliamentary government from Britain, which requires the majority party in Parliament to form the government. The executive is therefore reliant on support from parliament to stay in power. Such power can easily be eroded if MP's vote against the party line in favour of their own ideals, thereby undermining the legitimacy of the government. Since an MP's appointment is dependant on the success and favour of their party, there is further incentive to vote in line with their party.

The culture of strict party discipline in South Africa was also inherited from the Westminster system of parliamentary government and limits the ability of MP's to disobey their party leadership when performing their legislative functions. MP's

are constrained in voting with their conscience as this may affect their standing within the party.

The internal party discipline that is indicative of South Africa's party culture also prevents MP's from voting as individuals in parliament and rewards those members that stay loyal to the party and 'toe the party line'. De Vos and Freedman have described this culture as democratic centralism. The party will internally debate an issue and once it has made a decision, it is expected that all members are to publicly support the decision and may not act in a manner that undermines the authority of the party or the decision that has been taken.

Lastly, the closed list proportional representation system is a tool to further control members of parliament when performing their duties. Since MP's are dependant on the favour of the party leadership for their position in parliament, and they can easily be removed from their posts, there is a huge incentive for MP's to obey the party. MP's from a specific party will vote as a block according to the party decision, even on contentious issues where there may be individuals who would vote against the majority. This results in a legislature, specifically in South Africa with the ANC majority, that cannot hold the executive to account and often acts as a puppet of the party leadership. The executive, which is made up of the party leadership is easily able to push its agenda through parliament.

8. In terms of section 57(1) and 70(1), the NA and the NCOP have the power to determine and control their own internal arrangements, proceedings and procedures. Parliament also has the power to make rules governing its business, but due regard must be given to representative and participative democracy, accountability, transparency and public involvement.
9. There are three main ways in which the powers of Parliament are restricted by the Constitution: openness and transparency, Parliamentary privilege, and public involvement.

Section 59 and 72 states that Parliament must conduct its business in an open manner and hold their sittings in public. Parliament is forbidden from excluding

the public and the media from the sitting of a committee unless it is reasonable and justifiable to do so in an open and democratic society. In the *Doctors for Life Case*, it was stated, *obiter dictum*, that non-compliance with the public access requirements could affect the validity of any law passed.

To ensure that the true will of the people is expressed through the elected representatives, members of parliament are allowed to speak freely when in Parliament. This is called parliamentary privilege and allows MP's to perform their functions without interference from outside forces such as the executive and the judiciary. As a result, free and honest debate can take place in Parliament without members fearing reprisals. Parliamentary privilege is governed by section 58 and 71 of the Constitution. Members of Parliament and Cabinet have freedom of speech in Parliament and its committees, subject to the House's rules and orders. Members are not liable to criminal or civil proceedings, arrest, imprisonment or damages for anything said in Parliament, including the committees. In the *Democratic Alliance v Speaker of the NA* case it was emphasised that the free speech of members is subject to the rules and orders of the relevant House of Parliament and cannot be limited by any Act of Parliament. Section 11 of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act, which made for provision of a person, including a member of Parliament, to be arrested and removed from Parliament, was found to be unconstitutional as it violated section 58(1)(b) and section 71(1)(b). It directly violated the parliamentary privilege that protects each member from criminal proceedings, arrest and imprisonment thereby discouraging robust and honest debate. To remedy this defect, the words "other than a member of Parliament" was read into section 11 to ensure members still had Parliamentary privilege. The participatory element of our democratic system requires Parliament to facilitate public involvement in the legislative and other processes of Parliament, as contained in section 59(1)(a) and 72(1)(a). A vital part of the law-making process includes the need to facilitate public involvement. There are three main ways in which this is achieved: public hearings, lobbying and petitions, although this is not a closed list. The *Doctors for Life* case emphasised the importance of public involvement in the legislative process and warned that any unreasonable failure to facilitate such involvement could result in the

legislation being unconstitutional and therefore invalid. This case gave further clarity to the meaning and scope of the duty to facilitate public involvement. Parliament must act reasonably, and this will depend on a number of factors, mainly, the nature and importance of the Bill and the intensity of its impact on the public. Parliament is expected to provide meaningful opportunities for public participation, and take measures to ensure that people have the ability to take advantage of such opportunities.

10. The Constitution provides Parliament with the power to give effect to the will of the people, while still ensuring mechanism are in place to limit abuse of this power. The limits mentioned in the memo in question 6 are relevant here. The Constitution requires Parliament to perform its business in an open and public manner, give MP's and cabinet ministers parliamentary privileges while in Parliament to ensure robust and honest debate, and has made public involvement a vital part of the legislative process.

The abuse of government power, of the tyranny of the majority, can also be curtailed through substantive measures such as the justiciable Bill of Rights and the rule of law, as well as procedural measures called the separation of powers doctrine. Although the separation of powers doctrine is not explicitly referred to in our Constitution, it is inherent in the structure and underlying principles of the Constitution. The separation of powers aims to limit the power of the majority and the concentration of power in one body or individual.

The four principles of the separation of powers are as follows:

Firstly, there is the division of governmental power into the three branches of government, the executive, legislature and the judiciary. (*trias politica*) Second, there is the separation of functions which assigns unique responsibility and authority to each branch of government and prohibiting the usurping of the power and responsibility of another branch of government. Third, there is the separation of personnel which requires specific persons to be assigned to each branch to perform that branch's function. Last, there are the checks and balances that hold one branch accountable to another. The concept of judicial review, which allows

the judiciary to strike down any law that is inconsistent with the Constitution is an effective check on the power of the executive and the legislature and aims at protecting those minority groups that may be unfairly treated as a result of an unfair law passed by the legislature.

11. In terms of section 50(1), the President must dissolve the NA if the Assembly has adopted a resolution to dissolve with a supporting majority of its members and three years have passed since the Assembly was elected. Section 50(2) requires the President to dissolve the NA if there is a vacancy in the office of the President, and the Assembly failed to elect a new President within days after the vacancy occurred.
12. No, the section 69 powers of the NCOP are identical to the section 53 powers of the NA.
13. The minister would first have to correctly tag the Bill as either a section 75 or section 76 Bill. The “substantial measures” test from the *Liquor Bill* case is used to determine whether any of the provisions of the Bill in substantial measure fall within the functional area of the provinces. The court in *Tongoane* also reaffirmed the majority’s position in the *Liquor Bill* case which said that any Bill whose provisions substantially affect the provinces must be tagged as a section 76 Bill. Since this Bill deals with healthcare it will definitely affect the provinces and the Bill should be tagged as a section 76 Bill.

A Bill affecting the provinces must be legislated according to the process set out in section 76. The Bill can be introduced in either the NA or the NCOP. Since it is the Minister instigating the legislation it is likely it will be tabled first in the NA. The Bill will be discussed and amended by the responsible Committee and then debated in the NA. Once it is passed by the NA it must be sent to the NCOP for discussion and amendment by the specific Committee and then it will be debated in the NCOP. If the Bill is passed with no amendments, then it will be sent to the President for assent. If the Bill is passed with amendments or rejected, mediation will occur. If the mediation is successful and both Houses agree or come to a compromise, then the Bill will be sent to the President for assent. If there is no

agreement, then the Bill is sent back to the NA and they are able to pass the Bill without the agreement of the NCOP if they achieve a 2/3 majority.

In addition to the above procedures, Parliament is required to facilitate public involvement in the legislative processes. [section 59(1)(a) and section 72(1)(a)] Parliament cannot pass any legislation without facilitating some sort of public involvement. In the *Doctors for Life* case it was held that the duty to hold public hearings or facilitate public involvement rests equally on both the NA and the NCOP, and this duty is a requirement for the validity of the legislation. The extent and degree of the public participation required is an objective enquiry dependent on the following factors:

- the nature and importance of the Bill;
- the intensity and impact of the Bill;
- the burden of time, efficiency and expense; and
- what parliament thought was reasonable at the time.

Ultimately Parliament must provide meaningful opportunities for public participation, and take measures to ensure that the public have the ability to take advantage of the opportunities provided.

14. Parliament has the power to call any member of the executive to account for their actions in terms of section 56 and section 59 of the Constitution. These sections allow the NA or the NCOP to summon any institution or person before them. The rules of the NA and NCOP allow for Parliament to hold members of the executive accountable for their actions and allow members of parliament to ask questions and receive oral or written answers from members of the executive.

The NA also has the power to pass a motion of no confidence in terms of section 102, which if passed with a simple majority will force the President and his cabinet to resign. This is purely a political removal which acts as a motivator for the President and his cabinet to retain the support of Parliament, specifically those belonging to their party.

Section 89 gives the NA the power to impeach the President by adopting a resolution with a supporting vote of at least 2/3 of its members. An impeachment must be based on the grounds of a serious violation of the Constitution or the law, serious misconduct or inability to perform the functions of the office.