

**THE IMPACT OF THE NATIONAL COUNCIL OF PROVINCES
ON LEGISLATION**

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**A mini-thesis submitted in partial fulfillment of the requirements
for the degree of Master of Philosophy in Law**

WESTERN CAPE

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DECLARATION

I hereby declare that this is my own work. It is submitted for the Degree of Master of Philosophy in Law in the Community Law Centre, University of the Western Cape. I further testify that it has not been submitted before for any other degree or examination to any other university or institution of higher learning, and that all sources that I have used or quoted have been indicated and acknowledged as complete references.

Signature: _____

Vuyokazi A Mafilika



Dated this _____ day of November 2013

Signature: _____

Prof. Nicolaas Steytler

Dated this _____ day of November 2013

DEDICATION

This study is dedicated to all the young women who are doing post graduate studies on a part-time basis. Working full time and studying is both physically and emotionally challenging. This study is also meant to inspire and motivate the young people of Langa Township, in Cape Town, because you too can achieve this goal. Seize the opportunity and make your contribution to the academic space.



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- To the friendly staff of the Community Law Centre: Thank you for making those appointments with the Prof less stressful. Your warm welcome always made my visit a joy.

ACRONYMS

| | |
|-------|--|
| ANC | African National congress |
| CLaRA | Communal Land Rights Act |
| DA | Democratic Alliance |
| DRB | Division of Revenue Bill |
| COGTA | Cooperative Governance and Traditional Affairs |
| IFP | Inkatha Freedom Party |
| IRG | Intergovernmental Relations |
| JTM | Joint Tagging Mechanism |
| NA | National Assembly |
| NCOP | National Council of Provinces |
| NP | National Party |
| UWC | University of the Western Cape |



ABBREVIATIONS

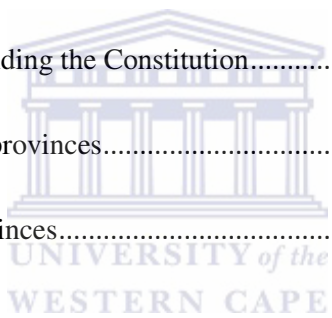
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|--------------------------------|--|
| Cabinet | The Cabinet of South Africa. (Senior executive consisting of the President, the Deputy President, the Ministers, and the Deputy Ministers.) |
| Constitution | The Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996) |
| Executive | A member of National Cabinet, i.e a Minister |
| Interim Constitution | The Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993) |
| Money bills | Bills that seek to appropriate money, impost tax, levies or surcharges, etc. |
| National Assembly | National Assembly of South Africa |
| Parliament | Parliament of the Republic of South Africa |
| Parliamentary Monitoring Group | A website with verbatim minutes, reports and status of bills of parliamentary proceedings, including portfolio committee meetings of parliament |
| president | The president of the Republic of South Africa |
| provinces | the provinces of South Africa |
| Third Parliament | Third Parliamentary session since democracy; covers the period from 2004 to 2009 |
| Tagging | A process followed by Parliament for classifying bills. It determines the scope and depth of amendments that the NCOP may follow in passing bills. |

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ABSTRACT

The paper focuses on the role of the National Council of Provinces (NCOP) in the national legislative process. An enquiry into the relevance of the NCOP when processing bills during the Third Parliament has been critical when reviewing this role. The paper studied all the bills processed by Parliament with particular interest in the amendments proposed by the NCOP. The legislative framework in which the NCOP functions was critical to determine whether it enables this institution to adequately fulfill this role.

The objective of this paper was to assess whether or not the NCOP fulfills its constitutional role of representing provincial interests in the national legislative process. The paper has uncovered the following regarding the NCOP's role in the national legislative process.

- The NCOP role varies according to the different pieces of legislation it is considering. This means that the manner in which it processes and passes ordinary bills affecting provinces will be different from the way it considers those bills not affecting provinces.
- The NCOP has thorough consultative process on bills affecting provinces, compared to the superficial role it plays on bills not affecting provinces. More ordinary bills not affecting provinces have been processed by Parliament; however, the NCOP has proposed more amendments to the minority of bills affecting provinces.
- The electoral system of South Africa has weakened the caliber of delegates in the NCOP. This has unintended consequences on the strength of the NCOP as an institution to abide by its decisions or to challenge the National Assembly when there are disagreements.
- The NCOP may be misguided about its role at times and not strategically situated to focus on matters of provincial competence.

The paper argues that the NCOP remains relevant and has achieved its constitutional mandate of representing the interests of provinces. However, more work needs to be done to ascertain a common view of what constitutes provincial interests. Furthermore, the NCOP should confine its scope to matters of provincial competence. Thus the small number of delegates will be focused on the issues that reflect the core mandate of this institution.

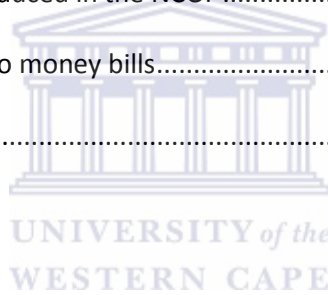
Keywords

Amendments, constitution, cooperative government, legislation, NCOP, parliament, provinces, provincial interests, quality, tagging.



LIST OF FIGURES

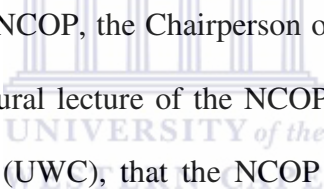
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CHAPTER ONE: INTRODUCTION

1. PROBLEM STATEMENT

The National Council of Provinces (NCOP) has a constitutional mandate to represent provinces in Parliament. It thus acts as a forum through which provincial interests are raised and debated at national level.¹The relevance of the NCOP, including the role played by the provincial legislatures in the national legislative forum, has featured prominently in public debates. Some people emphasise the relevance of the NCOP and provincial legislatures while others hold contrasting views. The NCOP has faced both criticisms and acclamations from different political players and academics regarding the value that it has added thus far.



Underlining the relevance of the NCOP, the Chairperson of the NCOP, Johannes Mahlangu, stated, in his speech at the inaugural lecture of the NCOP in February 2013, hosted by the University of the Western Cape (UWC), that the NCOP has closely examined legislation forwarded to its committees. To support his claim, the chairperson raised the Protection of State Information Bill as an example of a bill to which the NCOP had supposedly made numerous technical and substantial amendments.²Mahlangu further indicated that in 2012, the NCOP proposed important amendments to the National Credit Act 34 of 2005 and the Consumer Protection Act 68 of 2008. He also noted that there is room for improvement in the processing of section 76 legislation.³ This is more pertinent in the Division of Revenue Bill, a section 76 bill, because of its impact on provinces.⁴ Clearly, the chairperson is of the opinion

¹Section 42 (4) Constitution of the Republic of South Africa (1996).

²Mahlangu J *Address by the Chairperson of the National Council of Provinces, on the occasion of the inaugural lecture of the National Council of Provinces (NCOP)* (2013).

³Ordinary Bills affecting provinces that follow the procedure set out in section 76 of the Constitution. See Chapter 3 for a detailed discussion.

⁴Mahlangu J (2013).

that the NCOP has made notable contributions to the legislative process. The chairperson in his speech not only commends the NCOP but also recognises its value and impact in the national legislative process.

Similarly, at the 2009 NCOP conference, Deputy President Kgalema Motlanthe expressed confidence in the capacity of the NCOP to exercise oversight and to serve as an institution of interaction between national government and the provinces.⁵ Motlante also pointed out that the NCOP had to face up to its challenges and move towards outcomes based oversight. Improvements have been noted although more initiatives are required to ensure that optimal success is achieved by the NCOP.⁶

Some ten years earlier in 1998, the then Deputy President Thabo Mbeki was also very supportive of the legislative role of the NCOP, even though he admitted that the institution faced a number of challenges that were inhibiting the proper execution of its mandate.⁷ Mbeki also pointed out that the NCOP had existed for only a short period of time (since the NCOP was then only one year old) and this affected its ability to fulfill its constitutional mandate. He further stated that provincial legislatures viewed the NCOP as an ‘add on’ function and not part of the core business of provincial legislature. Thus provinces have failed to use available opportunities such as the NCOP to raise provincial concerns.⁸

⁵Motlante K *Deputy President’s address at the NCOP strategic planning workshop* (2009).

⁶Motlante K (2009).

⁷Mbeki T *Speech of Deputy President TM Mbeki at a conference on the NCOP* (1998).

⁸Mbeki T (1998).

The 2008 parliamentary assessment report was more critical of the NCOP. The view of the report was that the NCOP debates are misaligned and do not adequately discuss provincial issues during their debates in the national forum. This report further stated that the NCOP had not fulfilled its constitutional mandate since it neither engaged nor highlighted the needs of provinces and some of its debates had no link to provincial interests.⁹ The former Minister for Cooperative Governance and Traditional Affairs (COGTA) Sicelo Shiceka was among those who viewed the NCOP as an irrelevant institution. Shiceka questioned the effectiveness of the NCOP and suggested that it should be reviewed.¹⁰

The weakness of the NCOP has been attributed to the democratic deficit in the manner in which it is composed. Its members are provincial representatives and they have not been directly elected by the people.¹¹ The Centre for Policy Studies, states that there is a narrow interpretation that over emphasises the internal weaknesses of the NCOP including role confusion, poor administration and lack of resources. However, the inadequacies in the NCOP may only be understood upon adequate examination of its role in the broader political system.¹²

The African National Congress (ANC) debated on various occasions within its structures the role of the provincial sphere of government and whether it should be removed or reviewed.¹³ The ruling party proposed the removal of provinces or a review of the provincial

⁹Parliament of RSA *Report of the independent panel assessment of Parliament*(2008).

¹⁰Legal brief Today *Shicelo questions relevance of the NCOP* (2010).

¹¹Murray C & Nijzink L *The NCOP: A forum for legislative intergovernmental relations* (2002) 66.

¹²Kihato C & Rapoo T *In poor voice: NCOP's weakness flows from the Westminster system* (2001).

¹³African National Congress (ANC) *Summit on provincial and local government* (2010) 7.

sphere of governance.¹⁴ However, opposition parties including the Democratic Alliance (DA) and Inkatha Freedom Party (IFP) have contrasting views. They maintain that provinces are critical for South Africa's democracy. Helen Zille, the leader of the DA, stated that the provinces have substantial powers and the view that provinces are subservient to national laws and policies is incorrect.¹⁵ The existence of the NCOP is important for opposition parties possibly because they value the autonomous role of the provinces or want to protect their power bases.

2. RESEARCH QUESTION

It is clear from the above that the significance of the NCOP is a contested issue. This paper, therefore, seeks to investigate whether, in fact, the NCOP is a relevant institution. The thesis does so by examining whether or not the NCOP plays a significant role in the legislative process at national level, since this is its principal constitutional mandate.

3. PURPOSE AND SIGNIFICANCE OF THE STUDY

Very little research has been conducted on the role of the NCOP even though it has been in existence since 1997. Previous research also did not cover an entire parliamentary term of five years, as will be done in this paper. This paper, on the other hand, examines the nature of all the bills processed in an entire parliamentary term and the manner in which the bills were processed with a view to ascertaining the role the NCOP played.

The NCOP is a unique institution and hence there are no similar houses against which it can be assessed or benchmarked. It would be unfair to use standards to assess the performance of

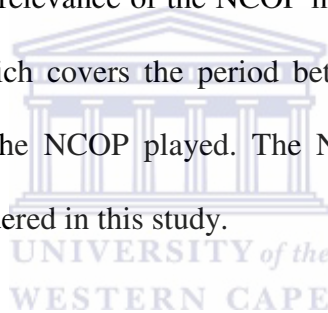
¹⁴African National Congress (2010).

¹⁵Zille H *Scrapping the provinces a bad idea* (2009).

provincial legislatures because they have different capacities and service delivery needs.¹⁶ However, the debate should be guided by a clear consideration of the strengths and weaknesses of South Africa's intergovernmental system. In addition, the work of the NCOP would be meaningless without the provincial participation and therefore this should be monitored.¹⁷ The findings of this paper will contribute to deepening the understanding of the role of the NCOP and will add to the existing literature on the impact and value of this institution. The paper will explain not only the mechanics of the NCOP but how it exercises its authority in the national legislative process.

4. SCOPE OF THE STUDY

This paper explores the role and relevance of the NCOP in the national legislative processes during the Third Parliament which covers the period between 2005 and 2009. The paper focuses on the legislative role the NCOP played. The NCOP's other roles, including its oversight roles, will not be considered in this study.



The debate on the abolition of provinces has been fuelled by differences in political ideologies, with the ruling party being largely in favour of abolishing or at least reviewing the role of the provinces.¹⁸ The introduction of the metropolitan municipalities was viewed as an attempt by the ruling party to abolish the provinces and give power to the metros. Provinces have been observed to have failed in their role of being counterbalancing centers of power. It is also argued that provinces should be structured in such a way that they become oversight bodies of local government.¹⁹ If such debates persist and are translated into changes to the

¹⁶Memela T *Speech by the Deputy Chairperson of the National Council of Provinces on the occasion of the democracy development programme's 6th national annual government conference* (2010).

¹⁷Memela T (2010).

¹⁸Kihato C & Rapoo T (2001).

¹⁹Kihato C & Rapoo T (2001).

number and role of provinces, then the composition and relevance of the NCOP would be affected. Even though it would be interesting to find out whether the challenges faced by the provinces have a direct impact on the role and functioning of the NCOP, it will not be covered in this paper.

5. ARGUMENT

Based on the examination of the NCOP's role when processing bills in the Third Parliament, this paper argues that the NCOP has demonstrated its relevance and impact when processing national legislation. Furthermore, the paper will argue that the NCOP has fulfilled its constitutional mandate of representing provincial interests by playing a central role in processing legislative bills affecting provinces. Although there are a limited number of permanent members of the NCOP who process the voluminous legislation, the paper will show that the NCOP has prioritised legislation affecting provinces and instituted meaningful amendments.

The central argument of this paper confirms the relevance of the NCOP and further views the NCOP as a critical role player providing meaningful input in the national legislative process.

6. LITERATURE REVIEW

Limited research has been conducted on the role and functioning of the NCOP and on the impact of this institution. Pierre De Vos argues that the NCOP has not been successful in executing its mandate partly due to its composition and make up.²⁰ Certain members are permanent delegates, while the special delegates function on a rotational basis which creates capacity challenges. Furthermore, NCOP members are elected after the national and

²⁰De Vos P 'Do not say goodbye to the NCOP yet' (2010).

provincial parliament's positions have been filled. This creates uncertainty about the caliber of the remaining representatives that are assigned to the NCOP.²¹ The NCOP has faced challenges from its inception due to its young existence and uniqueness. The NCOP had to define its role as envisaged by the Constitution and thus would learn from its own experiences in order to be a bridge for the different spheres of government.²²

According to Christina, Murray and Lia Nijzink the NCOP is not redundant, but its role as envisaged by the Constitution has been underutilised.²³ The political context of the NCOP has been cited as one of the challenges that inhibits the institution from fully exhibiting its potential as intended.²⁴ An assessment report of Parliament was issued in 2008 which indicated that the NCOP has not fully represented the interests of provinces.²⁵

The debates of the NCOP do not provide synergy on the link in representing or tackling issues of provincial interests but are more focused on national issues.²⁶ Murray indicates that the content and debates in the NCOP varied.²⁷ Evidence has shown that the number of section 76 bills processed by the NCOP in 2001 decreased from 20 in 2001 to only 11 of the 69 bills.²⁸ This implied that the number of bills affecting provinces at Parliament has reduced. Similarly, the numbers of section 76(1) bills, those introduced in the NA, were more than those introduced in the NCOP. The reason for the decline was due to the decline in Parliament's legislative agenda which primarily focused on issues of socio-economic

²¹De Vos P (2010).

²²Murray C, Hoffman-Wanderer Y & Saller K *Speeding transformation: Monitoring and oversight in the NCOP* (2004).

²³Murray C & Nijzink L (2002) 45.

²⁴Murray C & Nijzink L (2002) 45.

²⁵Parliament of RSA (2008).

²⁶Parliament of RSA (2008).

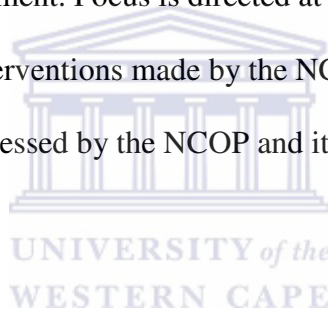
²⁷Murray C, Hoffman-Wanderer Y and Saller K *NCOP second term 1999-2004 in Parliament of the Republic of South Africa* (2004).

²⁸Murray C & Nijzink L (2002) 75.

transformation which fell within the concurrent jurisdiction of provinces.²⁹ The paper examines whether or not the NCOP has improved in its impact on legislative processes since its establishment and whether it is adding value in national policy by highlighting provincial interests. Given the limited research on the functioning of the NCOP, this study contributes to providing some insight on the impact of the NCOP.

7. RESEARCH METHODOLOGY

This study uses both qualitative and quantitative methods of data gathering. Quantitative research involves the statistical analysis of information. This paper looks at all the bills processed during the Third Parliament. Focus is directed at the number of bills tabled in Parliament and the number of interventions made by the NCOP. An analysis is presented based on the number of laws processed by the NCOP and its significance.



Qualitative research is used as another method of analysis in reaching conclusions for this paper. The qualitative method focuses on the interpretative quality of amendments instituted by the NCOP and the effectiveness or impact this has on the role of the NCOP in fulfilling its constitutional mandate. This paper provides insight into the operations of the NCOP and analyses the nature of amendments made by this institution in order to determine its value in promoting the interests of the provinces. The paper also monitors the regularity with which the executive introduced bills in the NCOP.

²⁹*Murray C & Nijzink L (2002) 75.*

This paper relies on primary sources contained in minutes and supporting documents produced by Parliament and the Parliamentary Monitoring Group. Data were also gathered from secondary sources such as newspaper articles, media statements by the delegates of the NCOP and through seminar papers delivered on the role of the NCOP. Additional information was obtained from the parliamentary library that is, the bills reference materials. The committee proceedings were sourced either from the relevant committee secretaries or the Parliamentary Monitoring Group website. Information gathered is presented according to the different category bills.

8. OUTLINE OF THE STUDY

This study consists of five chapters including this introductory chapter. Chapter two focuses on the composition of the NCOP and how its membership is formed. Furthermore, there is an outline of the functions performed by the NCOP. The third chapter explores the legal framework in which the NCOP functions, including the different types of bills it processes.

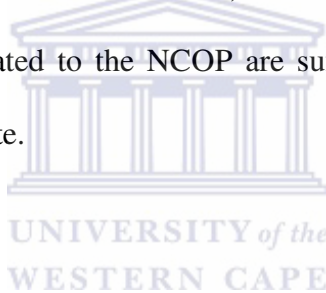
The fourth chapter considers the legislative interventions of the NCOP and provides an assessment of how it has processed legislation during the period under review.

The final chapter reviews the previous chapters, focusing on the argument and presents the findings of the research as well as the recommendations flowing from the findings.

CHAPTER TWO: COMPOSITION AND FUNCTIONS OF THE NCOP

1. INTRODUCTION

This chapter provides a descriptive account of the constitutional framework in which the NCOP operates. It discusses the history of the establishment of the NCOP. In exploring the value added by the NCOP in the legislative process, this chapter examines its composition, functions and operations. South Africa's electoral system is considered and the impact it has on the ability of the NCOP to accomplish its constitutional mandate. The membership of the NCOP is reviewed to see whether or not the NCOP has adequate resources to support the achievement of its constitutional role. In addition, the chapter explores whether or not the composition and resources allocated to the NCOP are sufficient to enable it to effectively carry out its constitutional mandate.



2. HISTORY OF THE NCOP

The South African Constitution established a bi-cameral parliamentary system consisting of two houses namely, the National Assembly (NA) and the NCOP. Parliament is vested with legislative authority.³⁰ A bi-cameral parliamentary system generally allows for balanced quality control processes and reduces the risk of elective dictatorship.³¹ In the South African context, the bi-cameral system was established to provide for provincial participation in the national legislative process and to protect the interests of provinces.³²

³⁰S 43 (a) Constitution.

³¹ Comfort N Brewer's *politics: A phrase and fable dictionary* (1993) 44.

³²Brandt M *From the Senate to the NCOP* (2001).

The bi-cameral parliamentary system in South Africa can be traced back to colonial times. South Africa has retained the influences of the Westminster system even though it has experimented with other types of parliamentary systems.³³ A bi-cameral system was introduced by the South Africa Act of 1909, which provided for the Union of South Africa, with a Parliament comprised of the Senate and House of Assembly.³⁴ The bi-cameral system was replaced in 1984 by a tri-cameral parliamentary system.

During the transition to democracy and interim negotiations, there were deliberations on whether or not South Africa should adopt a federal state structure and governance system.³⁵ The National Party (NP) was in favour of the adoption of some form of federal state structure. The ANC, however, was against the idea of a federal system being introduced in South Africa.³⁶ As a compromise, semi-autonomous provinces were created with limited powers.³⁷ This was affected with the adoption of the 1993 interim Constitution. South Africa was henceforth transformed from a unitary state to a semi-federal state with nine provinces.³⁸ In addition, this interim Constitution created a second chamber for Parliament, referred to as the Senate in which all of the nine provinces were equally represented.³⁹

At the first democratic elections in 1994, the bi-cameral parliamentary system was, therefore, re-introduced in the form of the NA and the Senate.⁴⁰ The Senate 'functioned like a strange hybrid, which operated like a second chamber in a unitary state, yet its composition was

³³Cloete J *Parliaments of South Africa* (1996) 14.

³⁴Cloete J (1996) 14.

³⁵De Vos P (2006) *The Role of the National Council of Provinces in the governance of South Africa* (2006) 614.

³⁶ Inman P & Rubinfield D 'Federalism and South Africa's Democratic Bargain: The Zuma Challenge.' www.law.berkeley.edu.

³⁷De Vos P (2006) 614.

³⁸De Vos P (2006) 616.

³⁹De Vos P (2006) 616.

⁴⁰De Vos P (2006) 614.

linked to the quasi-federal system of government'.⁴¹ It could pass all bills, except money bills, and had no veto power. It could however delay legislation. A resolution by the joint committee of Parliament was required when the Senate and the NA passed two different versions of the same bill.⁴²

The Senate did not have a distinctive role in the adoption of legislation due to limited functions afforded to the Senate by the interim Constitution.⁴³ In addition, the Senate was perceived to be ineffective, not fulfilling its role of representing the interests of provinces in Parliament and duplicating the role played by the NA.⁴⁴ The Final Constitution therefore replaced the Senate with the NCOP.⁴⁵

3. COMPOSITION OF THE NCOP

The legislative power is divided amongst three spheres: national; provincial and local government.⁴⁶ The national legislative authority is located in the NA and the NCOP.⁴⁷ The legislative authority in the second sphere of government resides with the provincial legislatures.⁴⁸ The most important legislative functional areas of the national and provincial governments are shared in a system of concurrent jurisdiction.⁴⁹

⁴¹De Vos P (2006) 616.

⁴²The interim Constitution (1993).

⁴³De Vos P (2006) 617.

⁴⁴De Vos P (2006) 617.

⁴⁵De Vos P (2006) 618.

⁴⁶Ss 44, 104 and 156 Constitution.

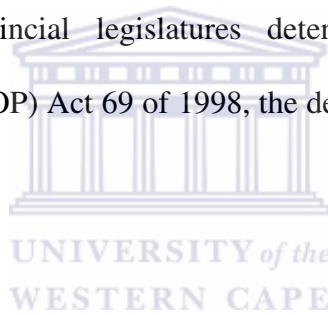
⁴⁷S 44(1) Constitution.

⁴⁸S 104 (1) Constitution.

⁴⁹*Stephen Segopotso Tongoane and Others vs. Minister of Agriculture, Land Affairs and Others* (2010) (8) BCLR 741 (CC).

The establishment of the NCOP was inspired by the German Bundesrat model which was adapted to the South African context.⁵⁰ The Constitution adopted the approach whereby provinces partake in the decision making process through provincial mandates.⁵¹ The NCOP hence broke away from the traditional role of second houses that were developed from the Westminster model.⁵²

The NCOP members are not directly elected to serve in the NCOP. They are representatives of provinces. They are therefore nominated by their respective provinces to serve at Parliament. The delegation of each province is expected to reflect the strength of party political representation in the provinces, as set out in schedule 3 of the Constitution.⁵³ Thirty days after elections the provincial legislatures determine, in accordance with the Determination of Delegates (NCOP) Act 69 of 1998, the delegates to be sent from each party in the provincial council.⁵⁴



Each province sends ten provincial delegates to serve as members of the NCOP. Organised local government is represented in the NCOP by ten non-voting delegates. The NCOP thus has a total of 100 members.⁵⁵ The ten provincial delegates are divided into four special delegates and six permanent delegates.⁵⁶ Hence only 54 out of the 100 members of the NCOP are permanent delegates who reside at national parliament to fulfill its function, as opposed to

⁵⁰De Vos P (2006) 618.

⁵¹Murray C & Nijzink L *The NCOP* (2002) 45.

⁵² Calland R & Nijzink L *Intergovernmental Relations in the Legislative Branch of Government* (2001) 112-113.

⁵³S 61(1) Constitution.

⁵⁴ S 61 (2) (a) Constitution.

⁵⁵Determination of Delegates (NCOP) Act 69 of 1998.

⁵⁶Determination of Delegates (NCOP) Act 69 of 1998.

the NA that has about 400 members.⁵⁷ The rest of the NCOP members are special delegates and 10 organised local government representatives.

Special delegates consist of members of the provincial executive and provincial legislature as determined by the area of specialty. The special delegates often include the provincial premier, who is the head of the provincial delegation, and three other delegates.⁵⁸ The premier may designate a member of the provincial legislature to head the delegation for any general or specific business of the NCOP when he or she is unavailable.⁵⁹ Special delegates participate on certain occasions based on the specific nature of the subject to be discussed in the NCOP. Hence, for example, a member of the provincial legislature who sits on the health portfolio of the provincial legislature attends as special delegate at a session where the NCOP deals with issues relating to health. The permanent delegates' term expires at the next national elections.⁶⁰ Furthermore, permanent delegates lose their status once they become members of the provincial legislature or lose the confidence of their party in the provincial legislature.⁶¹

The NCOP delegates are not part of the national or provincial lists of the political parties since they are indirectly elected by the provincial councils after the latter have been elected. Members of the political parties' national list serve in the NA depending on the number of seats won during a vote. The top members in the province's list will serve in the Provincial Legislatures. After this allocation, the members of the NCOP are nominated and this in effect

⁵⁷S 46 (1) Constitution.

⁵⁸ S 60 (2)(a)(i) Constitution.

⁵⁹S 60 (2) (a) and (3) Constitution.

⁶⁰S 62 Constitution.

⁶¹S 62 (4) Constitution.

means that they are the third group of identified representatives. Thus the NCOP members act as the ‘third team’ and possibly not the strongest of the political representatives, which weakens the role of the NCOP. This caliber of membership compromises the quality of legislative scrutiny conducted by the NCOP and its ability to scrutinize the amendments brought by the NA.

4. FUNCTIONS OF THE NCOP

The legislative power of the NCOP includes the power to consider, pass, amend, propose or reject amendments to legislation brought to it.⁶² The NCOP may also initiate or prepare legislative bills on matters listed in schedule 4 of the Constitution. These are concurrent functional areas of both the national and provincial spheres of government. The NCOP may also initiate legislative processes on matters referred to under section 76(3) of the Constitution. It may not, however, initiate or prepare money bills.⁶³

Other functions of the NCOP include conducting oversight by summoning any person, including institutions, to give evidence, submit reports or make presentations.⁶⁴ However, for the purposes of this paper, attention will focus on the legislative function of the NCOP since this is the primary function of the NCOP.

⁶²S 68 (a) Constitution.

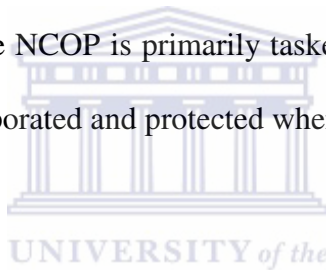
⁶³S 68 (b) Constitution

⁶⁴S 69 Constitution.

5. CONCLUSION

The above discussion shows that the main reason for the existence of the NCOP is to ensure that provincial interests are protected when laws are considered and passed in the national legislature. However, the number and caliber of delegates in the NCOP potentially compromises its ability to successfully implement its mandate.⁶⁵

The NCOP should ensure that it achieves its constitutional mandate because the Senate, its predecessor, was scrapped as it did not properly fulfill its mandate and duplicated the work of the NA. Changing the name of the Senate has informed and amplified this institution's primary role of being a council for the provinces and representing provincial interests. Amongst its various functions the NCOP is primarily tasked with passing laws and ensuring that provincial interests are incorporated and protected when passing these laws.



The uniqueness of the NCOP affords it opportunities to break new ground in South Africa by ensuring that the system of decentralised government is able to work effectively. The composition of NCOP members clearly strengthens this vision of debating provincial interests in the national forum because the delegates come directly from the provinces.

⁶⁵Murray C & Nijzink L (2002) 57.

CHAPTER THREE: THE NCOP FRAMEWORK FOR PROCESSING BILLS

1. INTRODUCTION

This chapter examines the role that the Constitution envisages the NCOP must play in the legislative processes at national level. The chapter therefore describes the procedures followed in the process of adopting bills and the role the NCOP plays in this respect. The chapter makes particular reference to the tagging process which is important for determining the route a bill follows during the parliamentary processes and the role that the NCOP plays. The chapter further describes how the classification of bills affects the participation of provinces. The chapter discusses the role played by the NCOP in processing different types of bills.

2. CONSTITUTIONAL FRAMEWORK

The Constitution identifies four different types of legislation. These are bills amending the Constitution (section 74), bills not affecting provinces (section 75), bills affecting provinces (section 76), and money bills (section 77). The parliamentary rules identified an additional type of bill i.e. a mixed bill.⁶⁶ The procedures for adopting each of these bills are found in the relevant sections of the Constitution. However, money bills are dealt with in accordance with the procedure established in section 75 of the Constitution.⁶⁷ The category to which a particular bill belongs is determined through the tagging process.⁶⁸ The tagging process also determines the role that the NCOP plays in the adoption of the relevant bill. The tagging

⁶⁶Joint Task Team Report Reviewing *the legislative process in Parliament: Tagging Bills* (2008)12.

⁶⁷S 77(3) Constitution.

⁶⁸De Vos P (2006) 637.

process is therefore very critical. An incorrect classification of a bill affects the validity of the bill once adopted.⁶⁹

3. LEGISLATIVE PROCESS OF THE NCOP

The Constitution envisages that the NCOP plays different roles when processing different types of legislation, depending on whether the bill directly or indirectly affects the provinces. This differentiation affects the voting process as outlined in section 65 of the Constitution.⁷⁰ The time allocated for public participation also differs depending on whether or not the proposed legislation affects provinces.

The NCOP has wider authority on legislation affecting provinces than ordinary bills not affecting provinces. This authority is evident from the process followed to secure agreement between the NA and the NCOP. Below is a detailed review of the role the NCOP is allocated when processing the different types of legislations.

3.1 Bills amending the Constitution

3.1.1 The nature of bills amending the Constitution

Bills amending the Constitution consist of four different types.⁷¹ The first type of constitutional amendment bill involves the amendment of section 1 of the Constitution which is referred to as the founding provision. The NCOP performs a critical role in the amendment of these types of bills, since at least six provinces have to vote in favor of the bill for it to be

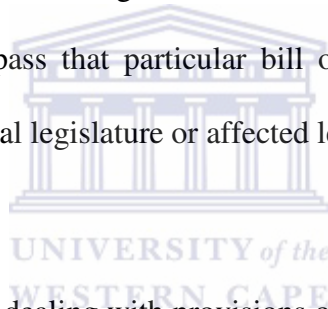
⁶⁹*Stephen Segopotso Tongoane and Others v Minister of Agriculture, Land Affairs and Others* 2010 (6) SA 214 (CC).

⁷⁰S 65 Constitution.

⁷¹De Vos P (2006) 643.

passed. Additionally, the bill has to be supported by 75 percent of the members of the NA.⁷² Members of the NCOP vote in blocks instead of individually when voting on bills amending the Constitution.⁷³ A bill amending the Bill of Rights needs to be supported by six provinces in the NCOP and by a two-thirds majority in the NA.⁷⁴

The third group of bills amending the constitution deals with any other provisions of the Constitution, 'that alters provincial boundaries, powers, functions or institutions'.⁷⁵ These bills require the supporting vote of at least six provinces and a two-thirds majority in the NA.⁷⁶ Other bills amending the Constitution are concerned with amendments to specific provincial matters.⁷⁷ When a bill amending the Constitution concerns a specific province or provinces, the NCOP may not pass that particular bill or relevant part of the bill unless approved by the relevant provincial legislature or affected legislatures.⁷⁸



The last category of bills is those dealing with provisions of the Constitution other than those referred to above. These bills only require the NA to pass the amendments with a two-thirds majority.⁷⁹

⁷²S 74 (1) Constitution.

⁷³S 65 Constitution, where a province has one vote to cast on behalf of the province by the head of the delegation.

⁷⁴S 74 (2) Constitution.

⁷⁵S 74 (3) (b) (ii) Constitution.

⁷⁶S 74 (3) (a) (b)

⁷⁷S 74 (3) (b) (iii) Constitution.

⁷⁸S 74 (8) Constitution.

⁷⁹S 74 (3) (a) Constitution.

The bill should be published in the government gazette for public comment, thirty days prior to its introduction by a person or a Committee in Parliament and must be submitted to the provincial legislatures to obtain their views. Written submissions on the bill either from the provincial legislatures or the public should be tabled in the NA on the introduction of the bill. If the House is not scheduled to sit within two working days, the bill will be sent to the relevant committee⁷⁹. The process followed for amending the Constitution occurs through

3.1.2 The procedure for bills amending the Constitution

Bills amending the Constitution must follow the procedure set out in section 74 to the Constitution. A section 74 bill is first tabled in the NA. The chairperson of the NCOP sends the bill, when it is referred to him or her, to the speakers of provincial legislatures with an accompanying memorandum for consideration and to obtain provincial mandates. There are no mediation procedures available with regards to bills amending the Constitution. Both houses must pass the bill with the required majorities.

The Constitution does not expressly state that the NCOP has a veto power on the aforementioned bills.⁸⁰ The NCOP will only consider a section 74 bill once it has been passed by the NA. The NCOP rules provide that the process to be followed when considering section 76 or section 74, subsection (1) or (2) bills, should be conducted in a manner that will ensure that provinces have sufficient time to consider the bills and confer mandates.⁸¹ Time should be set aside to allow provincial legislatures to comment on the bills.⁸² The comments from the provincial legislatures are tabled in the NA and where necessary in the NCOP.⁸³

Debates have ensued regarding the voting requirements for the amendment of the Constitution. The contention is whether the special voting requirements should be limited only to section 1 of the Constitution or they should also be extended to other provisions of the Constitution that are inconsistent with the founding provisions as contained in section 1 of the

provincial delegations or mandate. The provincial block vote is more stringent and has more requirements for passing this type of legislation. With regards to other bills that amend the Constitution but have no direct implication on provinces, the NCOP may debate the constitutional amendment but it is not required to approve the bill.

⁸⁰Bundler S'National Legislative Authority' (1996) 17-10.

⁸¹Rule 240 NCOP Rules.

⁸²S 74 (5) (b) Constitution.

⁸³S 74 (6) Constitution.

Constitution.⁸⁴ In the judgment of *United Democratic Movement & Others v President of the Republic of South Africa & Others*, the court accepted the view that the majority vote applies to the amendment of other provisions of the Constitution, which is inconsistent with the founding values.⁸⁵

3.2 Ordinary bills not affecting provinces

Ordinary bills not affecting provinces follow the procedure set out in section 75 of the Constitution.⁸⁶ All bills not dealing with concurrent functions between national and provincial competence (schedule 4) and exclusive provincial competence (schedule 5) are regulated in the form of section 75 bills.⁸⁷ These bills are introduced in the NA since they do not affect the provinces. The NCOP may pass, reject, or propose amendments to such bills.⁸⁸ If the NCOP does not propose amendments when considering section 75 bills, then the bill would be referred to the president for assent.⁸⁹ If the NCOP rejects the bill or proposes amendments to it, the bill would be referred back to the NA for further consideration. In such cases, the NA may decide to pass the bill again with or without amendments or not proceed with the bill.⁹⁰

⁸⁴Budlender S (1996).

⁸⁵*United Democratic movement & Others v President of the Republic of South Africa & Others* 2003 (1) SA 495 (CC), 2002 (11) BCLR 1179 (CC) paras 18-20 and 75.

⁸⁶S 75 Constitution. Although section 75 bills do not directly affect provinces, the NCOP must nevertheless consider and pass them (s 44(1)(b)(iii) of the Constitution. This clearly illustrates that provincial views are regarded as important and not neglected in any aspect of the national legislative process.

⁸⁷De Vos P (2006) 639.

⁸⁸S 75 (1) Constitution.

The Second Certification Judgment described the role of the NCOP with regard to section 75 legislation as “no more than a delaying power” which suggest the NCOP has limited authority over this type of legislation as it can be overridden by a simple NA majority. *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the amended text of the Constitution of the Republic of South Africa*. 1997 (2) SA 97(CC) (certification judgment II) para 64.

⁸⁹S 75(1)(b) Constitution .

⁹⁰S 75(1)(c) Constitution.

The voting process for a bill is critical and is determined by the procedure set out by section 65 of the Constitution. When passing a section 75 bill, each representative of the NCOP votes in their individual capacity. Each provincial delegate has one vote and passing the legislation is determined by the majority of votes of which there should be at least a third of the delegates to form a quorum.⁹¹

3.3 Ordinary bills affecting provinces

3.3.1 Nature of the bill

There are two kinds of bills affecting provinces: section 76 (1) bills and section 76(2) bills.⁹² Section 76(1) bills are introduced in the NA while section 76 (2) bills are introduced in the NCOP. Ordinary bills affecting provinces that are initiated under extraordinary circumstances may only be introduced in the NA.⁹³ Extraordinary circumstances refer to maintaining national security by regulating areas of exclusive provincial competence and are introduced only in the NA.⁹⁴

A bill affecting provinces follows the procedure prescribed in section 76 of the Constitution. The Constitution has built in more features concerning the role of provinces in relation to these types of legislation. This is evident from the manner in which the NCOP is required to vote on these bills.

⁹¹S 75 (2) Constitution

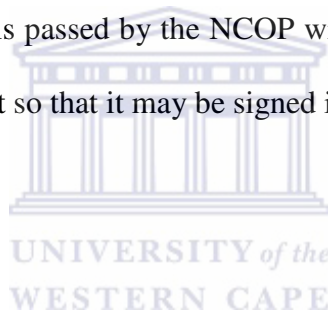
⁹²Rules of the National Assembly(2008) Chapter 1.

⁹³S 76 (4) Constitution. Ordinary bills affecting provinces deal with functional areas of concurrent national and provincial legislative competence as found in Schedule 4 of the Constitution. The Constitution further recognizes topics listed in Schedule 4 to potentially have a wider reach as informed by section 44(3) of the Constitution. This section 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 Schedule4.'

⁹⁴S 44 (2) Constitution.

3.3.2 Procedure followed for section 76 bills

The executive introduces a bill either in the NA or the NCOP.⁹⁵ The chairperson of the NCOP sends a copy of a section 76 bill, when it is referred to the NCOP, to the speakers of the provincial legislatures for consideration. The provincial legislature confers a mandate on its provincial delegation to the NCOP. The Constitution allows Parliament to enact legislation regulating the procedure of instituting provincial mandates on members of the NCOP.⁹⁶ The Mandating Procedures of Provinces Act facilitates uniform procedure for provincial legislatures to confer authority on their delegations when casting votes on their behalf.⁹⁷ This is done by the provincial legislature through conferring the mandate to its delegation either to propose amendments to the bill or to pass the bill without amendments. If a bill affecting provinces, introduced in the NA is passed by the NCOP without amendments, then it will be referred to the president for assent so that it may be signed into law.⁹⁸



3.3.3 Legislative cycle

The NCOP, when considering section 76 bills, usually operates on a four week cycle. The NCOP is briefed by the relevant executive authority on the proposed bill or amendments to the bill. During the second week, the NCOP delegates brief their provincial legislatures on the proposed bill or amendments.

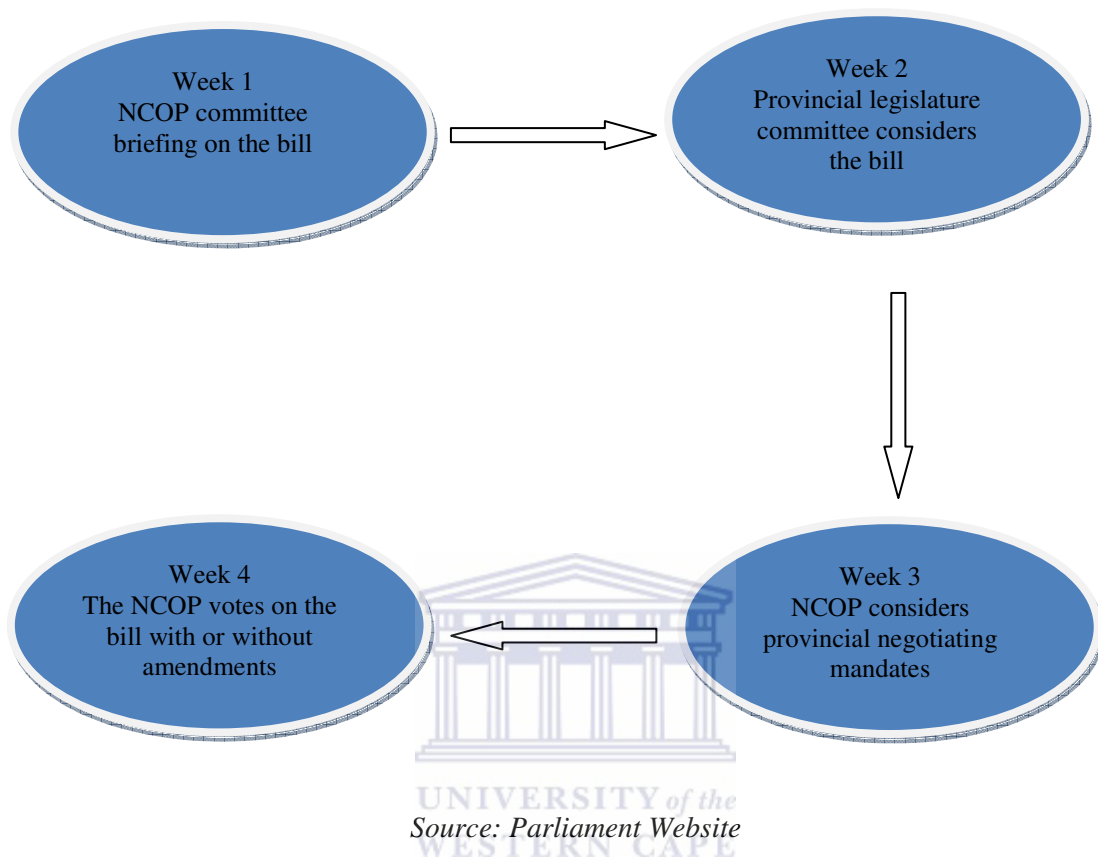
⁹⁵In most cases bills are initiated and drafted by the Department concerned and in case of ordinary bills affecting provinces the Minister will direct the bill to the intergovernmental forum of National Ministers and Members of the Executive Council (MINMEC).

⁹⁶S65(2) Constitution.

⁹⁷Mandating Procedures of Provinces Act 52 of 2008.

⁹⁸S 76 (1) (b) Constitution.

Figure 1: Legislative cycle of a section 76 bill



The provincial legislature confers authority on its provincial delegation to the NCOP to negotiate when the relevant select committee considers a bill and may include proposed amendments to the bill.⁹⁹ As depicted in Figure 1, during the third week of the legislative cycle, the NCOP considers the negotiating mandates of the various provinces.¹⁰⁰ The

⁹⁹S 5 of Mandating Procedures of Provinces Act 52 of 2008.

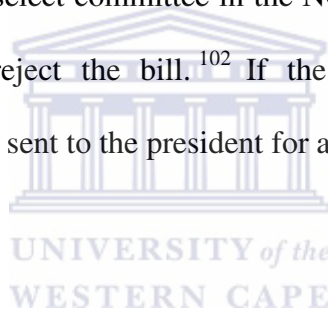
Usually during this process the provincial legislature and executive review the bills carefully before instructing their delegates on how to vote. Should a province realize that it does not have the capacity to implement a certain provision in the bill then it would instruct its provincial delegate to raise the concern when the NCOP meets to consider the bill so that the amendments incorporate the province's need.

¹⁰⁰ Prior to the NCOP plenary, the provincial legislature will confer authority to its provincial delegation to cast a vote when the relevant select committee considers the bill in the form of a final mandate which is usually faxed or mailed. If no matters arise when the select committee deliberates on the final mandates which may necessitate the consideration of the provincial legislature, then the provincial delegation should table its final negotiating mandate to the NCOP plenary as the province's voting mandate.

provincial legislature confers voting authority on the head of the provincial delegation to cast a vote at the NCOP plenary.¹⁰¹ Voting takes place during the last week of the NCOP's legislative cycle. The NCOP delegates vote according to the mandates that they are given by their respective provinces. Therefore, they are provided with sufficient time to discuss matters and formulate positions.

3.3.4 Section 76 procedures for bills introduced in the NA

Bills affecting provinces introduced in the NA follow the procedure set out in section 76 (1) of the Constitution. According to Joint Rule 184, after the NA has passed a section 76 (1) bill, it is referred to the relevant select committee in the NCOP through the chairperson. The NCOP may pass, amend, or reject the bill.¹⁰² If the NCOP passes the bill without amendments then the bill must be sent to the president for assent.¹⁰³



When the NCOP passes the bill with amendments, the amended bill is referred to the NA for consideration. If the NA passes the NCOP's proposed amendments, the bill will be sent to the president for assent.¹⁰⁴ The bill is sent to a mediation committee that is set up under section 78 of the Constitution if the NA rejects the proposed amendments by the NCOP or the NCOP rejects the bill.¹⁰⁵

The mediation committee is established to facilitate a resolution when there are disagreements between the two houses. The mediation committee consists of nine members

¹⁰¹S 8 Act 52 of 2008.

¹⁰²S 76 (1) (a) Constitution.

¹⁰³S 76 (1) (b) Constitution.

¹⁰⁴S 76 (1) (c) Constitution.

¹⁰⁵S 76 (1) (d) Constitution.

of the NA and a similar number from the NCOP representing each province.¹⁰⁶ The mediation committee may agree to adopt the NA's version of the bill, or the NCOP's version, or come up with a new version.¹⁰⁷ If the mediation committee agrees on the NA's version of the bill, it will be referred to the NCOP and if passed by the NCOP referred to the president.¹⁰⁸ However if the mediation committee agrees on the NCOP's version of the bill, it would be referred to the NA for it to be passed and sent to the president for his assent.¹⁰⁹ If the mediation committee agrees on a different version of the bill, it is referred to both houses for adoption.¹¹⁰

The bill lapses even if the mediation committee agrees on the NA's version of a bill or it comes with its own alternative version, if the NCOP rejects it, unless the NA passes it with a two-thirds majority.¹¹¹ The bill also lapses if the mediation committee refers it to the NA having agreed on the NCOP's version of amendments or its own version and the NA does not pass it. The NA may later pass its original version with a two-thirds majority.¹¹²

3.3.5 Section 76 procedures for bills introduced in the NCOP

Ordinary bills affecting provinces introduced in the NCOP are referred to as section 76 (2) bills and follow the procedures set out in the Constitution.¹¹³ After having been considered by the NCOP, the bill is referred to the NA for consideration, which may pass, reject or propose

¹⁰⁶S 78 (1) Constitution.

¹⁰⁷S 76 (1) (d) Constitution.

¹⁰⁸S 76 (1) (f) Constitution.

¹⁰⁹S 76 (1) (g) Constitution.

¹¹⁰S 76 (1) (h) Constitution.

¹¹¹S 76 (1) (i) Constitution.

¹¹²S 76 (1) (j) Constitution.

¹¹³Rules of the National Assembly (2008) Chapter 1.

amendments to the bill.¹¹⁴The bill is referred to the mediation committee if the two houses disagree on the amendments proposed to it.¹¹⁵The bill lapses if the mediation committee is unable to agree on a version of the bill within 30 days.¹¹⁶ If the mediation committee agrees of the NCOP's version of the bill then it will be sent to the president for assent.¹¹⁷ If the NA rejects the NCOP amendments or the mediation committee's version of the bill then the bill will lapse.¹¹⁸

3.4 Mixed bills

A mixed bill contains both section 76 and section 75 provisions. Legal uncertainty arises when determining the procedure to be followed when processing mixed bills. If a bill falls outside of a schedule 4 functional area, it will be classified as a section 75 bill, even though it might contain incidental matters that would touch on matters listed in schedule 4 functional areas.

Parliament has opted to deal with section 75 and section 76 provisions of the bill separately although some lawyers have expressed doubt on the constitutional validity of mixed bills.¹¹⁹

The Joint Rules refer to these types of bills as impermissible and the mixed bill needs to be divided into two where one part follows the section 75 procedure and the other follows the section 76 procedure.¹²⁰

Splitting of bills can be a challenging process in that sometimes a section 75 bill would pass with blank sections and the section 76 part of the bill once passed would complete the entire bill. When voting on mixed bills, the members of the NCOP vote both as individuals and per

¹¹⁴S 76 (2) (a) Constitution.

¹¹⁵S 76 (2) (d) Constitution.

¹¹⁶S 76 (2) (e) Constitution.

¹¹⁷S 76 (2) (f) Constitution.

¹¹⁸S 76 (2) (i) Constitution.

¹¹⁹Budlender S(1996)17-33.

¹²⁰Joint Rule 194.

province. The vote by the provinces is taken first.¹²¹ The voting process for mixed bills has been challenging especially for the provinces that are required to submit provincial mandates on an incomplete bill. This is due to fact that section 75 bills do not require provincial mandates and thus the section 75 part of a mixed bill would not necessarily be brought to the provinces.

3.5 Money bills

Money bills are those that are mentioned under section 77 of the Constitution. These bills seek to appropriate money, impose national tax, levies, duties or surcharges amongst others.¹²² The Minister of Finance is the only minister with the authority to introduce money bills.¹²³ Money bills follow the procedure set out in section 75 and the NCOP delegates vote on an individual basis. This means that the NA can override the NCOP with a simple majority should there be a conflict between the NA and NCOP when considering money bills. Previously the NCOP did not have the authority to amend money bills. However, the new Money Bills Amendment Procedure and Related Matters Act 9 of 2009 allows Parliament to amend budgets of departments.

4. TAGGING BILLS

Tagging is a process followed in Parliament for classifying bills, and it determines the role the NCOP may play in passing a particular bill. This important process identifies the role played by the provinces when considering section 76 bills and the impact it has on the provinces' ability to fully exercise their role when considering national legislation.¹²⁴ The Constitution has carefully crafted the representation of provinces when processing section 76 legislation.

¹²¹Joint Rule 197.

¹²²S 77 (1) Constitution

¹²³S 73 (2) Constitution

¹²⁴*Tongoane* (para 69).

4.1 Tests for tagging

The Constitutional Court differentiated between the test for legislative competence which is called the 'pith and substance test' and the test used in determining the tagging of a bill, referred to as the 'substantial measure test'.¹²⁵ The substantial measure test looks at the provisions of the bill with an eye to determining the extent that they may substantially affect functional areas listed in schedule 4 of the Constitution. The substantial measure test does not concern itself with provisions that are incidental to its substance.¹²⁶ Furthermore, the test ensures that section 76 bills are enacted in a manner that allows provinces to be represented fully and effectively.

4.2 Tagging process

The process of tagging bills is usually simple. However, there are instances where issues intermingle, requiring a breakdown of the phrase, 'with regard to any matter within a functional area listed in schedule 4 as this lies at the heart of confusion in interpretation'.¹²⁷ A bill is commonly introduced in Parliament by the executive and accompanied by a memorandum with the proposed procedure to be followed as certified by the state law advisor.¹²⁸ However, the final decision on the tagging of a bill is taken by a joint committee of Parliament with representatives from both houses.¹²⁹ The Speaker of the NA then refers the proposed bill to the Joint Tagging Mechanism (JTM) for classification and to determine the procedure that the bill will follow in Parliament.¹³⁰ The JTM consists of the Speaker and

¹²⁵*Tongoane* (para 37).

¹²⁶*Tongoane* para 59.

¹²⁷ Murray C & Simeon R 'Tagging bills in Parliament section 75 or section 76?' (2006) 242.

¹²⁸ S 73 Constitution.

¹²⁹ Joint Rule 153 (1).

¹³⁰ Joint Rule 151.

Deputy Speaker of the NA, including the chairperson and permanent deputy chairperson of the NCOP.¹³¹ This structure allows for equal representation from both houses of Parliament.

When tagging takes place in Parliament, the focus is confined to the functional areas listed in schedules 4 and 5 of the Constitution. Parliament looks at the subject matter of the bill and how the issues contained in the bills relate to systems of power and responsibility as divided amongst the three spheres of government in South Africa.¹³² The NA and the NCOP members or provincial legislatures may make a written submission to the JTM on how the bill should be classified.¹³³ Should the JTM members not agree on the classification of a bill, then the joint rules allow for a second legal opinion to be sourced from a constitutional expert approved by the JTM.¹³⁴ If no resolution is reached then the matter will be referred to the NA and the NCOP. If the challenge still persists then the Constitutional Court decides on the dispute regarding the tagging of the bill.¹³⁵

The courts have not provided much jurisprudence with regard to the classification of bills. However, the Constitutional Court has indicated that functional areas of the three spheres of government should be purposively interpreted. An example of a case where a bill was wrongly classified,¹³⁶ as a section 76 instead of section 75, involved the Communal Land Rights Act (CLaRA) which was a bill at that stage.¹³⁷

¹³¹Joint rules 151.

¹³²Murray C and Simeon (2006) 242.

¹³³Joint Rule, 154.

¹³⁴Joint Rule, 153 (3.)

¹³⁵Joint Rule, 153 (5) and (6).

¹³⁶The processing of CLARA failed to comply with section 76(3) which was a material part of law making process when following section 76 procedures. CLARA did not comply with section 76(3) of the Constitution and was thus declared to be invalid. The act was therefore considered to be unconstitutional in its entirety. This resulted because the consequence of a bill that was tagged incorrectly.

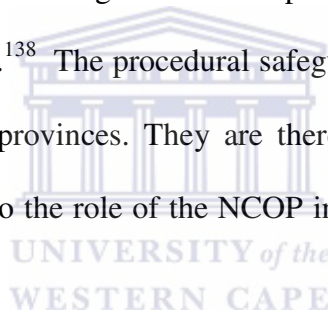
¹³⁷*Tongoane* (para 10).

5. CONCLUSION

The chapter has outlined the role of the NCOP in the national legislative process. As this discussion clearly shows, the NCOP has greater authority on bills affecting provinces including when there is conflict on the proposed amendments between the NA and NCOP.

The chapter further enquired into the tagging process of Parliament because of the significant impact this has on the process a bill needs to follow in Parliament and implications should errors occur in the classification of such bills.

There has been uncertainty about the term ‘provincial interests’ in the national forum. However, it would be fair to treat the ‘provincial interests’ as mandates that provincial delegates receive from their provincial legislatures to represent the views of their province on that specified piece of legislation.¹³⁸ The procedural safeguards for processing different bills are designed to give weight to provinces. They are therefore more than mere procedural safeguards and are fundamental to the role of the NCOP in ensuring that provincial interests are taken into account.¹³⁹



¹³⁸Boskati N *Promoting Provincial Interests: the role of the NCOP in the national legislature (2005)*.

¹³⁹Tangoane (para 66).

CHAPTER FOUR: ASSESSMENT OF THE LEGISLATIVE ACTIVITY BY THE NCOP

1. INTRODUCTION

This chapter examines the value added by the NCOP in processing bills that were introduced during the Third Parliament, which covers the period from 2004 to 2009. Both a qualitative and quantitative assessment of the laws the NCOP processed in the form of bills during the Third Parliament is provided. Special focus is directed at section 74, 75 and 76 bills. Although an analysis of section 77 bills also forms part of this chapter, the money bills are not discussed in detail because they follow a similar procedure to that established for processing section 75 bills. Case studies of mixed bills are featured to provide context to how Parliament processed these types of bills.

This chapter shows general trends of legislation processed by the Third Parliament in terms of the different types of bills brought before Parliament. It also highlights the trends in each type of bill and the role played by the NCOP in those different bills. This chapter examines the type of amendments proposed by the NCOP, whether these amendments were incorporated into law, and whether or not they were rejected by the NA. This will determine the strength of the NCOP and value in proposing amendments and whether or not they have such a significant impact that they become law that is binding in the country.

2. BACKGROUND

Soon after its establishment, the NCOP was seen to be reasonably active when dealing with section 75 bills which only affected provinces.¹⁴⁰ According to the Intergovernmental Relations Audit report, the NCOP's committee composition was not aligned to the functional

¹⁴⁰Ministry and Department of Provincial and Local Government *Intergovernmental Relations in the legislative branch of government: The Role and Function of the National Council of Provinces* (1999) Chapter 4.

areas of provinces during the 1997 to 1999 periods. An analogy provided by the Intergovernmental Relations Audit Report, indicated that the Select Committee on Justice, for instance, considered issues of justice, defence, correctional services, intelligence and safety yet, all these matters, with the exception of safety and security, fell outside provincial competence.¹⁴¹ Therefore, the NCOP was misaligned in its scope of work and constitutional mandate of representing provincial issues, since only 20 percent of the issues it considered fell within the area that affected the provinces.

In 1999 Parliament processed 60 bills and in 2000 a total of 70 bills were processed.¹⁴² It is important to note that this was the Second Democratic Parliament and a pivotal milestone in the history of South Africa and these bills sought to introduce major policy changes.¹⁴³

Ordinary bills affecting provinces referred to Parliament were much fewer than those bills not affecting provinces. The number of bills affecting provinces dropped from 1999 to 2001 and as a result in 2001, only 11 of the 69 bills passed were section 76 bills.¹⁴⁴ Murray and Nijzink noted an increase in the number of section 76 bills introduced in the NCOP during 1999, although they were still significantly less than the section 76 bills introduced in the NA.¹⁴⁵

3. METHODOLOGY

For data capturing purposes, the study focused on all bills processed during the Third Parliament. This information was gathered from the Parliament's document section which tracks the process a bill takes when proceeding through the parliamentary process, and records any developments made on a bill during its passage through Parliament. In addition, bills adopted by the two houses, are published in the Parliamentary Bills handbook and stored

¹⁴¹Ministry and Department of Provincial and Local Government (1999).

¹⁴²Murray C & Nijzink L (2002) 43.

¹⁴³Murray C & Nijzink L (2002) 43.

¹⁴⁴Murray C & Nijzink L (2002) 43.

¹⁴⁵Murray C & Nijzink L (2002) 43.

in Parliament's archives together with their amendments. The method used in calculating the bills processed by Parliament proved to be challenging in that sometimes bills are carried over from one year to the next. An example would be the National Ports Authority bill [B5-2003] that was introduced in 2003 during the Second Parliament but was still considered in 2005 by the Third Parliament. This bill was considered and passed towards the end of 2004 by the NA.¹⁴⁶ However, it had to be referred to the NCOP and it was adopted in 2005.¹⁴⁷ Thus in terms of the calculations, it would be reflected in the bills processed in 2005 because that is the year it was considered and concluded.

The challenge became evident when considering bills covering a two year period, for example, a bill introduced in one year (2005) and passed in the following year (2006). Bills were counted in the year they were finalised. Another challenge included instances where a bill is considered late in the year by the NA and then processed the following year by the NCOP. The paper counted the bills in the year in which they were actually passed by Parliament. The quantitative analysis of bills posed several analytical challenges due to the factors alluded to above.

4. BILLS PROCESSED BY PARLIAMENT FROM 2004 TO 2009

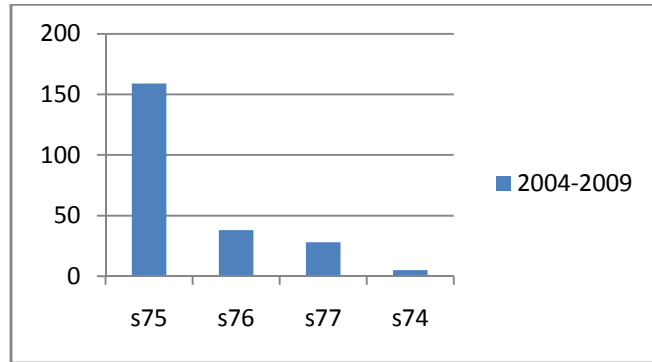
4.1 Quantity and nature of bills

The term 'Processed Bills' referred to in Figure 2, includes all the bills that have been introduced in Parliament and have gone through vigorous parliamentary processes including those that would be delayed, withdrawn or lapsed. Figure 2 shows the number of bills processed by Parliament and classified into the different procedures followed.

Figure 2: Bills processed by Parliament

¹⁴⁶Portfolio Committee on Transport *National Ports Authority Bill Adoption* (2004).

¹⁴⁷Select Committee on Public Service *Deliberation and Adoption of the National Ports Authority bill* (2005).



Source: Parliament Document Archives

During the Third Parliament, a total of 230 bills were processed. The Third Parliament processed mainly ordinary bills not affecting provinces. A total of 159 section 75 bills were processed by Parliament representing 69 percent of all bills. The bills affecting provinces are significantly lower than those not affecting provinces and amounted to 38 percent of bills processed during the period under review. This low number of section 76 bills constitutes only 12 percent of all bills processed by Parliament. Figure 3 gives the percentage of bills processed by Parliament during the Third Parliament.

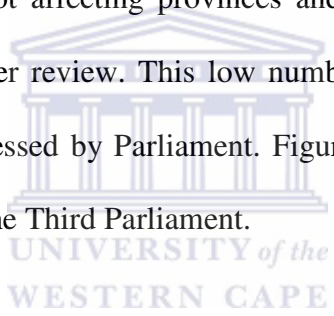
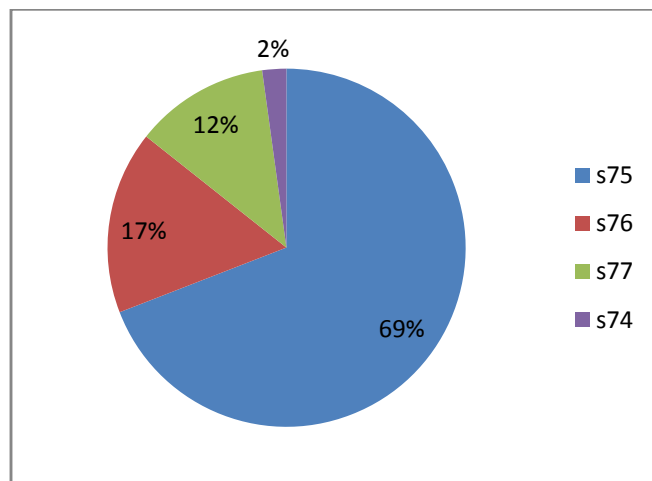


Figure 3: Bills processed by Parliament during 2004-2009



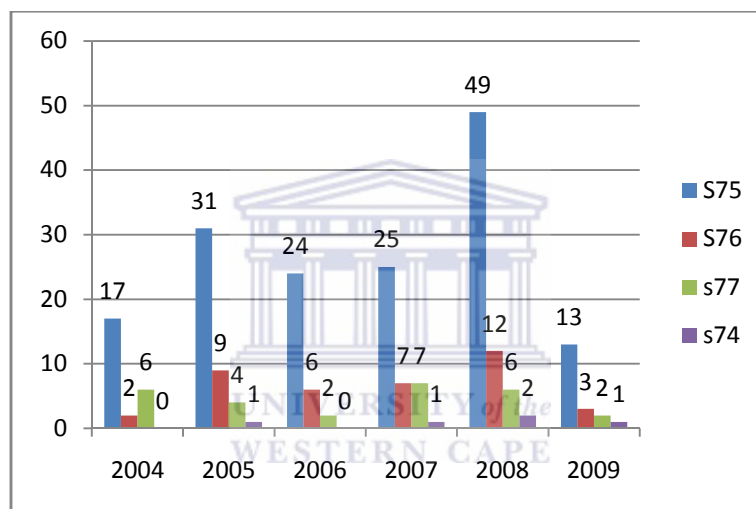
Source: Parliamentary bills document archives

More than two-thirds of bills were processed as section 75 bills as reflected in Figure 3. Parliament also considered five constitutional amendments, which accounts for two percent

of all the bills. The very few constitutional amendment bills reflect on the stability of the Constitution.

Figure 4 shows the number of bills processed by Parliament per year over a five year period. There were more section 75 bills processed every year in the period under review. The section 76 bills have been fluctuating over the years from nine bills processed in 2005 decreasing to six bills in 2006; however there is a slow increase thereafter with two bills processed in 2008.

Figure 4: Types of bills per year



Source: Document Archives

The years 2004 and 2009 reflect the least number of bills compared to any other year. In this period 32 bills were processed by Parliament. However, if combined, they show the same average number of bills as the years 2005 to 2007. This may be as a result of the Third Parliamentary session which began after June 2004 and ended in May 2009 because of the national and provincial elections. Figure 4 shows a steady increase in the frequency of bills processed from 2006 to 2008, although there was a decline in 2006. This indicates the movement of ordinary bills not affecting provinces, from 24 bills in the year 2006, to 27 bills in 2007 and a sharp increase to 49 bills in the year 2008. The section 75 bills processed in 2008 almost doubled those processed in other years. This could be as a result of the executive

pushing legislation through before the end of their term as it was a year just before national elections.

4.2 Bills amending the Constitution

The Third Parliament has processed five bills amending the Constitution. All bills required NCOP approval except for Fifteenth Constitutional Amendments which was finalised without provincial inputs. The Twelfth Constitutional Amendment Bill, sought to repeal all constitutional provisions dealing with Cross Boundary Municipalities.¹⁴⁸ A decision was taken in 2002 to abolish cross boundary municipalities and to change provincial boundaries so that all municipalities fell within one province. Thus the provisions contained in the Constitution which provided for the establishment of cross boundary municipalities were deleted. The bill incorporated the Merafong City Local Municipality into the Southern District Municipality of the North West and the provinces played a substantial role in this process.



The Twelfth Constitutional Amendment Bill brought changes that would directly affect certain provinces by eliminating cross boundary municipalities and thus public hearings were held with the people, to ensure that they were consulted about the changes that would affect them. All provinces supported the bill. Gauteng (GP) also supported the bill and in addition made special arrangements between GP and North West to ensure that service delivery standards would be maintained in Marafong Municipality.¹⁴⁹

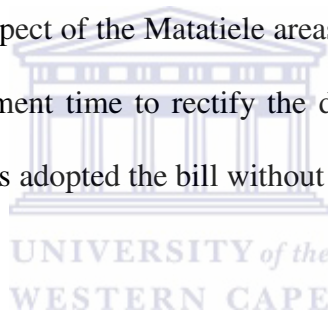
Members of the Merafong community challenged the validity of the Twelfth Constitutional Amendment Act. The applicants requested the Constitutional Court to declare that the

¹⁴⁸Constitution Twelfth Amendment Bill[B33-2005].

¹⁴⁹Select Committee on Security and Constitutional Affairs Constitution *Twelfth Amendment Bill, final mandates* (2005).

Gauteng Legislature failed to comply with provision section 118 of the Constitution, due to a lack of public consultation in the process leading up to adoption of the Twelfth Constitutional Amendment Bill.¹⁵⁰ The majority judgment written by Van der Westhuizen J, found that Gauteng complied with section 118 (1)(a) of the Constitution. However, KZN failed in its obligation to facilitate public consultation. Thus the part of the Twelfth Constitutional amendment which transferred Matatiele from KZN to Eastern Cape was declared unconstitutional.¹⁵¹

The Thirteenth Constitutional Amendment Bill came as a result of constitutional challenges against the Twelfth Constitutional Amendment Bill [B33-2005] and Related Cross Boundaries Municipalities Act no 69 of 2000. The court had found procedural irregularities, and had given an order of invalidity in respect of the Matatiele areas, but had suspended that order for eighteen months to allow Parliament time to rectify the defect.¹⁵² The select committee on security and Constitutional Affairs adopted the bill without amendments.



The Constitution's Fourteenth and Fifteenth Amendment Bills were processed at the same time, because these bills sought to abolish floor crossing. The Fourteenth Constitutional Amendment abolished floor crossing in the national and provincial legislatures whilst the Fifteenth Constitutional Amendment abolished floor crossing at municipal councils. These bills followed two different processes. The Fourteenth Constitutional Amendment Bill was

¹⁵⁰*Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others*. 2008 (10) BCLR 968 (CC)

¹⁵¹*Merafong Demarcation Forum and Others* para 21.

¹⁵²Select Committee on Security and Constitutional Affairs *Briefing on the by Departments of Justice and Provincial and local government*(2007).

referred to the provinces for further consultation, whilst the Fifteenth Constitutional Amendment was adopted by the NCOP without provincial input.¹⁵³

The Sixteenth Constitutional Amendment Bill dealt with re-demarcation of Gauteng and North West province.¹⁵⁴ This amendment sought to address concerns from the Twelfth Constitutional Amendments, by re-demarcating the Merafong City Local Municipality back to Gauteng. Due to the fact this affected the provinces and local government, it was necessary for this bill to be approved by the NCOP.¹⁵⁵ Regarding the mandates considered by the NCOP special focus was directed at those provinces that would be directly affected by the changes proposed through this constitutional amendment. The committee adopted the bill without amendments although had reservations or issues to be taken into account when implementing certain provisions of the bill.¹⁵⁶

4.3 Ordinary bills not affecting provinces

Although there were more Section 75 bills processed, the NCOP proposed only a few amendments. All the section75 bills were scrutinised and amendments proposed by the NCOP were counted and the quality of amendments was also assessed. A comparison was made between the NA and NCOP on the number of proposed amendments to section 75 bills as reflected in Figure5 .

The NCOP does not put much effort when considering section 75 bills, compared to when dealing with Section 76 bills due to limited authority. This may be due to the delaying function it has regarding Section 75 bills where its proposed amendments can be easily

¹⁵³Select Committee on Security and Constitutional Affairs *Briefing on the fourteenth and fifteenth Constitutional Amendment Bills* (2008).

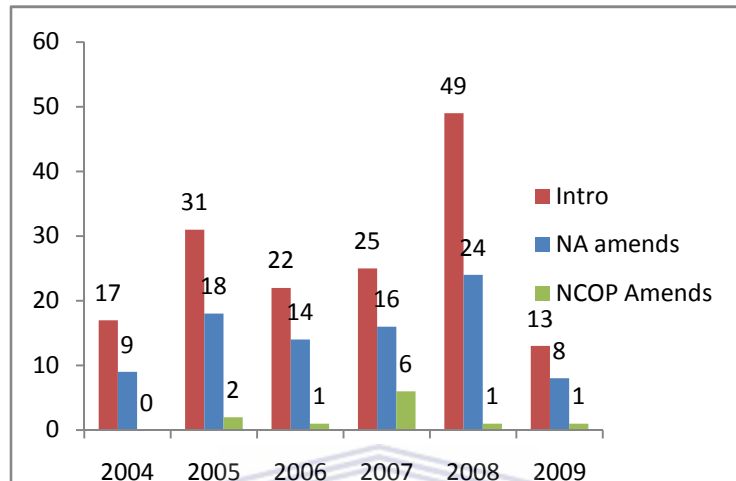
¹⁵⁴Constitution Sixteenth Amendment Bill [B1-2009]

¹⁵⁵S 74 (3)(b)(ii) Constitution

¹⁵⁶Select Committee on Security and Constitutional Affairs *Briefing on the fourteenth and fifteenth Constitutional Amendment Bills* (2008).

overridden by the NA.¹⁵⁷The NCOP pays less attention to these bills because they perceive these bills to have less impact on provinces.

Figure 5: NA and NCOP amendments of section 75 bills per year

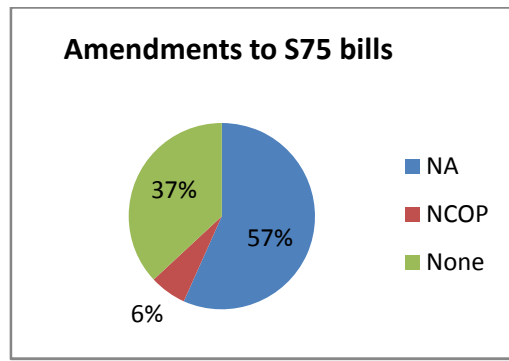


Source: Parliament Document Section, 2004-2009.

Figure 5 shows a significant increase in the introduction of ordinary bills not affecting provinces from 2006 to 2008. The NCOP proposed few amendments to section 75 bills, except in 2004 when there were no proposed amendments. The NCOP's proposed amendments were significantly lower and comprised three to four pieces of legislation a year. Figure 6 reflects proposed amendments to bills not affecting provinces in percentages.

Figure 6: Amendments to section 75 bills

¹⁵⁷The Ministry and Department of Provincial and Local Government (1999) 91.



Source: Parliament Document Archives, 2004-2009

The NCOP amended only six percent of the section 75 bills, which is very small compared to the number of amendments effected by the NA. The types of amendments instituted by the portfolio committees in the NA were largely technical, grammatical and some were substantial. The NA made substantial amendments to the legislation largely due to the stakeholder inputs from public hearings that contributed to the committee's instituting the correct type of amendments. Furthermore, submissions highlighted issues that would result in the committee's proposing amendments that would have significant impact on the legislation.

In few cases the NCOP would propose amendments at the request of the department sponsoring the bill, because they forgot to insert certain provisions when the bill was introduced in the NA.¹⁵⁸ The proposed amendments to the bills were either grammatical or technical; however they did not propose policy changes that would enhance the impact of the amendment. The NCOP proposed substantive and grammatical amendments to the Broadcasting Amendment Bill that was introduced in the NA. The substantive amendments included the composition of the South African Broadcasting Corporation (SABC) board members in terms of numbers required in order to form a quorum. On the substantive

¹⁵⁸Corporate Laws Amendment Bill [B5D-2006].

amendment the NCOP removed clauses that included the frequency of planning because this was not a function of the broadcaster.¹⁵⁹The NCOP further proposed the criteria or conditions under which the NA may dissolve the SABC board.¹⁶⁰

The NA in most cases accepted the NCOP's amendments to bills, irrespective of the grammatical, technical or substantive nature of these amendments. The NA usually accepted the NCOP's proposed amendment but in few circumstances the NA rejected some of the NCOP's proposed amendments. An example of a bill where the NA rejected the NCOP's proposed amendments was the Liquor Products Amendment Bill. The NCOP wanted to change the current practice where the minister notifies Parliament of board members, to one where the minister should consult Parliament before appointing board members. The NA felt that this would delay the appointment of board members hence they rejected this proposed amendment by the NCOP.¹⁶¹ The NA passed the bill without the NCOP's proposed amendments.

The NCOP discovered a typographical error when considering the National Ports Authority Bill [B5D-2003] and thus the section on the nature of action intended was removed as it did not appear in the initial draft bill.¹⁶² The removal of this clause was a technical amendment as it had certain implications on the application of the bill. This clearly shows that the NCOP is a second eye for verifying and checking the accuracy of contents of a bill, and has a quality control type of function. The NCOP thus acts as a good quality control mechanism for

¹⁵⁹Portfolio committee on Communications *Consideration of NCOP proposed amendments to the Broadcasters Amendment Bill* (2008).

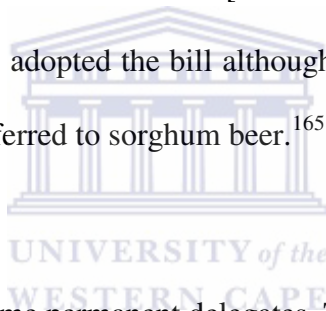
¹⁶⁰Broadcasting Amendment Bill [B72A-2008], clause 4 (3).

¹⁶¹Portfolio Committee on Agriculture *Provision of Land & Assistance Amendment Bill: deliberations; Liquor Products Amendment Bill: Rejection of NCOP amendment* (2008).

¹⁶²Select Committee on Public Service (2005).

legislation processed by Parliament to ensure the accuracy of the legislature's intention and eliminate errors in law. Furthermore, the NCOP is able to identify issues that might have been overlooked by the NA when considering legislation.

The NCOP's section 75 legislative role was mostly very superficial.¹⁶³ This has been evident in some instances where a select committee will consider two bills at a time by obtaining a briefing and adopting the bill on the same day.¹⁶⁴ The Select Committee on Environment and Land Affairs was briefed on the Agricultural Debt Management Repeal Bill [B24-2008] and adopted it on the same day without amendments. Additionally, the select committee was briefed on the Liquor Products Amendment Bill [B22b-2008] which incorporated the NA amendments. The committee also adopted the bill although with reservations regarding what the definition included when it referred to sorghum beer.¹⁶⁵



The NCOP operates with 54 fulltime permanent delegates. The special delegates perform a minimal role when they attend the NCOP sittings on special matters that would affect their delegates' performance area. The permanent delegates served on up to eight committees at a time compared to the NA where a member served on only two committees.¹⁶⁶ Furthermore, the select committees are clustered in such a way that they carry out the load of four portfolio committees which are combined into one committee. For example, the select committee on social services would oversee the departments of health, social development and home affairs, whereas the NA committees oversee one department. Thus, members of the NCOP

¹⁶³The Ministry and Department of Provincial and Local Government (1999) 94.

¹⁶⁴Select Committee on Land and Environmental Affairs *Briefing and Adoption of the Agricultural Debt Management Repeal Bill and Liquor Products Amendment Bill* (2008).

¹⁶⁵Select Committee on Land and Environmental Affairs (2008).

¹⁶⁶The Ministry and Department of Provincial and Local Government (1999) 95.

had high workloads due to the limited numbers of permanent delegates available to carry out its mandate effectively.

4.4 Ordinary bills not affecting provinces

The NCOP has more authority over ordinary bills affecting provinces, through the section 76 bills process.¹⁶⁷ Thus the consideration and passing of this type of legislation is viewed as the NCOP's pre-eminent role.¹⁶⁸ The NCOP further plays an important role with regard to provincial budgets because provinces have little power to raise their own revenues but are entitled to an equitable share of revenue raised nationally.¹⁶⁹ This equitable share is allocated by the Division of Revenue Bill (DRB) from the national pool of funds, which is distributed to all three spheres of government with the provincial share divided amongst the nine provinces.¹⁷⁰

The DRB is approved by the NCOP. Provincial obligations are usually imposed through national legislation and thus the DRB should ensure that provinces have enough resources to fulfill their obligations and this bill follows the section 76 procedure that would ensure that the provinces have a clear voice.¹⁷¹ Although the DRB is a money bill in nature it follows the section 76 process to provide provinces with an opportunity to give meaningful input in the form of provincial mandates, because it affects equitable share that will be distributed amongst provinces. The DRBs processed by the Third Parliament have also been included in the analysis of section 76 bills. Similarly the financial management Act of Parliament is also a section 76 bill even though it regulates the financial matters of Parliament.

¹⁶⁷S 76 Constitution.

¹⁶⁸The Ministry and Department of Provincial and Local Government (1999) 91.

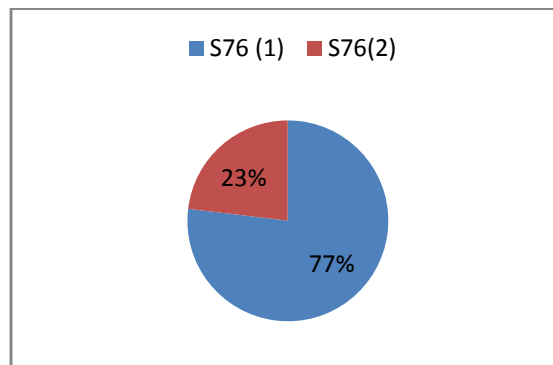
¹⁶⁹S221 (7) Constitution.

¹⁷⁰Murray C & Nijzck L (2002) 43.

¹⁷¹Murray C & Nijzck L (2002) 44.

Figure 7 provides a picture of ordinary bills affecting provinces as processed by the Third Parliament. The figure differentiates between those ordinary bills affecting provinces that were introduced in the NA and those introduced in the NCOP.

Figure 7: House for introducing Section 76 bills



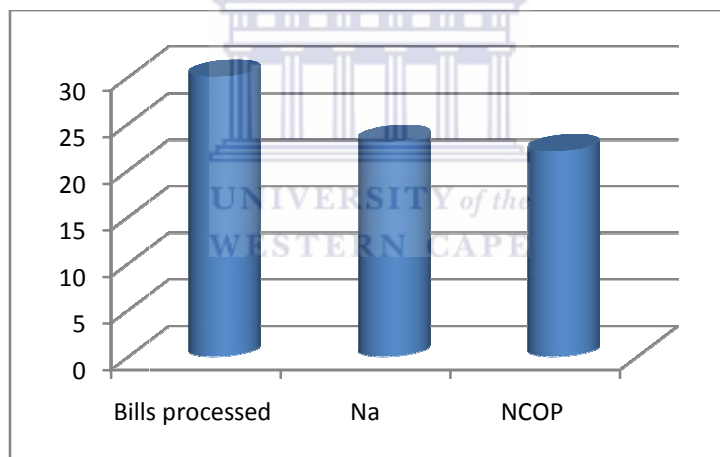
Source: Parliament Document Archives

Parliament received a total of 38 ordinary bills affecting provinces during the Third Parliament. As was indicated earlier this number of bills is significantly lower than Section 75 bills. As depicted in the graph above there are three times more ordinary bills affecting provinces introduced in the NA than in the NCOP.

Although section 76 bills affect provinces, only nine of these bills were introduced in the NCOP during the period under review. This trend displays reluctance by the executive to introduce bills affecting provinces in the NCOP. This was due to the stringent process of passing a section 76 bill affecting provinces if there are clashes between the NA's and NCOP's proposed amendments. Section 76 bills introduced in the NCOP provide more authority to the provinces in representing their views. If the NA had already approved a section 76 bill, politically it is more difficult for the NCOP with the third team of politicians' representatives to adjust amendments made by the NA.

NCOP delegates from the First Parliament stated that the NCOP has affected about three quarters of amendments to the section 76 legislation, amounting to 70 percent.¹⁷² There seemed to be a view that the amendments were grammatical with specific focus on textual errors and modifying what was already there. Furthermore, there was no conflict in terms of the substance of amendments to bills from the two houses, and this is evident in that there was only one dispute which led to a mediation committee.¹⁷³ The NCOP instituted more amendments to section 76 bills during the Third Parliament amounting to 79 percent of all bills. Also the type of proposed amendments is grammatical and substantial in nature. This showed a slight improvement on the number of amendments instituted by the First Parliament.

Figure 8: Amendments to section 76 bills introduced in the NA



Source: Parliament Document Archives

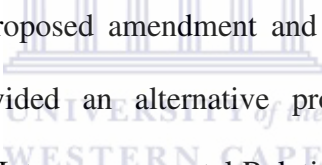
The graph above shows a picture of ordinary bills affecting provinces as introduced in the NA, section 76 (1) bills with proposed amendments by the NA and NCOP. The number of proposed amendments by the NCOP to bills affecting provinces was similar to the number of proposed amendments made by the NA. The NCOP pays particular attention to these types of bills and ensure that they consult their provinces and obtain both negotiating and final

¹⁷² Ministry and Department of Provincial and Local Government (1999) 91.

¹⁷³ Ministry and Department of Provincial and Local Government (1999) 91.

mandates before passing these bills. The number of amendments made by the NCOP is similar to the number instituted by the NA, yet in the section 75 bills the NCOP proposed far fewer amendments and there was a huge difference between the NA and NCOP in the number of proposed amendments.

The NCOP had made two substantive amendments to the Foodstuffs Cosmetics and Disinfectants Amendment Bill [B35-2005] which the NA accepted, however there were conflicting views on the definition to be used for ‘mollusc’. The NCOP wanted the definition to be expanded so that it provides an explanation of what it meant. However the opposing view was that in law if examples are provided anything outside the examples is excluded.¹⁷⁴



The NA rejected the NCOP’s proposed amendment and the bill was sent to a mediation committee upon which it provided an alternative proposal which became the final amendment. As articulated in the Intergovernmental Relations (IGR) Audit Report, there was a general perspective that some of the reasons for few clashes or bills referred to the mediation committee are as a result of the political context of this country in that, the ruling party has the same political majority in both houses. Furthermore, it was observed that had there been more political diversity in provinces then there would be real debate occurring in the NCOP.¹⁷⁵

Practice from the First Parliament has shown that only in exceptional cases have ordinary bills affecting provinces been introduced in the NCOP, whilst most bills affecting provinces

¹⁷⁴ Foodstuffs, Cosmetics and Disinfectants Amendment Bill [B35 – 2005].

¹⁷⁵ The Ministry and Department of Provincial and Local Government (1999)101.

are introduced in the NA. Upon further enquiry during the First Parliament, it was noted that an MP had indicated that the debate should be held in the NA which is viewed as the senior house.¹⁷⁶ A national minister (quoted anonymously) indicated a preference for introducing section 76 bills in the NA because once the NA agrees on the bill, the NCOP is under pressure to pass the bill. Furthermore, there is more control from the minister when interacting with the NA as, unlike the provinces, they meet regularly, and thus can have more influence on the process. Furthermore, there is an opportunity to fast track the bill through the legislative process if it is introduced in the NA.¹⁷⁷

During the period under review, a similar trend existed where few section 76 bills were introduced in the NCOP. It is possible that similar reasons exist for the introduction of more section 76 bills in the NA, but none of that confirmation was obtained. Figure 9 compares the number of bills introduced in the NCOP and amendments proposed by the two houses.

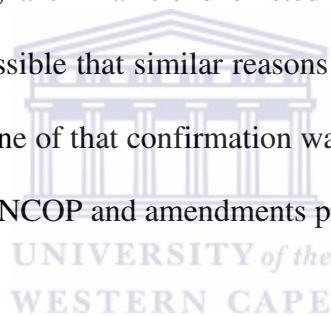
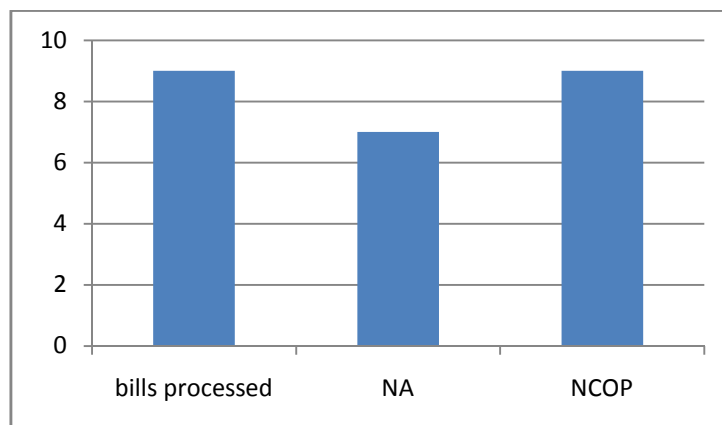


Figure 9: Amendments to bills introduced in the NCOP

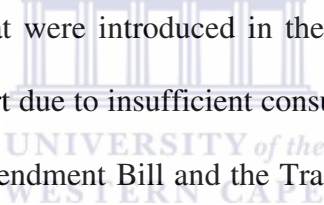


Source: Parliament archives 2004-2009

¹⁷⁶ Ministry and Department of Provincial and Local Government (1999) 93.

¹⁷⁷ Ministry and Department of Provincial and Local Government (1999) 93.

There has been a significantly lower number of section 76 bills introduced in the NCOP as opposed to those introduced in the NA. The NCOP has instituted amendments to all section 76 bills introduced in the NCOP. The amendments made by the NCOP were largely grammatical. However in some bills there were both technical and substantive amendments. An example is the proposed amendments to the Prevention of and Treatment for Substance Abuse Bill [B12C-2008]. The amendments required the removal of persons providing community based care services, and the registration of mental health practitioners providing community based care services. This ensured that a professional person would perform the duties instead of ordinary person. During the Third Parliament only two bills were referred to the mediation committee.¹⁷⁸



Two bills affecting provinces that were introduced in the NCOP were previously declared invalid by the Constitutional Court due to insufficient consultation. The bills were the Choice of Termination of Pregnancy Amendment Bill and the Traditional Health Practitioners' Bill. The reason these bills were introduced in the NCOP was because of the impact they have on provinces and the process would ensure greater public participation by the provinces. When dealing with these bills the NCOP first had preliminary negotiating mandates, final negotiating mandates and then final mandates.¹⁷⁹ So this clearly shows that the process was more vigorous. Bills introduced in the NCOP provide a substantial chance for the provinces to influence national legislation.¹⁸⁰

¹⁷⁸Foodstuffs, cosmetics [B35-2005] and children's amendment bill [B19-2006]

¹⁷⁹Select Committee on Social Services *Choice of termination of pregnancy and traditional health practitioners' bill: preliminary negotiating mandates* (2007).

¹⁸⁰Bosire C 'Evaluation and Impact on the National Council of provinces' (2010).

Generally the NCOP and NA agreed on proposed amendments and only two bills were referred to the mediation committee. The NCOP proposed amendments to the Prevention of and Treatment for substance abuse bill [B12C-2008]. The bill had grammatical errors such as changing ‘state organ’ to ‘organ of state’. Other amendments were technical in that they required the removal of persons providing community based care services replaced by the registration of mental health practitioners providing community based care services.¹⁸¹ The NA accepted the NCOP amendments.¹⁸²

The number of section 76 bills that are introduced in the NCOP is too small to differentiate the quality of the NCOP’s proposed amendments from those section76 bills introduced in the NA. The issue is not whether or not the NCOP proposes different types of amendments because both types of bills affect provinces. The concern is whether the NCOP’s proposed amendments are agreed upon by the NA and eventually incorporated into law. None of the section 76 bills introduced in the NCOP lapsed because of disagreements by the mediation committee.

4.5 Amending mixed bills

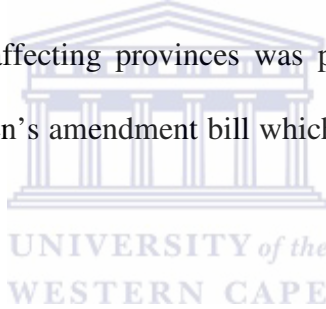
Amongst the bills processed by the Third Parliament there were also mixed bills. The mixed bills comprised a significantly low number of only two bills. An example of a mixed bill considered by Parliament was the Tobacco Products Control Amendment Bill [B24-2006]. This bill was classified as a mixed bill because it had both section 75 and section76 elements. The state law advisor indicated that the section 75 part would have to be processed before

¹⁸¹Prevention of and Treatment for substance abuse bill [B12C-2008] Clause 16

¹⁸²Portfolio Committee on Social Development *Prevention of & Treatment for Substance Abuse Bill: NCOP amendments* (2008).

considering the section 76 elements of the bill. The bill was then split and new public hearings were held to consider the bill thus re-starting the consultation process.¹⁸³

Another example of a mixed bill was the Children's Bill that was re-introduced in the Third Parliament and would be split. The splitting of mixed bills occurs when a bill is divided into two bills: those affecting provinces and those not affecting provinces. Parliament dealt with a section 75 aspect of the bill which comprised of national competencies that focus on children's rights and later considered section 76 elements that had provincial competence. The reason for the delay was that the correct procedures had to be followed for each section of the bill. When both sections of the bill were adopted, they would be reconciled into one.¹⁸⁴ The children's bill section not affecting provinces was passed in 2005, while the second section of the bill, namely children's amendment bill which affected provinces was passed in 2007.



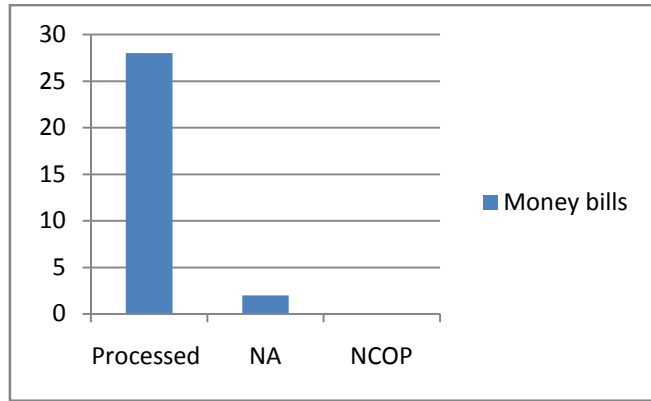
4.6 Amending money bills

The NCOP when considering money bills uses the procedure set out in section 75 where members vote individually and not per province. Similarly in the select committee's proceedings they adopt a similar practice to that when considering ordinary bills not affecting provinces that is, obtain briefings and adopt on the same day. However there are instances where they would require input from National Treasury or some other relevant financial institution to provide perspective on the money bills under consideration. There have been quite a substantial number of money bills considered by the Third Parliament as portrayed in Figure 10.

¹⁸³Portfolio Committee on Health, Foodstuffs, Cosmetics & Disinfectants Amendment Bill (B35D-2005): Consideration of NCOP Amendments (2006).

¹⁸⁴Portfolio Committee on Social Development *Children's Bill: Departmental Briefing* (2004).

Figure 10: Amendments proposed to money bills



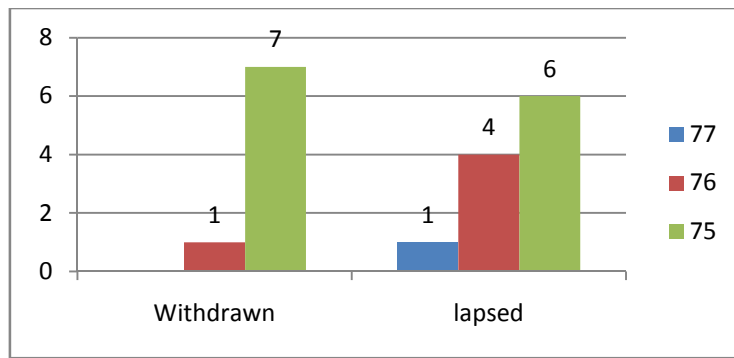
Source: Parliament Document Archives 2004-2009

Parliament has had few proposed amendments to the money bills through the NA. The Money Bills Amendment Procedure and Related Act 9 of 2009 came into force only on 16 April 2009, just before the end of the Third Parliament.

4.7 Bills not passed

Figure 11 below shows all the bills that were not passed by the Third Parliament, either because they were withdrawn or they lapsed. There were 11 bills that lapsed during the Third Parliament amounting to 4.7 percent. In addition, there were eight bills that were withdrawn resulting in 3.5 percent of the entire bills being processed in the Third Parliament.

Figure 11: Bills not passed



Source: Parliament Document Archives 2004-2009

Various processes are followed when different types of bills lapse. Usually bills will lapse if the mediation committee is unable to agree on a version of the bill within 30 days of the bill being referred to it, or rejected by the council in the case of section 76 bills introduced in the NCOP.¹⁸⁵ The figure above shows a significantly low number of bills that lapsed compared to bills that have been passed by Parliament.

There were only eight bills that were withdrawn by the executive during the third term of Parliament, constituting about 3.5 percent of the bills introduced. Withdrawal of bills had occurred at the portfolio committee level of interaction during the Third Parliament mainly due to the department's lack of consultative process.

Bills not passed continue to the next parliamentary session, although previous experience has shown that some of them eventually get withdrawn by the respective department. Examples of bills that were carried through two parliamentary terms and later withdrawn are the Judicial Officers Amendment bill [B1-2001] and the Superior Courts Bill [B52-2003]. The reason for the delay with these bills was to ensure that further consultation could take place.¹⁸⁶

4.8 Quality of the NCOP's amendments

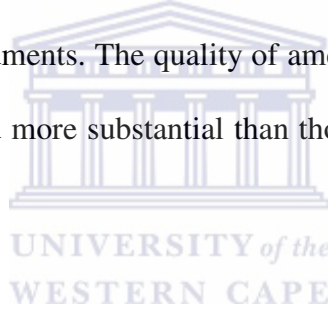
The amendments proposed by the NCOP were both technical and grammatical. Regarding ordinary bills not affecting provinces the NCOP usually functions as a review house that provides an opportunity to affect further amendments overlooked by the NA. The proposals

¹⁸⁵Rule 190, Joint Rules of Parliament

¹⁸⁶Portfolio Committee on Justice and Constitutional Development deliberating *on the Superior Courts Bill* (2003).

would normally be influenced by the respective department or relevant stakeholders and do not represent the views of provinces.

Amendments made to bills affecting the Constitution were low in number although great care was taken on constitutional amendments that affected provinces. The NCOP would not deliberate on bills amending the Constitution unless the interested provinces submitted mandates or agreed on the bill. In addition, the NCOP instituted numerous amendments to bills affecting provinces and facilitated provincial consultative processes. The NCOP proposed mainly substantial amendments to these types of bills and guarded against cost implications for the provinces in implementing such legislation. The NCOP also instituted technical and grammatical amendments. The quality of amendments introduced to legislation affecting provinces is greater and more substantial than those instituted on ordinary bills not affecting provinces.



Assessing the quality of amendments affected by the NCOP against its constitutional mandate of representing the provinces proved to be a challenge, because there is no definition or guideline of what constitutes provincial interests. Similarly, what might be of interest in the Eastern Cape, as an example, might not necessarily be of interest in Gauteng. Therefore a provincial interest does not have to be something applicable to all the provinces all the time. It is thus difficult to assess the legislative impact of the NCOP against the obligation of representing the interests of the provinces.

5. CONCLUSION

The NCOP has demonstrated greater participation when considering legislation affecting provinces as opposed to section 75 bills. This is due to the amount of proposed amendments and possibly the realisation that the legislation affects the provinces directly. There were more section 76 bills introduced in the NA than those introduced in the NCOP. It would be important to consider which criteria are used when ordinary bills affecting provinces should be introduced in the NA and when they should be introduced in the NCOP.

The NCOP has made substantial and grammatical amendments to legislation it has processed. However, it considered section 75 bills at a superficial level, whereby the committee would be briefed, consider and adopt that particular legislation on the same day. The NCOP sees itself playing a less significant role on section 75 bills because they do not affect the provinces. A thorough process is followed and accommodated in the NCOP four week programme when it considers bills affecting provinces and ensures there is a process of briefing and receiving submissions from provincial legislatures to guarantee that the interests of the provinces are taken into consideration.

The 2008 Parliament independent assessment report identified weaknesses in the parliamentary legal services for the non-initiation of legislation by both the NA and the NCOP.¹⁸⁷ In addition the NA has a large number of portfolio committees and members and thus more capacity to deal with legislation proposed by the departments. During the Third Parliament, the NA initiated an own bill, the Parliament financial management bill, which regulates how Parliament's funds should be used and reported on. This number is still low

¹⁸⁷Parliament of RSA *Report of the independent panel assessment of Parliament* (2008).

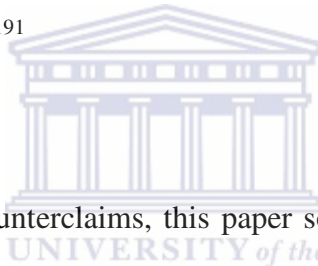
and Parliament should work at initiating its own pieces of legislation. The NCOP has not yet initiated any bills. It would be useful to conduct more research that would provide more information on what exactly provincial interests mean.



CHAPTER FIVE: CONCLUSION

1. INTRODUCTION

Some public figures, such as the former Minister of Cooperative Government Sicele Shiceka, claimed that the NCOP was an irrelevant institution,¹⁸⁸ whilst the independent assessment report of Parliament indicated that the NCOP failed to fulfill its constitutional mandate.¹⁸⁹ Former President Thabo Mbeki was amongst those who acknowledged the challenges in the composition of the NCOP and noted that it lacked strategic focus in its operation as a result of deep and complex challenges.¹⁹⁰ More recently, the Chairperson of the NCOP acknowledged the good work by the NCOP by recognising its impact and relevance in the national legislative processes.¹⁹¹



Prompted by such claims and counterclaims, this paper sought to examine the relevance of the NCOP in the national legislative processes. Were the claims questioning the relevance of the NCOP well founded? The questions the paper sought to answer concern the role and impact of the NCOP in the national legislative process; whether or not the NCOP adds any value, and if it has fulfilled its constitutional mandate to represent the interests of the provinces. The paper focused on bills processed by the Third Parliament. This chapter highlights the findings of the study by summarising the preceding chapters, focusing on the critical and important aspects that answer the question set out at the beginning of this paper. Some recommendations are also made that would assist in addressing some of the major findings from this paper.

¹⁸⁸Legal Brief Today (2010).

¹⁸⁹Parliament of RSA (2008).

¹⁹⁰Mbeki T (1998).

¹⁹¹Mahlangu J (2013).

2. SUMMARY OF THE PREVIOUS CHAPTERS

The second chapter discussed the formation of the NCOP and the reason for its establishment. The chapter provided a description of the role, function and the legal framework of the NCOP. The NCOP predominantly functions with 54 permanent delegates although in special cases it receives support from special delegates and non-voting local government representatives. The number of members who carry out the functions of the NCOP is limited, which means that the NCOP needs use its resources effectively.

It was pointed out that the caliber of the delegates of the NCOP had a negative impact on the effective achievement of its constitutional mandate.¹⁹² The delegates of the NCOP are politically weaker than their counterparts in the NA or the provincial legislatures and therefore they carry less authority. This is evident when disagreements arise between the NA and the NCOP's proposed amendments, where the NA may reject the NCOP's amendments with a special majority. Furthermore, the NCOP delegates may be recalled by the party that nominated them in the province should the provincial legislature lose confidence in its delegated members.¹⁹³

The third chapter described the legislative processes and the different types of bills as guided by the Constitution. There are three legislative processes followed when processing bills and these follow procedures outlined in section 74, section 75 and section 76 of the Constitution. The NCOP plays different roles on bills amending the Constitution depending on the type of

¹⁹²Murray C & Nijzink L (2001) 57.

¹⁹³Budlender S (1996) 17-3.

constitutional provisions to be amended. The NCOP has veto power on certain constitutional amendments to section 1 of the Constitution, the Bill of Rights, provincial matters or matters directly affecting the NCOP. Furthermore, the NCOP does not expressly regulate this process of the veto power by the NCOP.¹⁹⁴ When voting on these constitutional amendments the NCOP requires a minimum of six provinces voting in favour of the proposed amendments.¹⁹⁵ Furthermore, there are no mediation procedures available on bills amending the Constitution. These voting requirements are similar to those of ordinary bills affecting provinces.

The ordinary bills not affecting provinces follow the section 75 procedure outlined in the Constitution. The NCOP may pass, reject or propose amendments to these bills that are introduced in the NA. The process is fairly simple when the NCOP does not propose amendments or the NA accepts the NCOP's proposed amendments to these bills, as they will be sent to the president to be signed into law.¹⁹⁶ If the NCOP rejects the bill or the NA disagrees with the NCOP's proposed amendments, then the bill would be referred to the NA which will decide whether or not to accept or reject the NCOP's proposed amendments or pass the NA's original version of the bill.¹⁹⁷ When voting on a section 75 bill, each delegate of the NCOP casts an individual vote.

Ordinary bills affecting provinces may be introduced either in the NA or in the NCOP and they follow the procedure outlined in section 76 of the Constitution. There are no guidelines on when section 76 bills should be introduced in the NA or the NCOP, thus it is at the discretion of the executive authority. Furthermore, there are no differences in the

¹⁹⁴Budlender S (1996) 17-10.

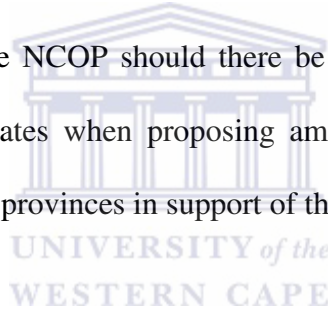
¹⁹⁵S 74 Constitution.

¹⁹⁶S 75 Constitution.

¹⁹⁷S 75 (1) (c) Constitution.

consultative process in the provinces when these bills are introduced in the different houses. However, the difference is noted in the veto power of the NCOP which is more evident in section 76 bills introduced in the NCOP.

If the NA and NCOP disagree on a version of a section 76 bill introduced in the NA and after consultation with the mediation committee the NCOP still disagrees, then either the bill will be passed by a two-thirds majority of the NA or it will lapse.¹⁹⁸ However, a section 76 bill introduced in the NCOP, where these two houses disagree on proposed amendments and after consultation with the mediation committee the NA rejects with the NCOP's proposed amendments, then the bill would lapse.¹⁹⁹ Thus the NCOP has more authority regarding section 76 bills introduced in the NCOP should there be disagreements with the NA. The NCOP requires provincial mandates when proposing amendments to section 76 bills and must vote with a minimum of six provinces in support of the proposed amendments.²⁰⁰



Apart from the assessment of the different legislative processes followed by the NCOP when processing different types of bills, the paper discussed the tagging process which classifies bills in parliament. Tagging is a process that determines the procedure to be followed by a particular bill in the parliamentary processes which impacts on the extent of involvement by the provinces. The different legislative processes followed when considering the different types of bills were outlined. Focus was on the role of the NCOP which differs when considering the different types of bills in terms of how it deliberates on the different bills, the

¹⁹⁸S 76 (1) (i) Constitution.

¹⁹⁹S 76 (2) (i) Constitution.

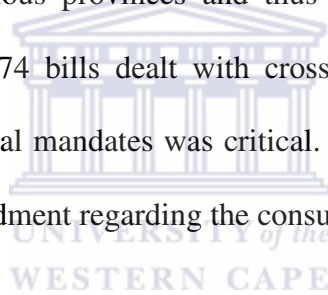
²⁰⁰S 65 Constitution.

consultative process, incorporation of proposed amendments and voting requirements when passing the different types of bills.

3. FINDINGS

The main findings of this thesis are summarized below.

Bills amending the constitution comprised two percent of all bills processed by the Third Parliament amounting to an average of one bill processed per year. The NCOP played a role in all the section 74 bills processed even though the Fifteenth Constitutional Amendment Bill did not require provincial input but was finalised at committee level. The NCOP proposed amendments to all the bills amending the constitution that required its input. The nature of these bills directly affected various provinces and thus required input by those affected provinces. Most of the section 74 bills dealt with cross boundaries and the consultative process of incorporating provincial mandates was critical. There were irregularities found in the Twelfth Constitutional Amendment regarding the consultative process.



Parliament processed more ordinary bills not affecting provinces than any other types of bills between 2004 and 2009. About two-thirds of section 75 bills were processed by Parliament, equating to 69 percent and an average of 31 bills processed each year.²⁰¹ The role of the NCOP with regard to section 75 bills is limited and superficial. The role of the NCOP is limited in that provincial input is not necessarily required on these bills because the NCOP delegates vote as individuals. Similarly, the NCOP plays a superficial role in section 75 bills because it would consider and adopt these bills on the same day. The committee would not have sufficient time to deliberate on a bill if it considers and adopts the bill on the same day.

²⁰¹Figure 3.

Parliament had about two-thirds of section 75 bills of which the NCOP proposed the least amendments to compared to section 76 bills. Furthermore, where the NCOP proposed amendments to section 75 bills, these were not substantial but were rather grammatical rectifications. This may be due to the superficial manner in which the NCOP considers these types of bills. In certain circumstances the NCOP has played a useful role in section 76 bills when a second review was necessary and instituted further amendments that had been overlooked by the NA.

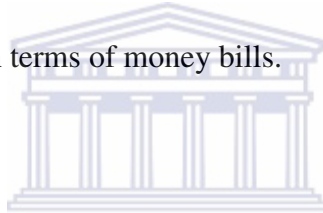
There were significantly lower numbers of section 76 bills constituting 17 percent of the bills processed by the Third Parliament and an average of three bills a year. The NCOP has proposed more amendments to ordinary bills affecting provinces compared to any other bills, constituting 79 percent. The NCOP followed a four week cycle when considering section 76 bills. Furthermore, the NCOP has more authority on section 76 bills and accommodates the interests of the provinces by requiring provincial mandates. In addition, the head of a provincial delegation will vote on behalf of the relevant province.²⁰²

Similar to the First Parliament, there were more section 76 bills introduced in the NA than in the NCOP. This is due to the more stringent process for passing a section 76 bill if it is introduced in the NCOP. This becomes a difficult process for the executive authority that has introduced the bill, hence it is easier and frequently practiced that the bill is introduced in the NA even though it directly affects the provinces.

²⁰²S 65 Constitution.

The NCOP proposed both grammatical and substantial amendments to section 76 bills. Thus, the NCOP has fulfilled its constitutional mandate of representing the interests of provinces in the national legislative process as guided by the Constitution and other legal frameworks. The NCOP has demonstrated its relevance and represented the interests of provinces on bills affecting provinces. The NCOP has played a significant role with regard to section 76 bills.

The money bills accounted for 12 percent which is an average of two bills a year. Those bills amending the Constitution formed two percent of bills processed by Parliament, averaging one bill per year.²⁰³ The Money Bills Amendment Procedure and Related Matters Act 9 of 2009 only came into operation 16 April 2009, almost at the end of the Third Parliament. Thus the NCOP could not play a role in terms of money bills.



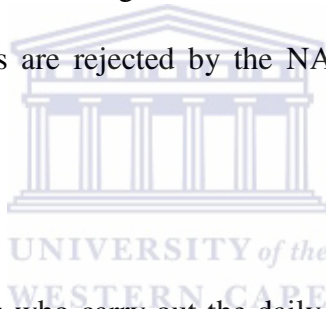
4. RECOMMENDATIONS

On section 74 bills, the NCOP must carefully monitor its consultative process especially in representing the interests of provinces. This will be achieved by the provincial legislature conducting a thorough consultation process with its citizens especially on matters of cross boundaries.

On section 75 bills, the NCOP should determine the role it seeks to play in section 75 bills. It could either not consider these bills or focus its energy on assigning limited resources to section 76 bills. Alternatively, the NCOP could act as a review house on those section 75 bills that require more input on aspects that were missed during the NA process.

²⁰³Figure 3.

- (i) On section 76 bills introduced in the NCOP, the role of the NCOP should be strengthened by requiring the executive authority to introduce more section 76 bills in the NCOP. This will grant the NCOP more authority on its proposed amendments and not be overridden by the NA's special majority should there be disagreements between the two houses.
- (ii) The electoral process of South Africa should be reviewed with a view to granting the delegates of the NCOP greater political power to represent its electorate. This change would enhance the political authority of the NCOP so that it would not fear being recalled by the provincial legislatures when they lack confidence in the NCOP or when its amendments are rejected by the NA with a special majority on bills affecting provinces.
- (iii) The permanent delegates who carry out the daily functions of the NCOP should be strategically located to perform the NCOP's core function of representing the interests of provinces without duplicating the work of the NA. The NCOP should re-prioritise its work and limit its committees to focus on issues of provincial competence. The NCOP committees should reflect the issues of provincial competence and the debates in the house should be focused on provincial matters. This would give the NCOP an opportunity to initiate its own legislation to exercise the full authority vested in it by the Constitution because currently it is still the executive authority that brings legislation to Parliament.



An in-depth analysis should be provided to shed light on the constitutional mandate of the NCOP of representing provincial interests. As mentioned earlier there is no uniform identification of what provincial interests are and thus no common understanding of what this implies. This is something that should be explored in order to provide a full assessment of whether the NCOP has indeed fulfilled its constitutional mandate.



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