

Chapter 17

National Legislative Authority

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17.1 Introduction *

This chapter explores the inner dynamics and the external effects of the National Legislature. The National Legislature occupies a critical space in South Africa's constitutional democracy. It embodies the realisation of the long and bitter struggle for liberation as made manifest by universal representation. It constitutes, at least in form, the primary driver of democratic rule. The Constitution also envisages a legislature that will make good the basic law's many promises. Yet, Parliament — precisely because of its vast powers and popular mandate — often poses the greatest threat (of the three branches of government) to hard won constitutional rights.

With these dangers in mind, the Final Constitution carefully calibrates the need to afford Parliament the necessary power to discharge its constitutional mandates, while cabining those same powers in a manner designed to prevent overreach and abuse. Those limits take a number of forms — most obviously the Bill of Rights and the assignment of certain powers to other spheres of government and organs of state. Parliament is also constrained by the procedures that it must follow in passing laws. Only laws that emerge from procedures clearly delineated in the Constitution are valid. These procedures go beyond purely formal niceties. They give life to forms of participatory democracy and direct democracy expressly contemplated by the Constitution. They likewise entrench our commitment to the rule of law.

Understanding how South Africa's Parliament manages to accomplish these various ends while remaining within constitutional confines first requires a somewhat detailed exploration of how it functions. This chapter cannot, within the space afforded, provide an exhaustive account of how (and how well) Parliament discharges its national legislative authority. To fully understand how Parliament acquits itself one would need to examine the basic principles of democracy from which it draws support,¹ the election of its members,² and the manner in which it shares power with the coordinate branches of national government,³ the provinces,⁴ and local government.⁵ One would be obliged to traverse the express

* The authors wish to thank Steve Budlender for use of material from the first iteration of this chapter. We have drawn extensively from Steve's work — particularly in §§ 17.2, 17.3 and 17.5. We deeply appreciate his generosity in allowing us to take some of the credit for his excellent efforts. However, all the positions expressed in this chapter — and any errors — are ours alone.

1 T Roux 'Democracy' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 10.

2 G Fick 'Elections' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 29.

3 S Seedorf & S Sibanda 'Separation of Powers' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 12.

substantive limits⁶ on Parliament's powers to make laws in addition to the implicit limits⁷ that flow from the aforementioned relationships and principles. Because these concerns are dealt with in detail elsewhere in this book, we engage them largely in passing. The chapter focuses primarily on the composition of Parliament, the interaction between its two houses, the procedures it follows to pass laws, how it regulates its internal proceedings and some of the more procedural limits on its powers.

§ 17.2 sets the stage by describing the make-up of Parliament and the interaction between the National Assembly ('NA') and the National Council of Provinces ('NCOP'). In § 17.3 we describe in detail — and with diagrammatic representations — how Parliament passes each type of law within its power. § 17.4 initiates the daunting task of considering the constitutional limits on Parliament's power by examining this surprisingly complex question: At what stage in the legislative process can litigants challenge legislation? Once we have established when a challenge can be brought, we examine the types of challenges that can be mounted. §17.5 provides an overview of the range of substantive challenges available: federalism, fundamental rights, extra-territoriality, separation of powers, delegation and legality constraints. The next section — § 17.6 — discusses oft-litigated and now well-ventilated procedural limits on Parliament's powers: public participation and tagging. The penultimate section asks some questions about the internal workings of Parliament. What are the limits of its rule-making power? And, what happens when Parliament breaks its own rules? Finally, we consider the role of the primary players in the legislative process: political parties.

17.2 Composition of Parliament

South Africa has a bicameral Parliament consisting of the NA and the NCOP. The NA 'is elected to represent the people'⁸ while the NCOP 'represents the provinces to ensure provincial interests are taken into account in the national sphere of

4 T Madlingozi & S Woolman 'Provincial Legislative Authority' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 19; C Murray & O Ampofo-Anti 'Provincial Executive Authority' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 20; V Bronstein 'Legislative Competence' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2005) Chapter 15; V Bronstein 'Conflicts' S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 16.

5 N Steytler & J De Visser 'Local Government' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 22; S Woolman & T Roux 'Cooperative Government' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, RS2, July 2009) Chapter 14.

6 All the chapters in this four volume treatise that cover substantive provisions of the Bill of Rights fall into this category.

7 F Michelman 'Legality, the Rule of Law and the Supremacy of the Constitution' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 11.

8 FC s 42(3).

government'.⁹ This section details how both houses are constituted, and how they interact with each other. We first discuss each house in general terms, then consider the relationship between the two, before finally looking in more detail at membership of, and defections from, both houses.

(a) The National Assembly

The NA is the first House of Parliament and the House to which the national executive is accountable.¹⁰ The Constitution provides that it must consist of between

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350 and 400 members elected by an electoral system based on a national common voters roll and producing, in general, proportional representation.¹¹

Decisions by the NA are generally decided by majority vote.¹² The quorum of the NA is a majority of its members when a vote is taken on a Bill and one-third of the members in most other matters.¹³

The NA is the primary legislative power in Parliament.¹⁴ It can legislate over the objections of the NCOP: (1) by a simple majority if the legislation does not affect provincial interests¹⁵ and (2) by a two-thirds majority if the legislation does affect provincial interests.¹⁶ It can also veto any legislation passed by the NCOP.¹⁷ Members of the NA and committees of the NA can prepare and introduce in the NA any Bill other than a money Bill.¹⁸

9 FC s 42(4).

10 Constitution of the Republic of South Africa, 1996 ('Final Constitution' or 'FC') s 55(2). If the National Assembly passes a vote of no confidence in the President and the Cabinet, the President and other members of the Cabinet must resign. The national executive is not accountable to the National Council of Provinces. Compare FC s 55(2) with FC s 68.

11 FC s 46(1). See also Electoral Act 73 of 1998.

12 FC s 53(1)(c). The special majorities required for amendments to the Constitution are discussed at § 17.2(a) *infra*.

13 FC ss 53(1)(a) and (b).

14 See § 17.2 *infra* for discussion of the national legislative process.

15 FC s 75.

16 FC s 76(1) and (2).

17 FC s 76(2)(i).

18 FC s 55(1)(b) and s 73(2). Only the Minister of Finance may introduce a money Bill in the Assembly.

The NA is chaired by the Speaker.¹⁹ The Speaker is the representative and spokesperson of the Assembly in its collective capacity.²⁰ The Speaker may therefore give binding undertakings on behalf of the NA. Such undertakings may even embrace the expenditure of moneys in relation to the legislative process.²¹ Though the Speaker may be removed by a resolution of the NA,²² the Speaker must not bow to political pressure and is 'required by the duties of his office to exercise, and display, the impartiality of a judge.'²³

Section 57(1) of the Constitution gives the NA the power to determine its internal arrangements and procedures and to make rules and orders concerning its business. The scope of these rules and their relationship to the constitutional text has already been the subject of litigation.²⁴ Section 57(2) requires that the rules of the NA provide *inter alia* for the establishment of committees and requires that minority parties be allowed to participate on these committees in a manner consistent with

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democracy.²⁵ For these reasons, the rules of the Assembly provide that parties are to be represented on the committees in substantially the same proportion as they are represented in the NA²⁶ and that, as far as possible, each party is entitled to at least

19 FC s 52. Note that the section provides also for an office of Deputy Speaker.

20 *Gauteng Provincial Legislature v Kilian* 2001 (2) SA 68 (SCA), 2001 (3) BCLR 253 (SCA) ('*Kilian*') at para 26.

21 *Ibid* at para 29. The SCA held that the Speaker of the Gauteng Provincial Legislature had the power to give an undertaking to minority political parties that the Legislature would cover the legal costs incurred in referring a pending bill to the Constitutional Court.

22 FC s 52(4).

23 *Kilian* (*supra*) at para 30.

24 *Speaker of the National Assembly v De Lille & Another* 1999 (4) SA 863 (SCA), 1999 (11) BCLR 1339 (SCA) ('*De Lille*'). See the discussion at § 17.7(a) and (d) *infra*.

25 FC s 57(2)(b). See *Democratic Alliance & Another v Masondo NO & Another* 2003 (2) SA 413 (CC), 2003 (2) BCLR 128 (CC), [2002] ZACC 28 ('*Masondo*') at para 18 (Constitutional Court held that the 'purpose of these provisions is to ensure that minority parties can participate meaningfully in the deliberative processes of parliament.') For comment on *Masondo*, see T Roux 'Democracy' in S Woolman & M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 10. Section 57(2)(d) provides for the recognition of the leader of the largest opposition in the Assembly as the "Leader of the Opposition". There is nothing in the Constitution that suggests that this requirement has anything but symbolic meaning.

26 This general rule does not apply to those committees where a specific composition is prescribed by the Rules. NA Rule 125(1). Note that, generally, parties appoint their members to sit on particular committees. NA Rule 126. Therefore in practical terms, the majority party will be able to control the election of the chairperson of any committee. See NA Rule 129.

one representative in each committee.²⁷ Meetings of the NA's committees are generally open to the public.²⁸

The committees contemplated by s 57 include portfolio committees. The portfolio committees play a crucial role in Parliament's legislative and oversight functions.²⁹ They are responsible for the detailed consideration and debate of Bills after their first 'reading' and are also the institutions to which public comment on Bills is usually addressed. The portfolio committees also play an oversight role by monitoring the performance of members of the national executive and their particular portfolios. The NA's committees also have the powers to summon any person to appear before them to give evidence or to produce documents and the power to require organs of state to report to them.³⁰ Through the judicious use of these powers the committees can be important tools for responsible, accountable and transparent government.

(b) The National Council of Provinces

The second House of Parliament is the NCOP. The NCOP, as its name suggests, aims to give the provinces representation in the national legislative process. Its composition, powers and processes were designed to offer more effective national representation for provincial interests than was provided by the Senate under the Interim Constitution.³¹

Although the primary function of the NCOP is legislative, it has the secondary role of providing a national forum for consideration of issues affecting provinces.³² The latter role distinguishes the NCOP from the NA. Another important

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difference between the Houses is that the NCOP is not an organ of responsible government. The national executive is accountable to the NA and not to the NCOP.³³

(i) Composition and electoral system

The NCOP consists of nine provincial delegations of ten members each.³⁴ The delegates are selected by the provincial legislatures on the basis of party political

27 NA Rule 125(2).

28 NA Rule 152.

29 See NA Rules 199-203. The equivalent NCOP committees are the select committees. See NCOP Rules 151-5.

30 FC s 56 and NA Rule 138. The NCOP committees have similar powers. See FC s 69 and NCOP Rule 103.

31 Constitution of the Republic of South Africa Act 200 of 1993 ('Interim Constitution' or 'IC'). See *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC), [1996] ZACC 26 ('*First Certification Judgment*') at paras 318-33, particularly para 331.

32 FC s 42(4).

33 Compare FC s 55(2) with FC s 68.

proportional representation.³⁵ Each delegation has six permanent members:³⁶ however, even these members are subject to recall by the party which nominated them if they lose the confidence of the provincial legislature.³⁷ The balance of the delegation is composed of four special members. These special members of the provincial legislature are sent to participate in particular NCOP business.³⁸ With one exception,³⁹ voting within the NCOP takes place by delegation. Each provincial delegation casts one vote in accordance with a provincial mandate determined by the provincial legislature.⁴⁰ A resolution requires the votes of five provinces to be adopted.⁴¹ This process attempts to subordinate party allegiance to allegiance to the province as a whole.⁴² The purpose of the voting procedure is to enhance the representation of provincial interests within the NCOP and to prevent the

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- 34 FC s 60(1). Provision is made in FC s 67 for a tenth delegation representing local government to participate in the deliberations of the NCOP when local government matters are discussed. The local government delegation does not have voting rights.
- 35 FC s 61(1), read with Part B of Schedule 3, sets out the formula for determining the representation of parties in the provincial delegations. Item 7 of Schedule 6 specifies the number of special delegates and permanent delegates to which the respective parties are entitled in each province. Item 7 applies only for the duration of the term of office of each provincial legislature. Once a new legislature is elected the distribution of special and permanent delegates will be governed by national legislation. See FC s 61(2)(a).
- 36 The presence of permanent delegates in the NCOP serves an important function by providing a continuous provincial political presence in Parliament and prevents the legislative process from being taken over entirely by both civil servants and national political interests. By contrast, the German Bundesrat has no permanent delegates and tends to be run by civil servants. For a discussion of the strengths and weaknesses of the NCOP as a mechanism for intergovernmental relations, see S Woolman & T Roux 'Co-operative Government and Intergovernmental Relations' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, RS 1, July 2009) Chapter 14.
- 37 FC s 62(4)(c).
- 38 FC s 60(2)(a).
- 39 Where the NCOP votes on legislation that does not relate to provincial matters, there is no delegation vote and individual members cast separate votes. FC s 75(2).
- 40 FC s 65(1)(a). Section 65(2) requires Parliament to pass national legislation that will provide a uniform procedure by which provincial legislatures will mandate delegations to cast their votes. That legislation — the Mandating Procedures of Provinces Act 52 of 2008 — is discussed in § 17.2(b)(ii) below.
- 41 FC s 65(1)(b).
- 42 It also means that the presence in the NCOP of individual members of provincial delegations is frequently unnecessary. Hence there is no requirement that a minimum number of members of the Council must be present before votes can take place. By contrast, FC s 53(1)(b) requires the presence of at least a third of the members of the National Assembly before a vote can be taken on any issue and an actual majority of all members for other votes.

Council from becoming a second House of Assembly in which the national political party Whip prevails over provincial concerns.⁴³

(ii) The National Council of Provinces and the legislative process

The NCOP exercises a veto over certain constitutional amendments.⁴⁴ The ordinary legislative powers of the NCOP are strongest with respect to legislation affecting the provinces.⁴⁵ Where there is a dispute between the NCOP and the NA regarding such legislation, mediation between the two houses takes place. Unless a settlement is reached, the NA can pass the legislation only with a two-thirds majority.⁴⁶ Where there is a dispute between the NCOP and the NA regarding other legislation, no mediation takes place and the NA is free to enact the legislation by a simple majority.⁴⁷

The different powers of the NCOP with respect to legislation on provincial matters and other legislation are reflected in different legislative processes within the NCOP. The default process in the NCOP — which applies to 'provincial' legislation and constitutional amendments — involves the execution of a provincial mandate, with voting taking place by delegation and not by member.⁴⁸ It is for that reason that, in its *Second Certification Judgment*, the Constitutional Court described the NCOP as: '[a] council of provinces and not a chamber composed of elected representatives. Voting by delegation reflects accurately the support of the different provincial legislatures. In this manner the provincial legislatures are given a direct say in the national law-making process through the NCOP.'⁴⁹

During the certification process, the system of mandated voting was challenged as failing to comply with Constitutional Principle ('CP') XIV. CP XIV required minority parties to participate in the legislative process 'in a manner consistent with democracy.' Because each province only has one vote in the NCOP, the challengers contended that minority parties' voices would not be heard. The Constitutional Court rejected the complaint, noting that minority parties would be fully heard in the NA. The Court also held that, '[g]iven the purpose of the NCOP, which is to involve the

43 This usurpation of provincial prerogatives was perceived to have been one of the failings of the Senate under the Interim Constitution. See *First Certification Judgment* (supra) at para 320 (Counsel for the Constitutional Assembly described the Senate as 'a mirror image of the National Assembly'.)

44 See § 17.3(a) infra.

45 This category encompasses all of the matters in respect of which the NCOP passes legislation in terms of s 76. See § 17.3(b) infra.

46 See § 17.3(b) infra.

47 See § 17.3(c) infra.

48 FC s 65(1).

49 *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996 1997 (2) SA 97 (CC), 1997 (1) BCLR 1 (CC), [1996] ZACC 24 ('Second Certification Judgment')* at para 61.

provinces in the enactment of certain legislation and to provide a forum in which provincial interests can be advanced, the method of voting is not inappropriate.⁵⁰

Because the vote of the provincial delegation is determined by a decision of the provincial legislature, there is less need for a substantial committee process in the

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Council itself on 'provincial' legislation.⁵¹ The mandated nature of the legislative process on Bills involving provincial matters also implies that there is limited scope for debate over such Bills in the Council as a whole. For the purposes of public accountability and transparency, it is appropriate for delegations to give detailed explanations in Council of the reasons for their vote on Bills involving provincial matters.⁵² These recommendations should, however, be distinguished from debating the merits of the Bill. Such debate would, for the most part, be irrelevant to the legislative process because delegates are voting on the basis of provincial mandates.

The Constitution requires an Act of Parliament that provides a uniform procedure for provincial legislatures to confer authority on their delegations to cast votes on their behalf.⁵³ This legislation was finally passed in 2009. Unfortunately, the Mandating Procedures of Provinces Act ('Mandates Act')⁵⁴ is not a model of statutory clarity. It distinguishes between four types of mandates: negotiating, final, legislative and voting.

First, a negotiating mandate contains the instructions the province's delegation must follow when the Bill is negotiated in committee and may include proposed amendments to the Bill.⁵⁵ Negotiating mandates are conferred by committees of the provincial legislature and are compulsory when an NCOP committee considers a Bill.⁵⁶

50 *First Certification Judgment* (supra) at para 227.

51 One possible NCOP committee function would be to summon the Cabinet member promoting the Bill to give answers to questions on the Bill where they are required. The answers could then be used to inform any provincial debate on the Bill. Provincial portfolio committees may not have the power to require the attendance of national Ministers (FC s 115 is open to conflicting interpretations in this regard). NCOP committees do. See FC s 66(2).

52 The NCOP's presiding officer may, on request, allow each province to give a declaration explaining the province's vote. NCOP Rule 71(b).

53 FC s 65(2).

54 Act 52 of 2008.

55 Mandates Act s 1.

56 Mandates Act s 5, which reads: 'A committee designated by a provincial legislature must in accordance with the format prescribed in Schedule 1 confer authority on its provincial delegation to the NCOP of parameters for negotiation when the relevant NCOP select committee considers a Bill after tabling and before consideration of final mandates, and may include proposed amendments to the Bill.'

Second, a final mandate tells the delegation how to vote on the Bill in committee.⁵⁷ They are conferred by the provincial legislature, and are mandatory for decisions on Bills.⁵⁸

Third, the Act provides two complementary (and somewhat conflicting) definitions of a 'legislative mandate'. According to the definitions section, a legislative mandate is 'the conferral of authority by a provincial legislature on its provincial delegation to the NCOP to cast a vote on a question contemplated in [FC ss 64, 74, 76 or 78].'⁵⁹ Section 7 indicates that a legislative mandate includes both a negotiating and a final mandate, and is required for decisions under FC ss 74 and 76.⁶⁰ The best

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interpretation of the definition read with s 7 seems to be that a combination of negotiating and final mandates is required when a delegation votes on a s 74 or s 76 question in committee. Presumably, both mandates must be conferred simultaneously. The omission of FC ss 64 and 78 from the list in s 7 is difficult to explain. The only plausible explanation is that a legislative mandate is permissible, but not required, for those decisions.

Fourth, while the negotiating, final and legislative mandates all apply to votes in committee, the voting mandate conveys the province's vote for a question in an NCOP plenary session. It must be conferred by the provincial legislature.⁶¹ To avoid interminable consultations between the provincial legislature and its delegation, s 8(2) provides: 'If no matter arises from the deliberations of the NCOP select committee when considering final mandates which may necessitate consideration by a provincial legislature, the provincial delegation to the NCOP must table its province's final mandate in the NCOP plenary as that province's voting mandate.'

In addition to categorising the types of mandates, the Mandates Act also sets out basic, formal requirements that all mandates must meet to be valid.⁶² Presumably, a mandate that does not meet these conditions will be invalid. But it remains unclear what will happen if the NCOP acts on what later turns out to have been an invalid

57 Mandates Act s 1.

58 Mandates Act s 6, which reads: 'A provincial legislature must confer authority on its provincial delegation to the NCOP to cast a vote when the relevant NCOP select committee considers a Bill prior to voting thereon in an NCOP plenary.'

59 Mandates Act s 1. FC s 64 deals with votes for the Chairperson and Deputy Chairperson of the NCOP. FC s 78 concerns decisions of the Mediation Committee.

60 Mandates Act s 7 actually refers to FC ss 74(1)(b), 74(2)(b), 74(3)(b), 74(8), rather than s 74 generally. However, those specific subsections are all the parts of FC s 74 that require a vote by the NCOP, so it can fairly be replaced with a reference to FC s 74 generally.

61 Mandates Act s 8(1), which reads: 'A provincial legislature must confer the authority on the head of the provincial delegation to the NCOP, or a delegate designated by the head of the delegation, to cast a vote in an NCOP plenary.'

62 Mandating Act s 3 (A mandate must: (a) indicate the name and number of the bill; (b) indicate how the province votes; (c) be signed by the Speaker of the provincial legislature or a delegate; and (d) be addressed to the Chairperson of the NCOP or a delegate.)

mandate. We discuss the question of failures to comply with internal procedures generally in the section on the Internal Regulation of Parliament.⁶³

However, the Mandates Act is vague on an even bigger question: How must provincial legislatures determine their mandate? Negotiating mandates must be conferred by committees of the provincial legislatures, while final, legislative and voting mandates come from the provincial legislatures themselves. But the Act allows the provinces to decide what process they will follow to confer the non-negotiating mandates. Are provinces required to have a plenary vote, or may they delegate the function — through their rules or practice — to a committee or the speaker? Can provinces adopt different requirements for different types of questions? The only constitutional limitation, in our view, is that a question under s 74(8) must be decided by a plenary vote. Given this omission, the Mandates Act may not actually fulfil its constitutional purpose to 'provide for a uniform procedure in terms of which provincial legislatures confer authority on their delegations to cast votes on their behalf.' The actual mechanism for conferring authority is left to the provinces. The Mandates Act only regulates the form in which that authority must be expressed in the NCOP.

The mandating procedure has been the topic of litigation several times in the Constitutional Court. All of these cases predated the Mandates Act. However, their disposition by the Constitutional Court remains illustrative of the Court's reluctance to decide some difficult issues. In *United Democratic Movement*

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& *Others v President of the RSA & Others*,⁶⁴ the applicants attempted to rely on the failure of some of the provincial delegations properly to confer and present their mandates in order to challenge the validity of one of the Acts at issue in the case.⁶⁵ The respondents, in turn, contended that a court was not competent to enquire into compliance with the NCOP rule that governed mandates; only the NCOP was competent to determine compliance with its internal rules and procedures so long as no violation of the Constitution was alleged.⁶⁶ The Constitutional Court in *United Democratic Movement* ducked this question, presumably because the Act in question was declared invalid on other unrelated procedural grounds.

In *President of the Republic of South Africa & Others v Quaglini* the applicants argued that South Africa's extradition treaty with the United States of America was invalid because the mandates in the NCOP had not been properly conferred.⁶⁷ In terms of FC s 231(2), treaties must be approved by resolution in both legislative houses.⁶⁸ The Court avoided deciding the mandates issue for three procedural reasons. First, the applicants had not joined the speakers of the provincial

63 § 17.7 below.

64 *United Democratic Movement & Others v President of the Republic of South Africa & Others* 2003 (1) SA 495 (CC), 2002 (11) BCLR 1179 (CC), [2002] ZACC 21 ('*United Democratic Movement*').

65 Loss or Retention of Membership of National and Provincial Legislatures Act 22 of 2002.

66 In making this argument, the respondents relied on FC ss 70(1)(a) and 71(2) read with ss 36 and 37 of the Powers and Privileges of Parliament Act 91 of 1963.

67 2009 (4) BCLR 345 (CC), [2009] ZACC 1.

legislatures.⁶⁹ Second, the complaint was inordinately delayed.⁷⁰ Finally, the Court held that a bald allegation that mandates were not conferred was insufficient. An applicant had to provide some evidence to indicate that the proper procedure had not been followed.⁷¹ These findings serve as important reminders of the procedural hurdles for anybody planning a future mandates challenge.

The only detailed consideration of the role of mandates occurs in *Merafong Demarcation Forum & Others v President of the Republic of South Africa & Others*.⁷² The issue in *Merafong* was whether a provincial delegation to the NCOP could propose an amendment to a s 74(8) Bill amending provincial boundaries. We address that question in more detail later.⁷³ For now, we focus on the Court's comments about the nature of the mandated voting system in the NCOP. Van der Westhuizen J held that '[a]lthough the NCOP fulfils an important function in the protection of provincial interests, there is no scope for debate and for substantive amendments as far as bills altering provincial boundaries are concerned.'⁷⁴ Citing an earlier passage from the original iteration of this chapter (which we retain),⁷⁵ he argued that

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'[t]he reason is of course the mandated nature of the process. Delegates to the NCOP vote on the basis of provincial mandates. They cannot agree to support an amendment which they have not been mandated by their provincial legislatures to support.'⁷⁶

This conclusion cannot possibly be correct. What Steve Budlender was (correctly) pointing out in the quoted passage is that the mandated nature of the process makes it pointless for the delegates to engage in substantive debate with each other about a Bill. For ss 74 and 76 Bills the substantive debate occurs through sharing and altering mandates. The NCOP is merely a mechanism through which the provincial legislatures negotiate with each other: the delegates are merely

68 FC s 231(2) reads: 'An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces'.

69 *Quagliani* (supra) at para 27.

70 *Ibid* at paras 28-29.

71 *Ibid* at para 30.

72 2008 (5) SA 171 (CC), 2008 (10) BCLR 968 (CC), [2008] ZACC 10 ('*Merafong*').

73 §17.3(a) below.

74 *Merafong* (supra) at para 81.

75 S Budlender 'National Legislative Authority' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2005) 17-5 ('Such debate would, for the most part, be irrelevant to the legislative process because delegates are voting on the basis of provincial mandates.')

76 *Merafong* (supra) at para 81.

mouthpieces. But that does not mean that it is pointless to propose amendments to ss 74 and 76 Bills. All it means is that the amendments must be proposed in terms of negotiating or legislative mandates received from the provincial legislatures. Those mandates can propose amendments which the other provinces can accept or reject when they confer their final and voting mandates. *Merafong* evinces a serious misunderstanding or mischaracterisation of the mandating process. The Court should revisit this issue at the earliest opportunity to avoid the potential for stifling meaningful discussion between provinces in the NCOP.

In the case of 'non-provincial' s 75 legislation, the considerations outlined above do not apply because voting within the Council takes place by individual members⁷⁷ and the provincial mandate does not operate.⁷⁸ In the case of such 'non-provincial' legislation, the Constitution also requires that minority parties be allowed to participate in the proceedings of the NCOP and its committees 'in a manner consistent with democracy'.⁷⁹ The meaning of this phrase was considered by the Constitutional Court with reference to s 160(8). Section 160(8) imposes a similar obligation on Municipal Councils.⁸⁰ Langa DCJ, for the majority, held that the 'purpose of these provisions is to ensure that minority parties can participate meaningfully in the deliberative processes of parliament'.⁸¹ O'Regan J (in dissent) contended that the phrase 'implies that the majority must always be able to determine decisions.'⁸²

This requirement does not apply when the NCOP deals with 'provincial' legislation or other matters — in such cases the NCOP rules and orders are required instead to provide for the participation of all the provinces in a manner consistent with democracy and there is, understandably, no reference to minority parties.⁸³

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This distinction has also been reflected in the NCOP rules regarding its select committees. These committees have to deal both with non-provincial matters under s 75 and with matters that affect the provinces. The rules therefore provide that each province is entitled to an equal number of permanent members on each committee⁸⁴ and that each party represented in the NCOP is entitled to proportional representation on the committee or, where this is not possible due to the committee

77 FC s 75(2).

78 FC s 65(2) applies only to those cases where the provincial delegation casts a single vote.

79 FC s 70(2)(c).

80 *Democratic Alliance & Another v Masondo NO & Another* 2003 (2) SA 413 (CC), 2003 (2) BCLR 128 (CC), [2002] ZACC 28.

81 *Ibid* at para 18.

82 At para 61.

83 FC s 70(2)(b).

84 NCOP Rule 154(a).

size, at least one representative on the committee.⁸⁵ Committee decisions on s 75 matters require a simple majority of the votes cast, whereas committee decisions on 'provincial' legislation or other matters require the supporting vote of five provinces.⁸⁶ On matters affecting the provinces, provincial legislatures will, through their committees, facilitate public involvement in their legislative processes in their respective constituencies, making it unnecessary that the same task be undertaken by the NCOP's committees.⁸⁷

(c) Membership and defections

The story of the constitutional regulation of members' defection from political parties is long, complicated and ends where it begins. Under the Interim Constitution, a member of the NA who ceased to be a member of the party that nominated him or her had to vacate his or her seat.⁸⁸ This 'anti-defection'

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provision was kept in place under the Final Constitution⁸⁹ and was unsuccessfully challenged in the *First Certification* proceedings.⁹⁰

In 2002, Parliament passed four Acts,⁹¹ including two constitutional amendments, that aimed to allow defections at national, provincial and local government levels.

85 NCOP Rule 154(b).

86 NCOP Rule 152(2) and (3). Note that these rules also provide that the quorum requirement is different in each of these situations.

87 In *Doctors for Life International*, the Court emphasised the interdependency between the work of the NCOP and the provincial legislatures, and consequently their respective committees. *Doctors for Life International v Speaker of the National Assembly & Others* 2006 (6) SA 416 (CC), 2006 (12) BCLR 1399 (CC), [2006] ZACC 11 ('*Doctors for Life*') at paras 159-163. The Court considered the 'question as to whether the duty of the NCOP to facilitate public involvement in its legislative process may be met through public hearings that are conducted by the provincial legislatures'. It found that functional and practical considerations generally weigh in favour of holding public hearings in the provinces by the provincial legislatures rather than at the seat of the NCOP. The functional advantages include the fact that some members of the provincial delegation in the NCOP are also members of the provincial legislature, able to partake in the facilitation of public involvement at the provincial level. Practically, the Court found it wasteful of the government's limited resources if both the NCOP and provincial legislatures were to hold separate public hearings in the same provinces. However, the Court came short of laying down a hard and fast rule in this regard and held that the 'ultimate question' remains 'whether the provincial interests on the legislation under consideration were taken into account in the national legislative process'. Thus '[w]hether public hearings conducted by provincial legislatures are sufficient to satisfy the obligation of the NCOP under s 72(1)(a) ultimately depends on the facts and the nature of the process of facilitating public involvement that has occurred in the provinces, including the extent to which NCOP delegations therein were involved in and have access to the information gathered during that process.' *Ibid* at para 163. For further discussion of *Doctors for Life*, see § 17.6 below

88 IC s 43(b).

89 FC s 47, which deals with membership of the National Assembly, did not itself contain an anti-defection clause. The anti-defection clause was contained in FC Schedule 6, item 6(3) read with item 23A of Annexure A to Schedule 6, which provided:

(1) A person loses membership of a legislature to which this Schedule applies if that person ceases to be a member of the party which nominated that person as a member of the legislature.

(2) Despite subitem (1) any existing political party may at any time change its name.

The constitutionality of these Acts was challenged in the Constitutional Court in *United Democratic Movement & Others v President of the RSA & Others*.⁹² The Court rejected the bulk of the challenges. It held that the constitutional amendments did not destroy the 'basic structure' of the Constitution⁹³ and that they were not inconsistent with the founding values of the Constitution and the Bill of Rights.⁹⁴ The Court also rejected the contention that the amendment allowing defections at local government level was inconsistent with the Constitution.⁹⁵ The only challenge that the Court upheld was the challenge to the Loss or Retention of Membership of National and Provincial Legislatures Act ('Membership Act'). This Act, though it amended the transitional provisions of the Final Constitution, had been passed by the procedure for ordinary legislation (s 76(1)) rather than by the procedure for constitutional amendments (s 74(3)). The Court recognised that

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(3) An Act of Parliament may, within a reasonable period after the new Constitution took effect, be passed in accordance with section 76(1) of the new Constitution to amend this item and item 23 to provide for the manner in which it will be possible for a member of a legislature who ceases to be a member of the party which nominated that member, to retain membership of such legislature.

(4) An Act of Parliament referred to in subitem (3) may also provide for—

(a) any existing party to merge with another party; or

(b) any party to subdivide into more than one party.

90 *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC), [1996] ZACC 26 ('*First Certification Judgment*') at paras 182-7. The Court rejected submissions that, by submitting legislators to the authority of their parties, the anti-defection clause: was inimical to accountable, responsive, open, representative and democratic government; that universally accepted rights and freedoms, such as freedom of expression, freedom of association, the freedom to make political choices and the right to stand for public office and, if elected, to hold office, are undermined; and that the anti defection clause militates against the principles of 'representative government', 'appropriate checks and balances to ensure accountability, responsiveness and openness' and 'democratic representation'.

91 Constitution of the Republic of South Africa Amendment Act 18 of 2002, Constitution of the Republic of South Africa Second Amendment Act 21 of 2002, Local Government: Municipal Structures Amendment Act 20 of 2002 and Loss or Retention of Membership of National and Provincial Legislatures Act 22 of 2002.

92 2003 (1) SA 495 (CC), 2002 (11) BCLR 1179 (CC), [2002] ZACC 21 ('*United Democratic Movement*' or '*UDM*').

93 *Ibid* at para 17. The Court found that it did need to decide whether the 'basic structure doctrine' formed part of South African law. See § 17.5(g) *infra*.

94 *United Democratic Movement* (*supra*) at para 75. The Court therefore concluded that there had been no need to pass the amendments in accordance with the requirements of FC s 74(1) or (2). The amendments had been correctly passed in accordance with FC s 74(3). See § 17.3(a) *infra*.

95 *United Democratic Movement* (*supra*) at para 84. This was on the assumption that Schedule 6A (which was created by the amendment) had the status of ordinary legislation due to the way it could be amended and could therefore be assessed against the provisions of the Final Constitution.

the Constitution had vested a special power in Parliament to amend these particular transitional provisions of the Constitution by an ordinary Act of Parliament, rather than by a constitutional amendment.⁹⁶ However, it held that the proviso that the Act had to be promulgated 'within a reasonable period after the new Constitution took effect' meant that the special power had lapsed.⁹⁷ The Membership Act was consequently declared invalid on procedural grounds. Following this decision, Parliament duly passed a constitutional amendment⁹⁸ to replace the Membership Act. This regime — in place until 2009 — permitted defections at national, provincial and local levels, but only during specified periods and under certain conditions.

In 2008, Parliament passed the Fourteenth and Fifteenth Constitutional Amendment Acts that repealed *all* the 2002 floor-crossing provisions. The amendments came into force on 17 April 2009. The position on defections and floor crossing now is precisely what it was before the 2002 amendments: if a member leaves her political party, she loses her seat. Period. The seat belongs to the party, not the member.

Although we have ended where we began, the floor-crossing saga tells us something important about the nature of our democracy: it is flexible and dynamic. The 'multi-party representative' democracy envisioned in the Constitution is capable of embracing several different variations. At the very least, proportional representation is compatible with a system that links seats partly to individual members rather than entirely to parties.⁹⁹

(d) The Relationship between the NA and the NCOP¹⁰⁰

It is easy to see the NCOP as the less important house of Parliament. It has fewer powers and can, on most issues, be overridden by a sufficiently determined NA. This description is not inaccurate: where both Houses and the majority of provinces are dominated by a single party, the NCOP tends to play a secondary role.

Despite the actual place of the NCOP in our legislative process, the Constitutional Court has developed and applied a nuanced conception of the NCOP's place in the constitutional firmament.

96 See *United Democratic Movement* (supra) at para 104 and the provisions of item 23A(3) of Annexure A to Schedule 6 of the Final Constitution.

97 Ibid at para 105 (The Court held that 'In determining what is a reasonable period ... it is necessary to have regard to all relevant facts and circumstances. The relevant considerations depend in the first instance upon the nature of the task that has to be performed, and in the second instance upon the object for which the time is given. Here the task to be performed was the passing of legislation to modify transitional provisions that had a limited life... . Having regard to all the circumstances, we are unable to conclude that an amendment passed more than five years after the Constitution came into force, to change a provision which had only another two years to run, was passed within a reasonable period.')

98 Constitution of the Republic of South Africa Amendment Act 2 of 2003.

99 For a critique of *UDM*, see T Roux 'Democracy' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 10; G Devenish 'Political Musical Chairs — The saga of Floor-crossing and the Constitution' (2004) 15 *Stell LR* 52.

100 For an excellent discussion on the role of the NCOP, see C Murray & R Simeon 'From Paper to Practice: The National Council of Provinces after its First Year' (1999) 14 *SA Public Law* 96.

Its role is both unique and fundamental to the basic structure of our government. It reflects one of the fundamental premises of our government, which sees national, provincial and

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local governments as 'spheres within a single whole' which are distinctive yet interdependent and interrelated. The NCOP ensures that national government is responsive to provincial interests while simultaneously engaging the provinces and provincial legislatures in the consideration of national policy. From this perspective, the NCOP plays a pivotal role 'as a linking mechanism that acts simultaneously to involve the provinces in national purposes and to ensure the responsiveness of national government to provincial interests.'¹⁰¹

That account certainly reflects a constitutional ideal. But when eight of the nine provinces and the NA are controlled by the same political party, the NCOP will always fade into the background. We discuss the consequences of the ANC's dominance of the political scene in more detail in § 17.8(b) below. For now, we note that the role of the NCOP and the relationship between the two Houses will depend on how political power is actually distributed.

17.3 The National Legislative Process

The Constitution creates four different legislative processes: amendments to the Constitution, Bills affecting provinces, Bills not affecting the provinces, and Money Bills. The processes (except that for Money Bills) are illustrated in diagrammatic form in Figures 17.1, 17.2, 17.3 and 17.4.¹⁰² A narrative description of the three processes follows below. After we have described each process, we consider the final step that all forms of legislation must take: assent by the President. Lastly, we look at the possibility for the President or Members of Parliament ('MPs') to refer legislation to the Constitutional Court.

Before we describe the different processes, we must raise (and immediately bracket) the question of 'tagging'. Tagging is the determination of which process applies to a bill. Tagging constitutes the first step in the legislative process. Voting can only commence once Parliament knows what type of Bill has been tabled. Tagging is dealt with in full in § 17.6(b) below.

(a) Bills amending the Constitution

There are several different types of constitutional amendments, each with slightly different requirements. We first address the procedures that apply to all amendments. Next, we consider the different variations and the problems each raises. Lastly, we identify some general difficulties regarding the NCOP's participation in amending the Constitution.

101 *Doctors for Life* (supra) at para 79 quoting C Murray & R Simeon 'From Paper to Practice: The National Council of Provinces after its First Year' (1999) 14 *SA Public Law* 96, 98 and 101 (footnotes omitted) (The Court noted that the NCOP was modeled on the *Bundesrat* in Germany. 'Like the NCOP, the *Bundesrat* represents the interests of the *Länder*, which in this context are equivalent to the provinces in our country, in the national government. ... The members of the *Bundesrat* are members of the state governments and are appointed and subject to recall by the states. They serve in the council as representatives of the *Länder*. The German Constitution provides that the *Länder* shall participate, through the *Bundesrat*, in the national legislative process.' *Doctors for Life* (supra) at para 80.)

102 Figures 17.1, 17.2, 17.3 and 17.4 are based on diagrams prepared by M Phillips for the Gauteng Legislative NCOP Workshop, October 1996.

Constitutional amendments may only be introduced in the NA.¹⁰³ At least 30 days prior to the introduction of a Bill to amend the Constitution, particulars of the Bill must be published in the *Gazette* for public comment and must be submitted to the provincial legislatures for their views.¹⁰⁴ Any written comments on an amendment Bill received from the public or the provincial legislatures must be tabled in the NA on the introduction of the Bill.¹⁰⁵ An amendment Bill may not include provisions other than constitutional amendments and matters connected with the amendments.¹⁰⁶ The NA considers all Bills to amend the Constitution and (with one exception) may pass them only with a supporting vote of two-thirds of its members.¹⁰⁷

We have identified five types of constitutional amendments:

- (i) Amendments to FC ss 1 or 74;
- (ii) Amendments to the Bill of Rights;
- (iii) Amendments that affect the provinces generally;
- (iv) Amendments that affect a specific province or provinces;
- (v) All other amendments.

The first variation, set out in s 74(1), is an amendment that affects the Constitution's basic principles. The founding provisions of s 1¹⁰⁸ are specially entrenched and may only be amended with a supporting vote of 75 per cent of the members of the NA,¹⁰⁹ and the vote of six of the nine provinces in the NCOP.¹¹⁰ There is an argument developed by the Indian Supreme Court — which we discuss later¹¹¹ — that there are some principles of the Constitution that are so central to the nature of the Constitution that they are un-amendable. The Constitution does not raise this possibility explicitly and any doctrine of that sort would have to be created by the courts.

103 Compare FC s 73(1) and FC s 73(3) read with FC s 76(3). See also Joint Rule 173(b).

104 FC s 74(5).

105 FC s 74(6)(a).

106 FC s 74(4).

107 FC s 74(2) and (3).

108 For more on the founding values, see, C Roederer 'Founding Provisions' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 13.

109 FC s 74(1) provides that amendments to the amendment section itself must be passed with a vote of 75% of the members of the National Assembly.

110 FC s 74(1).

111 §17.5(g) below.

Second, amendments that alter the Bill of Rights must garner the ordinary two-thirds majority in the NA *and* six provincial votes in the NCOP.¹¹²

There is some debate over whether the super-majority of 75 per cent required by s 74(1) applies only when the founding values in s 1 are explicitly amended, or whether it also applies to an amendment to other parts of the Constitution where the proposed amendment is inconsistent with the founding values in s 1. A similar debate could be had about amendments that are inconsistent with — but do not change the language of — the Bill of Rights. In *United Democratic Movement*, the Constitutional Court operated on the assumption that the latter view was correct

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and so the stricter requirements would apply.¹¹³ However, the *UDM* Court expressly left the issue undecided as it was not germane to the disposition of the matter.¹¹⁴

In our view, the Court should, when faced with an appropriate matter, adopt a broader construction of s 74(1). The founding values are rarely used directly. They could be severely undermined if the s 74(1) process could be bypassed by using the less onerous s 74(2) and s 74(3) processes to pass amendments inconsistent with the founding values. The same is true of amendments to Chapter 2. It would subvert s 74(2) if it could be avoided simply by locating amendments that affect the Bill of Rights in other parts of the text of the Constitution.

However, that position needs to be tempered by an additional point made in *United Democratic Movement*. The Court stressed that the Constitution, as amended, had to be read as a whole and its provisions interpreted in harmony with one another.¹¹⁵ Amendments that could be interpreted to be inconsistent with s 1 should, if possible, be read to be consistent with the Constitution. Only if the amended text is not reasonably capable of a harmonious reading should the constitutional amendment have to follow the FC s 74(1)/(2) procedure.

The Court's extant jurisprudence suggests that this more expansive approach relates only to amendments that are inconsistent with the founding values. It will not, and should not, apply to amendments that do no more than influence one's reading of the founding values. In *Premier, KwaZulu-Natal, & Others v President of the Republic of South Africa & Others*¹¹⁶ the Constitutional Court was faced with an argument that amendments to the Interim Constitution that might affect the scope of the legislative and executive powers of the provinces (contained in IC ss 126 and 144) should comply with the special procedures that governed amendments to those two sections. The Court rejected this argument. It held that since the two

112 FC s 74(2).

113 *United Democratic Movement* (supra) at paras 18-20.

114 *Ibid* at para 75.

115 *Ibid* at para 12.

116 *Premier, KwaZulu-Natal, & Others v President of the Republic of South Africa & Others* 1996 (1) SA 769 (CC), 1995 (12) BCLR 1561 (CC), [1995] ZACC 10 ('*Premier, KwaZulu-Natal*').

amendments did not actually amend either s 126 or 144, the procedures in question did not need to be applied.¹¹⁷

In *United Democratic Movement*, the Court also left open the question whether the founding values and Bill of Rights could be amended by inference or whether it is necessary to draw attention to this possibility in s 74(5) notices and to state specifically that the provisions of s 74(1) and (2) are applicable to such amendments.¹¹⁸ To give full effect to the principles and purposes underlying s 74, the latter view is to be preferred.

The third variation, dealt with in FC s 74(3)(b), is amendments that affect the provinces because they: (a) involve the NCOP;¹¹⁹ (b) alter provincial boundaries, powers, functions or institutions;¹²⁰ or (c) amend a provision of the FC that deals specifically with a provincial matter.¹²¹ These amendments have the same requirements

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as those requirements that amend the Bill of Rights: two-thirds in the NA and the votes of six of the nine provinces in the NCOP.¹²² The provisions giving this veto power to the NCOP are not themselves directly entrenched against amendment. However, they are indirectly entrenched: Any amendment of such a provision would be an amendment that affects the powers of the Council and would therefore have to be passed with the support of six provinces in the Council.¹²³

The fourth variation on the s 74 process applies to an amendment covered by s 74(3)(b) and 'concerns only a specific province, or provinces'. In terms of FC s 74(8), the NCOP can only pass those amendments if it has been approved by the provincial legislature(s) of the affected province(s). It is important to note a specific variation on the normal mandate procedure here. As we explained earlier, neither the Constitution nor the Mandates Act specifies how a provincial legislature must confer a mandate. It may do so through a committee, a plenary vote, or some other mechanism. However, when it comes to s 74(8) the Constitution requires 'the provincial legislature' to approve that part of the Bill which affects the province. In our view, this process demands a plenary vote.

117 Ibid at paras 27-8, 43.

118 *United Democratic Movement* (supra) at para 75.

119 FC s 74(3)(b)(i).

120 FC s 74(3)(b)(ii).

121 FC s 74(3)(b)(iii).

122 A Bill amending the Constitution which affects only a specific province or provinces cannot be passed unless it is approved by the legislature or legislatures of the province or provinces concerned. See FC s 74(8).

123 *Ex parte the Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996, 1997 (2) SA 97 (CC), 1997 (1) BCLR 1 (CC), [1996] ZACC 24 ('Second Certification Judgment')* at para 70.

Section 74(8) effectively gives each province a veto over any constitutional amendment that singles them out. 'It is not difficult,' according to Ngcobo J, 'to imagine the purpose of this provision. Its purpose is to ensure that the boundaries of a province are not reduced without its consent. This protects the territorial integrity of a province.'¹²⁴ While it is true that s 74(8) will most often be applicable when provincial boundaries are altered, it is not confined to that arena. It applies whenever provinces are treated differently. An amendment that attempted to reduce the influence of a specific province — or a class of provinces — in the NCOP or to limit their functional areas would be subject to a s 74(8) veto.

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Whether an amendment 'concerns' a province is a more difficult question than it may seem. In *Matatiele II* the Court was confronted with a constitutional amendment¹²⁵ that altered the building blocks that defined the area of provinces from magisterial districts to municipalities.¹²⁶ The amendment also shifted the boundaries of some, but not all, of the provinces. The government argued that s 74(8) should not apply because the change in how provincial territories are defined affected *all* the provinces. The Court roundly rejected this contention:

The provisions of section 74(8) are clear and admit of no ambiguity. They apply where a "Bill ... or *any part of the Bill* concerns only a specific province or provinces." The plain and ordinary meaning of this phrase is that if any part of a proposed constitutional amendment concerns a specific province or provinces only, the provisions of section 74(8) apply. It is sufficient that a part of the proposed constitutional amendment concerns only a specific province or provinces and not other provinces. The fact that the proposed amendment deals with all provinces matters not. What matters is that there are parts of the proposed amendment which concern "only a specific province or provinces" and not other provinces.¹²⁷ (our emphasis.)

While the court certainly arrives at the correct conclusion, its analysis throws up a number of interesting procedural problems. First, how many votes does a province receive when voting on a s 74(8) amendment? In *Matatiele II*, the Court seemed to

124 *Matatiele Municipality & Others v President of the Republic of South Africa & Others (1)* 2006 (5) SA 47 (CC), 2006 (5) BCLR 622 (CC), [2006] ZACC 2 ('*Matatiele I*') at para 60. The Court expanded on this theme in *Merafong Demarcation Forum & Others v President of the Republic of South Africa & Others* 2008 (5) SA 171 (CC), 2008 (10) BCLR 968 (CC), [2008] ZACC 10 ('*Merafong*') at paras 23-24 ('When a constitutional amendment alters provincial boundaries, whole communities may, by the stroke of the proverbial pen, be relocated from one province to another, even though not physically. They may involuntarily end up in another province. ... The fundamental right of a citizen to enter, remain in and reside anywhere in the Republic is also at stake. The attachment of people to provinces in which they live should not be underestimated. The very identity of people may be affected. ... It must be added that the history of South Africa is — sadly — one of the balkanisation of our country, as well as of the separation and the forcible removal and relocation of our people. ...When democracy was about to dawn and a new constitutional dispensation was negotiated, the question of whether South Africa should be a unitary state, or a federation, or a variation of any of these, was hotly debated. The Constitution embodies a carefully crafted balance. ... But our country has nine constitutionally entrenched provinces with inhabitants who may well strongly identify with the province in which they live. Thus the boundaries, powers, or functions of provinces may not easily be altered.')

125 The Constitution Twelfth Amendment Act of 2005.

126 *Matatiele Municipality & Others v President of the Republic of South Africa & Others (2)* 2007 (1) BCLR 47 (CC), [2006] ZACC 12 ('*Matatiele II*').

127 *Matatiele II* (supra) at para 21. The Court endorsed this reasoning in *Merafong* (supra) at para 20.

hold that a province would have two votes: one on the Bill as a whole, and a separate veto on the part of the Bill that affects the province specifically.¹²⁸ However, the Court seemed to retreat from this position in *Merafong*. In dissent, Mosenke DCJ adopted the *Matatiele II* position. In criticising advice given to the Gauteng Provincial Legislature that it could only vote 'aye or nay' on the Twelfth Amendment that would alter Gauteng's boundary by moving part of the Merafong municipality to the North West, he wrote:

[T]his is a misconception of the power and obligation of the Province under the Constitution. The Province could have supported the [Twelfth Amendment] but declined to support that part of the [Twelfth Amendment] relating to the incorporation of Merafong-Gauteng into the North West Province. This is so because the power and duty of a province in relation to the adoption of a constitutional amendment that re-draws its boundary must be distinguished from the power and duty it bears in relation to any other constitutional amendment. ... [I]t could have ... vot[ed] in favour of the [Twelfth Amendment] while declining to support that part of the Bill which affected its boundary. Despite the early counsel, the Legislature thought that the only option it had was to vote 'aye' or 'nay' on the entire Bill. This demonstrates a failure on the part of the Province to appreciate its nuanced duty under the Constitution. The Province had at least two valid legislative options open to it. It could have, at once, achieved the termination of cross-boundary municipalities by supporting the Bill and defeated the re-drawing of its boundary in relation to Merafong.¹²⁹

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Van der Westhuizen J, writing for the majority, disagreed. He held that multiple votes are 'not envisaged by sections 74(3) and (8) of the Constitution which refer to a Bill or the relevant part of a Bill that alters provincial boundaries.'¹³⁰ However, he does not explain why the sections do not allow for multiple votes. Nor does he indicate precisely how the s 74(8) procedure should work. Several possibilities exist. A province might receive one vote, and if it votes against a Bill it may be deemed to have used its s 74(8) veto power. Or, a province which disagrees with a Bill may have an election to either: (a) vote against the Bill, without exercising its veto; or (b) exercise its veto. The only option specifically excluded by the *Merafong* majority is that endorsed by Mosenke DCJ: a vote for the Bill in general, *plus* a veto of the part that affects its boundary. In our view, a province must have a choice to vote against the Bill without using its veto. The province may support the part of the Bill that affects it, but disagree with other parts of it. It should be able to formally express that view.

Second, what are the consequences of a veto? Section 74 is silent about whether a veto stops the entire Bill in its tracks, or whether it only affects that part of the Bill being vetoed, while the rest is passed as is. The Constitution does not provide an answer. The Joint Rules do. As the *Merafong* Court noted, in terms of rule 174, the Bill can proceed without the vetoed portion. However, it must be referred back to the NA. The NA must pass it again, without the vetoed portion.

128 *Matatiele II* (supra) at para 25 ('The legislatures of KwaZulu-Natal and the Eastern Cape were only required to approve those parts of the amendment that concerned them specifically. However, these two provinces were still required to cast their votes on the proposed constitutional amendment as a whole in terms of section 74(3)(b)(ii).')

129 *Merafong* (supra) at para 180.

130 *Merafong* (supra) at para 105.

To complete the taxonomy of constitutional amendments we return to the fifth and final type of constitutional amendment. These Bills do not amend FC s 1, the Bill of Rights, or affect the provinces. These Bills are simply passed by the NA with a two-thirds vote. The NCOP is not required to vote on type five amendments. However, particulars of the Bill must be submitted to the NCOP for public debate at least thirty days before the Bill is introduced in the NA.¹³¹

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Figure 17.1 How the Constitution may be amended (s 74)

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Before we move on from constitutional amendments, we need to address whether the NCOP can propose amendments to Bills amending the Constitution. As we have already noted, unlike FC ss 75 and 76, s 74 is silent on this score. As we explain in more detail in the following sections, where the two houses pass different versions of ss 75 or 76 Bills, the Constitution creates a procedure to settle the dispute.¹³² Strangely, s 74 simply does not seem to contemplate the possibility that the two houses could pass different versions of a Bill.

The consequence of this omission arose squarely in *Merafong*. The applicants argued that the Gauteng Provincial Legislature had acted under the mistaken legal advice that it could not propose an amendment to the Bill that would keep Merafong in Gauteng. They argued that this flawed legal advice rendered the provincial parliament's mandate to its NCOP delegation to support the Bill invalid. To address this challenge, the Court had to decide whether the legal advice was, indeed, wrong. The Court unanimously held that it was not.

Van der Westhuizen J offered three bases for his conclusion. First, he makes the point that s 74 makes no mention of amendments. Second, the fact that the procedure in the NCOP is mandated makes amendments impractical. In the Court's words:

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Although the NCOP fulfils an important function in the protection of provincial interests, there is no scope for debate and for substantive amendments as far as bills altering provincial boundaries are concerned. The reason is of course the mandated nature of the process.¹³³ Delegates to the NCOP vote on the basis of provincial mandates. They cannot agree to support an amendment which they have not been mandated by their provincial legislatures to support.¹³⁴

131 FC s 74(5)(c). Paragraph (c) of FC s 74(5) makes no express provision for the proceedings of the NCOP debate to be tabled in the Assembly when the Bill is considered (compare paras (a) and (b)), but this is probably implicit in s 74(5).

132 For s 75 Bills, the NA can simply pass its own version again. When the Bill concerns the provinces, the houses must seek a solution through a mediation committee, although the NA can ultimately override the provinces' concerns with a two-thirds vote.

133 See S Budlender (supra) at 17-5: 'Such debate would, for the most part, be irrelevant to the legislative process because delegates are voting on the basis of provincial mandates.' (original footnote).

134 *Merafong* (supra) para 80.

Third, rule 174(3) of the Joint Rules of Parliament only makes provision for amendments following a s 74(8) veto which affects part of a Bill. In that case the Bill reverts to the NA which must reconsider the new version — the Bill minus the vetoed portion. The NA may amend the Bill. And the process starts again. The implication, according to the Court, is that there is no space for amendments that do not follow this process.

These reasons, individually and collectively, fail to support the Court's conclusion. The problem is not that they are 'wrong'; they are all technically correct. The problem is that each of the three rationales is too thin to do the work the Court requires.

In respect of the Court's first reason, it is true that the Constitution is conspicuously silent on the issue of amendments to s 74 Bills. But it does not explicitly prohibit them. It is plausible to interpret this silence, as the Court does, as prohibiting amendments. But is there any underlying principle supporting the reading that such amendments are prohibited?¹³⁵ It surely does not serve to enhance any form of democracy. The inability to propose amendments severely restricts the ability of delegations to the NCOP to debate the merits of the amendment. A delegation may be aware of the concerns of other provinces, but if it cannot respond by supporting a change to the legislation that they are considering, then the scope for delegations to inform their provincial legislatures of those concerns and for the provincial legislatures in turn to accommodate those concerns all but disappears. The only option is unattractive: rejecting a Bill altogether. Outright rejection will often not be a real option when most legislation contains a range of provisions, or when it is on an urgent timetable. The *Merafong* rule also renders representatives less able to convey the wishes of their constituents.

The Court's second reason concerned the mandated nature of NCOP voting on s 74 Bills. As we already explained, FC s 65(1) makes a mandated vote the default mechanism for all decisions in the NCOP. Only where the Constitution provides otherwise — as it does, for example, in s 75 for Bills that do not affect the provinces — are votes taken without mandates. The Constitution explicitly contemplates the possibility of amendment within the mandated structure for s 76 Bills, and the Joint Rules explain how that occurs. Is there any reason why amendments are considered eminently practical for ordinary Bills that affect the provinces, but not appropriate for constitutional amendments? No, not one. If

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anything, amendments to our basic law require greater deliberation, participation and more effective representation than ordinary legislation. Those goods are largely what prohibition of amendment denies.

How, then, do we deal with the difference between ss 75 and 76 on the one hand, and s 74 on the other? The best explanation is that the Constitution leaves it up to the various legislative bodies — the NA, the NCOP and the various provincial legislatures — to decide how to deal with amendments to s 74 Bills. That leads us to the most glaring omission in the Court's reasoning with respect to its third reason. The Court inexplicably fails to mention that the Joint Rules and the NCOP's rules make *specific provision* for provincial delegations to propose amendments to s 74

135 For a discussion of this element of *Merafong*, see M Bishop 'Vampire or Prince? The Listening Constitution and *Merafong Demarcation Forum & Others v President of the Republic of South Africa & Others*' (2009) 2 *Constitutional Court Review* 313, 345-347.

Bills in the NCOP.¹³⁶ Rule 224(1)(a) of the NCOP Rules reads: 'After a [s 74] Bill has been placed on the Order Paper but before the Council decides the Bill a member may place amendments to the Bill on the Order Paper.' The rest of NCOP rule 224 and rules 225 and 228 go on to describe in great detail which amendments can be made, how they must be made, and the procedure to follow after amendment. That procedure is largely replicated in Joint Rules 176-179 and involves referral to a mediation committee virtually identical to the procedure followed for a s 76 Bill.

But isn't there a difference between s 74(8) Bills and other s 74 Bills? Perhaps the Court believed that rule 174(3) deals exclusively with s 74(8) Bills and the other rules that we quote above do not apply to s 74(8) Bills. There is no reason to credit that suggestion. First, the Court's reasoning applies to *all* s 74 Bills. Second, there is nothing in the rules to suggest that s 74(8) Bills can only be amended by veto while other s 74 Bills can be amended ordinarily. Nor is there any principled reason to treat s 74(8) Bills differently. The explanation for rule 174(3) is that it is not at all concerned with the power to propose amendments in the NCOP but with the consequences of exercising the s 74(8) veto. Amendments for *all* s 74 Bills are covered by the detailed procedure in the subsequent rules.

No good textual or principled argument exists to prevent provincial legislatures, through their delegations, from proposing amendments to s 74 Bills in the NCOP. If presented with an opportunity the Court should reconsider the position it took in *Merafong* and permit the sensible practice adopted by the Legislature through its rules.

(b) Bills affecting the provinces

FC s 76 identifies a category of Bills affecting the provinces. The category embraces primarily those Bills relating to Schedule 4 matters.¹³⁷ However, it also encompasses Bills relating to a range of specific matters enumerated in the section: the provincial mandate for NCOP delegations,¹³⁸ organised local government,¹³⁹ the Public Protector,

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the Public Service Commission, the public service and public administration,¹⁴⁰ the Financial and Fiscal Commission,¹⁴¹ Schedule 5 matters,¹⁴² and matters contemplated in chapter 13 of the Constitution that affect provincial finances.¹⁴³

136 The GPL's rules do not directly address the question, but they say nothing to suggest that the GPL could not mandate its delegation to propose an amendment.

137 Schedule 4 covers matters in respect of which there is concurrent national and provincial legislative competence.

138 FC s 76(3)(a) read with s 65(2).

139 FC s 76(3)(b) read with s 163.

140 FC s 76(3)(c)-(f) read with ss 182 and 195-197.

141 FC s 76(4) read with s 220(3).

Bills affecting the provinces may be tabled in either House of Parliament. A Bill passed by one House must be referred to the other House. The second House considering a Bill may then pass it, pass an amended version of it, or reject it. If both Houses pass the same version of the Bill, it is submitted to the President for assent.¹⁴⁴ If the second House passes an amended version of the Bill passed by the House in which the Bill originated, then the amended version is referred to that House for its consideration and, if it is passed, is submitted to the President for assent.¹⁴⁵

In all cases where the two Houses do not agree on a single version of the Bill, the matter is referred to the mediation committee.¹⁴⁶ The mediation committee is composed of nine members of the NA proportionally representing the parties in that House and one delegate from each provincial delegation in the NCOP.¹⁴⁷ To be carried, decisions in the mediation committee require the support of at least five NA members and five NCOP members.¹⁴⁸ In order to facilitate negotiation and mediation, meetings of the mediation committee are closed to non-members of the Committee, including the public and the media, except with the permission of the committee.¹⁴⁹

The mediation committee may agree on the Bill in the form passed by either House or in another form.¹⁵⁰ If the mediation committee fails to agree on any version of the Bill within 30 days, the Bill lapses unless it originated in the NA and is again passed by the NA with the support of two-thirds of its members.¹⁵¹ If the mediation committee does agree on a version of the Bill, the Bill must be referred to the House or Houses that did not pass it in the version accepted by the mediation committee. If

142 FC s 76(4) read with s 44(2). These are the Bills concerning matters in respect of which Parliament is able to intervene in areas which otherwise fall within the exclusive legislative competence of the provinces.

143 FC s 76(4). Money Bills are excluded from this category of Bills. FC s 77 provides that they are passed in accordance with the procedures of FC s 75.

144 FC s 76(1)(b) and 76(2)(b).

145 FC s 76(1)(c) and 76(2)(c).

146 FC s 76(1)(d) and 76(2)(d). See Joint Rules 104-10.

147 FC s 78(1)(a) and (b). Joint Rule 104(2) provides that a political party which is represented in the National Assembly or NCOP, but which is not represented in the mediation committee, may designate one of its members in the Assembly or NCOP to attend the meetings of the mediation committee. Such a member may speak in the committee, but may not vote.

148 FC s 78(2)(a) and (b).

149 Joint Rule 110.

150 FC s 76(1)(f)-(h) and 76(2)(f)-(h).

151 FC s 76(1)(e) and 76(2)(e).

the Bill is then passed by the relevant House or Houses, it is submitted to the President for assent.¹⁵² If the Bill as agreed by the mediation committee is not passed by the relevant House or Houses, it lapses unless it (or an earlier version of the Bill passed by the NA) is passed again by the NA with the support of two-thirds of its members.¹⁵³

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Figure 17.2 Legislative process: Bills affecting provinces initiated by National Assembly (NA) (s 76(1))

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Figure 17.3 Legislative process: Bills affecting provinces initiated NCOP (s 76(2))

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(c) Bills not affecting the provinces

Bills that do not amend the Constitution or affect the provinces, may be introduced only in the NA.¹⁵⁴ If such a Bill is passed by the NA, it must be referred to the NCOP. The NCOP then considers the Bill and votes on it by individual member rather than delegation.¹⁵⁵ If the NCOP passes the Bill, it is submitted to the President for assent. If the NCOP rejects the Bill or passes an amended version of the Bill, the Bill is returned to the NA for reconsideration and the NA may pass the Bill with or without any amendments proposed by the NCOP or may let the Bill lapse.¹⁵⁶ A Bill passed by the NA in any form after a referral from the NCOP is submitted to the President for assent.¹⁵⁷

Figure 17.4 Legislative process: Bills not affecting provinces (s 75)

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(d) Money Bills and the Division of Revenue Bill

152 FC s 76(1)(g) and (h) and 76(2)(g) and (h).

153 FC s 76(1)(i) and (j) and 76(2)(i).

154 Compare FC s 73(1) and FC s 73(3) read with FC s 76(3).

155 FC s 75(2).

156 FC s 75(1)(c).

157 FC s 75(1)(d).

Money Bills are defined in FC s 77(1) as Bills that appropriate money, impose or alter taxes or authorise direct charges against the National Revenue Fund.¹⁵⁸ The Final Constitution states that the procedure for passing money Bills is basically the same as s 75 Bills, with a few important differences. First, money Bills can only be introduced by the Minister of Finance.¹⁵⁹ Second, money Bills cannot contain any provisions that do not fall under FC s 77(1) or are not incidental thereto.¹⁶⁰ Third, until recently there was no legislative procedure for amending money Bills — they either had to be accepted or rejected as presented by the Minister. FC s 77(3) requires an Act of Parliament to regulate how amendments may be made to money Bills. That legislation — the Money Bills Amendment Procedure and Related Matters Act¹⁶¹ — only came into force on 16 April 2009. The Act creates a detailed framework, timetable and procedure for the passage of several specific forms of money Bills — the Appropriation Bill,¹⁶² a Revenue Bill¹⁶³ and an Adjustments Appropriation Bill,¹⁶⁴ other money Bills,¹⁶⁵ and the annual division of revenue Bill in the NA and the NCOP.¹⁶⁶ The Act also provides that the committees of the NA and the NCOP must conduct public participation, in the form of joint public hearings on the

158 FC s 77(1) reads in full:

A Bill is a money Bill if it

- (a) appropriates money;
- (b) imposes national taxes, levies, duties or surcharges;
- (c) abolishes or reduces, or grants exemptions from, any national taxes, levies, duties or surcharges; or
- (d) authorises direct charges against the National Revenue Fund, except a Bill envisaged in section 214 authorising direct charges.

159 FC s 73(2).

160 FC s 77(2).

161 Act 9 of 2009.

162 Money Bills Act s 10.

163 Money Bills Act s 11. Revenue Bills are 'Bills which impose or abolish national taxes, levies, duties, surcharges or which abolish, reduce or grant exemption from any national taxes, levies, duties or surcharges.'

164 Money Bills Act s 12.

165 Money Bills Act s 13.

166 Money Bills Act s 9. A Division of Revenue Bill is not a money Bill, but a prerequisite of annual legislation required in terms of FC s 214 which determines and divides among provinces and local governments their equitable share and other conditional allocations from the revenue raised nationally. In addition to what is provided for in the Money Bills Act, the Intergovernmental Fiscal Relations Act 97 of 1997 provides conditions and procedure applicable to the passing of the Division of Revenue Bill. For more on the division of revenue, see, R Kriel & M Monadjem 'Public Finances' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 27.

fiscal framework (a mandatory framework which must precede all money Bills) and revenue proposals.¹⁶⁷ Further, the standing rules of Parliament must make provision for the relevant committees to conduct public hearings on the Appropriation Bill, a Revenue Bill and the Division of Revenue Bill.¹⁶⁸

(e) Presidential assent and publication

When a duly passed Bill is submitted to the President for assent, the President must assent to and sign the Bill. Only if the President has reservations about the constitutionality of the Bill may he or she refer it back to the NA for reconsideration.¹⁶⁹ The procedure for such a referral is dealt with by the Joint Rules of Parliament¹⁷⁰ and contemplates referrals due to concerns regarding either procedural defects or substantive defects.¹⁷¹ Once a Bill has been resubmitted to the President, the President must assent to and sign the Bill if it fully accommodates his or her reservations. Otherwise the President must refer the Bill to the Constitutional Court for a decision on its constitutionality.¹⁷²

Once the President has assented to and signed a Bill, it becomes an Act of Parliament and must be published promptly.¹⁷³ An Act takes effect either when it is published or on a date determined in terms of the Act.¹⁷⁴ The Constitutional Court has made clear that Parliament has the power to provide that the date an Act comes into operation will be determined by the President.¹⁷⁵ However the Court has also stressed that when Parliament gives such a power to the President, this power must be exercised lawfully. The power cannot be used by the President to veto or otherwise block the implementation of an Act.¹⁷⁶

167 Money Bills Act s 8(2).

168 Money Bills Act ss 9(5)(b), 10(8)(a) and 11(4)(a).

169 FC s 79(1). The NCOP must participate in the reconsideration of the Bill if the President's reservations relate to a procedural matter that involves the NCOP or if the Bill is a constitutional amendment bill or a s 76 bill. FC s 79(3).

170 Joint Rules 202-12.

171 Joint Rules 205-6.

172 FC s 79(4). See § 17.3(e)(i) *infra*.

173 FC s 81.

174 *Ibid*.

175 *Ex Parte Minister of Safety and Security: in re S v Walters* 2002 (4) SA 613 (CC), 2002 (7) BCLR 663 (CC), [2002] ZACC 6 at para 71.

176 *Ibid* at para 73.

The power also cannot be exercised irrationally. On two occasions, the Court has been required to repair faulty attempts by the President to bring legislation into force. In *Pharmaceutical Manufacturers* the President had, based on flawed advice from the Department of Health, brought an Act regulating the use of medicines into force before the necessary regulations had been written.¹⁷⁷ The result was that the use and possession of many dangerous substances inadvertently became legal. The Constitutional Court granted the request, supported by the President, to set aside the proclamation.¹⁷⁸ It held that although the act of bringing legislation into force was not administrative action — Chaskalson P concluded that it was primarily legislative in nature — it was still subject to review under the principle of legality. This standard of review requires that the President act in consonance with the objects of the legislation:

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Powers are not conferred in the abstract. They are intended to serve a particular purpose. That purpose can be discerned from the legislation that is the source of the power and this ordinarily places limits upon the manner in which it is to be exercised. If those limits are transgressed a court is entitled to intervene and set the decision aside.¹⁷⁹

A power not exercised for the purpose for which it was granted would be irrational and set aside. Rationality has to be judged objectively, not subjectively. The President's good faith belief that his decision is rational is irrelevant if no objective grounds exist for his action.¹⁸⁰

In the second case of presidential confusion — *Kruger v President of the Republic of South Africa* — the Constitutional Court was confronted with an unusual, perhaps unique, situation.¹⁸¹ The President had issued a proclamation ('the First Proclamation') bringing into effect certain sections of an Act¹⁸² amending the Road Accident Fund Act.¹⁸³ The sections would come into force on 31 July 2006. Unfortunately, he named the wrong sections. Instead of bringing into force ss 1-4, he brought into force ss 4, 6 and 10-12.¹⁸⁴ Before the sections actually came into force, the President realised his error and issued a new proclamation ('the Second Proclamation'). The Second Proclamation aimed to amend the First Proclamation so

177 *Pharmaceutical Manufacturers Association of South Africa & Another: In re Ex Parte President of the Republic of South Africa & Others* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC), [2000] ZACC 1 ('*Pharmaceutical Manufacturers*').

178 The decision of the High Court, which came to the same conclusion, is reported as *Pharmaceutical Manufacturers Association of SA & Another: In re Ex parte President of the Republic of South Africa & Others* 1999 (4) SA 788 (T).

179 *Pharmaceutical Manufacturers* (supra) at para 76.

180 *Ibid* at paras 86 and 89.

181 *Kruger v President of the Republic of South Africa & Others* 2009 (1) SA 417 (CC), 2009 (3) BCLR 268 (CC), [2008] ZACC 17 ('*Kruger*').

182 Road Accident Fund Amendment Act 19 of 2005.

183 Act 56 of 1996.

that it referred to the correct sections. However, the Second Proclamation was only published on 31 July — the day the sections were, in terms of the First Proclamation, due to come into force.

The constitutionality of the First Proclamation was challenged on the ground that it was irrational. The applicant claimed that the consequences of the error had created great uncertainty. The High Court upheld the claim on the basis that the President did not have the power to amend a proclamation bringing an Act into force. Granting the President such a power would permit him 'the power to revoke by proclamation any Act that he or his predecessors have previously brought into operation by publishing a proclamation to that effect in the *Gazette*. ... Such a regime will simply be government by decree which is the antithesis of the Rule of Law which is one of the cornerstones of our Constitution.'¹⁸⁵ When the case came before the Constitutional Court, the validity of the Second Proclamation was also in issue.¹⁸⁶

Skweyiya J, writing for the majority, held, first, that the First Proclamation was irrational. It contained a random selection of sections which, if enacted, would create serious practical problems.¹⁸⁷ Next, Skweyiya J addressed the danger alluded to by the High Court. In his view, the power to enact legislation must necessarily

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include the power to withdraw an erroneous proclamation, provided it is done *before* the original proclamation takes effect.¹⁸⁸ The Court supported the holding of the High Court that a President cannot undo a proclamation once it has brought legislation into force.

However, in this case the President could not alter or withdraw the First Proclamation because it was invalid from its inception: 'The President cannot have the power to amend a nullity.'¹⁸⁹ The solution in such a situation, Justice Skweyiya reasoned, is to issue both a withdrawal of the invalid proclamation and a new proclamation.¹⁹⁰ The withdrawal was necessary because there might be doubt about

184 The numbers the President referred to were the sections of the original act that the amending act would alter, not the numbers of the amending act that would do the altering.

185 [2007] ZAGPHC 352.

186 Kruger did not challenge the Second Proclamation, but the Road Accident Fund made an application for direct access — which the Court heard — to challenge the Second Proclamation.

187 *Kruger* (supra) at paras 50-54.

188 *Kruger* (supra) at para 61.

189 *Ibid* at para 64. The Court seems to be saying that a withdrawal is always possible, even if the original amendment was invalid. This cannot, technically, be true as you cannot withdraw something that does not exist. However, in many cases it may be unclear to the President whether the proclamation was invalid or not and a withdrawal provides the certainty that, even if the proclamation was originally valid, it no longer is. If the proclamation was originally invalid, the withdrawal does nothing but remove doubt.

190 *Ibid* at para 67.

whether a proclamation was indeed irrational. If it was in fact irrational, a withdrawal would be unnecessary. The Court recognised that this approach may place form above substance, but held that 'the principle that substance should take precedence over form ... must yield in appropriate cases to the rule of law.'¹⁹¹ Accordingly, the Court declared both proclamations invalid, but suspended the orders to prevent any disruption and to afford the President an opportunity to pass a new, valid proclamation.

In his dissent,¹⁹² Jafta AJ argued that *Kruger* was different from *Pharmaceutical Manufacturers* for two reasons. First, in *Kruger* the President became aware of the defect before the legislation was in force.¹⁹³ Second, the error in *Kruger* was purely clerical. What he intended to do was rational, but the proclamation was incorrectly drafted¹⁹⁴ In *Pharmaceutical Manufacturers* the President intended to do something that was substantively irrational. For these reasons, he found that the First Proclamation was not irrational. The problem was instead that the proclamation failed to fully reflect the President's rational intention.¹⁹⁵ Only the part of the Proclamation that failed to reflect the President's true intention was invalid and could be rectified by amending the Proclamation accordingly. While there is something alluring about Acting Justice Jafta's approach, it is flawed. However much sense it makes in theory to distinguish between the express wording of the Proclamation and the President's actual intention, in the context of enacting legislation, the need for publicity and certainty require that courts ought to assume that proclamations in fact reflect the President's intention. The alternative — that the validity of a

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proclamation can depend on the intention of its maker alone, and not its content — would lead to unacceptable uncertainty.

(f) Challenges by the President or MPs

The final stage in the legislative process allows for either the President or MPs to refer the legislation directly to the Constitutional Court for a decision on its constitutionality. If, after the President has asked Parliament to reconsider a bill, she still has reservations about its constitutionality, she can refer the Bill to the Constitutional Court for a decision on its constitutionality.

(i) FC s 79: Referral by the President

191 Ibid at para 62.

192 Yacoob J also dissented. However, his dissent is more about the appropriate remedy. He agreed with Skweyiya J that the First Proclamation was invalid. But he would have held that it was not just and equitable to declare that proclamation invalid *ab initio*. Instead, he would have severed the part of the First Proclamation referring to the wrong sections, and read-in the appropriate alterations to make the First Proclamation rational. Ibid at para 135.

193 Ibid at para 97.

194 Ibid at para 98.

195 Jafta AJ found that only part of the First Proclamation should be declared invalid, as the President had correctly brought s 4 into operation. Ibid at para 95.

Section 79¹⁹⁶ permits the President to refer a Bill to the Constitutional Court for a decision on its constitutionality before he assents to it. However, he or she may do so only if the Bill has first been remitted to the NA for reconsideration and Parliament has failed to address the concerns relating to the constitutionality of the Bill despite having been given the opportunity to do so.¹⁹⁷ Only the Constitutional Court has jurisdiction to decide on the constitutionality of a Bill at the insistence of the President.¹⁹⁸

The President has only used this power once. In 1999, the President referred the Liquor Bill — which would regulate the liquor industry — on the basis that he was concerned that it would impair provincial powers. In its decision — *Ex Parte President of the Republic of South Africa: In Re Constitutionality of the Liquor Bill* — the Constitutional Court made it clear that when the President acts under FC s 79, the Court is required to consider only the reservations the President has expressed.¹⁹⁹ The Court explained that a s 79 referral does not entail a 'mini-certification' process. While the President is entitled to express reservations about as much, or as little, of the Bill as he wishes,²⁰⁰ the Court is not required to certify conclusively that every part of the Bill accords with the Constitution.²⁰¹ Therefore, a finding by the Court under a s 79 referral that a particular Bill was constitutional does not exclude a subsequent constitutional challenge to a different part of the Bill — except to the extent that such a challenge rehearses issues that the Court had already decided in considering the President's challenge to the Bill.²⁰² In *Liquor Bill*, the Court concluded that part of the Bill was indeed unconstitutional. Parliament

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was therefore required to reconsider the Bill and either amend it to accommodate the Court's findings, or abandon it.

(ii) FC s 80: Referral by MPs

Unlike the Interim Constitution,²⁰³ the Final Constitution makes no provision for abstract judicial review of Bills by the Constitutional Court at the instance of MPs. However, MPs may refer legislation to the Court once it has become an Act. Section

196 FC s 121 provides a similar process for Premiers to refer the constitutionality of provincial bills to the Constitutional Court.

197 FC ss 79(1), 79(4)(b), 84(2)(b) and 84(2)(c). See also Rule 14 of the Rules of the Constitutional Court, which governs the procedure to be followed in cases of referral of a Bill.

198 FCS s 167(4)(b).

199 2000 (1) SA 732 (CC), 2000 (1) BCLR 1 (CC), [1999] ZACC 15 ('*Liquor Bill*') at para 14. The Court did not decide whether it could ever be appropriate for the Court acting in such circumstances to consider other provisions which are manifestly unconstitutional but which are not amongst the President's reservations. In our view, the need for clarity in the President's reservations and the need for respect to be shown to the legislature would mean that it would never be appropriate.

200 *Ibid* at para 16.

201 *Ibid*.

202 *Ibid* at para 20.

80 allows one third of the members of the NA to apply for abstract review of an Act within 30 days of the date upon which the President assented to the Act and signed it. When it receives an application for abstract review, the Constitutional Court may grant an interim order suspending the operation of the Act, or those sections of the Act that are subject to review, until the main application has been decided. The discretion of the Court in this regard is limited to cases where the application has reasonable prospects of success and the interests of justice require the suspension of the operation of the legislation.²⁰⁴ FC s 80 therefore offers a fast-track mechanism to determine whether widely held concerns about the constitutionality of newly enacted legislation are legitimate.

The changes from the Interim Constitution to the Final Constitution concerning abstract review are to be welcomed. FC ss 79 and 80 have none of the uncertainties of s 98(2)(d) and 98(9) of the Interim Constitution. The provisions in the Final Constitution ensure that a minority in the legislature is unable to interfere with the legislative process by applying for the review of Bills before they are enacted. It allows them a limited but significant opportunity to challenge legislation.²⁰⁵ Section 80 places in the hands of the Constitutional Court the decision as to whether legislation will operate pending resolution of the challenge to

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its constitutionality and provides the Court with an appropriate framework within which to take this decision.

17.4 Timing of Challenges to Legislation

203 In terms of IC s 98(2)(d), the Constitutional Court had jurisdiction over the constitutionality of a Bill before Parliament or a provincial legislature. IC s 98(9) provided that this jurisdiction could be exercised only at the request of the Speaker of the National Assembly, the President of the Senate, or the Speaker of a provincial legislature. These legislative officers seemed to have a general discretion to request abstract review of any Bill, but they were obliged to make such a request when one-third of the members of the National Assembly, the Senate or the provincial legislature petitioned them to do so. Parliament could control the procedure which it followed in relation to the referral of Bills. See *Ex parte Speaker of the National Assembly: In re Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill No 83 of 1995* 1996 (3) SA 289 (CC), 1996 (4) BCLR 518 (CC), [1996] ZACC 3 at paras 43-44.

204 FC s 80(3). See also Rule 15 of the Rules of the Constitutional Court, which governs the procedure to be followed in cases of abstract review of an Act.

205 See *Gauteng Provincial Legislature v Kilian* 2001 (2) SA 68 (SCA), 2001 (3) BCLR 253 (SCA) ('*Kilian*') at paras 25 and 29. The Supreme Court of Appeal held that the determination concerning the constitutionality of a Bill under IC s 98(9) was 'in the interests of the provincial legislature and its effective and efficient functioning' and thus 'part and parcel of the legislative process'. It held further that under such circumstances 'the petitioners acted at all relevant times not in their personal capacities, but in their capacities as members of the legislature and, [unless their action was frivolous, vexatious or due to improper motives,] were not personally liable for costs.' The SCA therefore upheld an undertaking given by the Speaker to pay such costs.

It is unlikely that this principle will be applicable to abstract review proceedings under FC s 80. In terms of FC s 80 abstract review takes place only after the legislative process has been concluded, but before 30 days have elapsed. FC s 80 proceedings should therefore be seen as somewhat outside the legislative process. FC s 80 is a provision which confers on members with the requisite support a form of political standing to bring abstract challenges to Acts of Parliament upon their enactment. Members that exercise this political standing should not be entitled to do so at the expense of the legislature. See also FC s 80(4), which contemplates the award of costs orders against applicants for abstract review.

The next two sections consider the substantive and procedural limits to Parliament's power. But first, we consider the surprisingly complex question as to *when* legislation can be challenged. As we just explained, the final part of the legislative process involves the opportunity for the President or MPs to bring challenges to legislation. The Constitution specifically regulates those powers; the President may question a Bill before he assents, but only after giving Parliament an opportunity to respond. MPs may only challenge legislation directly in the Constitutional Court after it has become an Act. But at what stage can ordinary citizens challenge legislation on either procedural or substantive grounds? Obviously, it is always open to members of the public, with the requisite legal standing, to challenge legislation once it has become law. But may they bring challenges at earlier stages in the legislative process? The short answer is: No. However, the Court has left a tiny amount of wiggle room that may in very rare occasions permit a challenge by members of the public before the President assents to a statute.

The question was first considered in *President of the Republic of South Africa & Others v United Democratic Movement*. The Court concluded that 'on a proper reading of the Constitution, [the Constitutional Court may not], save as provided in [FC s] 79 ... , consider the constitutionality of a bill before the National Assembly.'²⁰⁶ This finding was, strictly speaking, *obiter* as the laws in question had already been signed by the President. But the rule was confirmed in the leading decision on abstract review: *Doctors for Life International v Speaker of the National Assembly & Others*.²⁰⁷

Doctors for Life, as we discuss in greater detail below,²⁰⁸ involved challenges to four pieces of legislation on the grounds that they had been enacted without the necessary public participation. One of those four laws — the Sterilisation Amendment Act²⁰⁹ — had been passed by Parliament but had not yet been signed by the President. The Court was therefore forced to decide whether it had the power to intervene at that stage of the legislative process. Justice Ngcobo identified three phases in the legislative process, with different rules at each stage: (a) while the bill is still being deliberated by Parliament; (b) after the bill has been passed by Parliament, but before it has been signed by the President; and (c) after the bill had been signed, but before it has come into force.²¹⁰ We follow his lead

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and consider the position at each stage, while taking into account developments since *Doctors for Life*.

206 *President of the Republic of South Africa & Others v United Democratic Movement* 2003 (1) SA 472 (CC), 2002 (11) BCLR 1164 (CC), [2002] ZACC 34 at para 26. FC ss 79 and 121 specifically reserve the referral power to the President in terms of national legislation and to the Premier in terms of provincial legislation.

207 2006 (12) BCLR 1399 (CC), 2006 (6) SA 416 (CC), [2006] ZACC 11 ('*Doctors for Life*').

208 See § 17.6(a) below.

209 Act 3 of 2005.

210 *Doctors for Life* (supra) at para 34.

Before we begin, it is important to note that the 'crucial time for determining whether a court has jurisdiction is when the proceedings commenced.'²¹¹ In *Van Straaten v President of the Republic of South Africa & Others*, the Constitutional Court refused to hear a challenge to a bill that had since become an Act because, at the time the case was filed, the bill had not yet been signed by the President.²¹²

(a) While a Bill is being deliberated on by Parliament

This is clearly a delicate question as the Court has twice avoided giving a straight answer. Although the question was not in issue in *Doctors for Life*, Justice Ngcobo indicated that '[w]hat courts should strive to achieve is the appropriate balance between their role as the ultimate guardians of the Constitution and the rule of law including any obligation that Parliament is required to fulfil in respect of the passage of laws, on the one hand, and the respect which they are required to accord to other branches of government as required by the principle of separation of powers, on the other hand.'²¹³ He canvassed the law in other Commonwealth jurisdictions,²¹⁴ and distilled the following general approach:

where the flaw in the law-making process will result in the resulting law being invalid, courts take the view that the appropriate time to intervene is after the completion of the legislative process. ... But intervention will occur in exceptional cases, such as where an aggrieved person cannot be afforded substantial relief once the process is completed because the underlying conduct would have achieved its object.²¹⁵

In *Glenister I*, the Court's ability to intervene at this stage of the legislative process was squarely on the table.²¹⁶ *Glenister*, a businessman, had challenged the decision of the executive to introduce Bills²¹⁷ that would abolish a specialised crime fighting body, the Directorate of Special Operations (known as 'the Scorpions'). The Court had to decide whether it was competent to intercede at that stage, or whether *Glenister* would have to wait for the Bills to be enacted. Noting the same concerns

211 *Doctors for Life* (supra) at para 57.

212 2009 (3) SA 457 (CC), 2009 (5) BCLR 480 (CC), [2009] ZACC 2.

213 *Doctors for Life* (supra) at para 70.

214 *Ibid* at n52-53. The Court discusses the following foreign case law: *Rediffusion (Hong Kong) Ltd v Attorney-General of Hong Kong and Another* [1970] AC 1136 (Privy Council); *Bahamas District of the Methodist Church in the Caribbean and the Americas v Symonette*; *Poitier v Methodist Church of the Bahamas* [2000] JCJ 31, 26 July 2000 (Privy Council); *Cormack and Another v Cope and Others*; *The State of Queensland and Another v Whitlam and Others* [1974] HCA 28; 131 CLR 432 (High Court of Australia); *In re Canada Assistance Plan* (B.C.) [1991] 2 SCR 525 (Supreme Court of Canada); *In re Amendment of the Constitution of Canada* (1981) 125 DLR (3d) 1 (SCC) (Supreme Court of Canada).

215 *Doctors for Life* (supra) at para 69.

216 *Glenister v President of the Republic of South Africa & Others* 2009 (1) SA 287 (CC), 2009 (2) BCLR 136 (CC), [2008] ZACC 19 ('*Glenister I*').

217 The National Prosecuting Authority Amendment Bill of 2008 (NPAA Bill) (B23-2008) and the General Law Amendment Bill of 2008, which has been renamed the South African Police Service Amendment Bill of 2008 (SAPSA Bill) (B30-2008).

that troubled the *Doctors for Life* Court, Chief Justice Langa assumed, without deciding, that the Court could intervene. He then set out the circumstances that

would justify intervention. Largely adopting the position taken by foreign courts, the Chief Justice adopted the following test:

Intervention would only be appropriate if an applicant can show that there would be no effective remedy available to him or her once the legislative process is complete, as the unlawful conduct will have achieved its object in the course of the process. The applicant must show that the resultant harm will be material and irreversible.²¹⁸

Although he stressed that '[t]his is a formidable burden',²¹⁹ and that 'intervention on this approach will be extremely rare',²²⁰ Langa CJ declined to identify situations that might justify court involvement.

However, we are given some sense of what the Court might require by its conclusion that Glenister had not met the high burden for intervention. Glenister argued that the Bills were already causing irreversible harm as many members of the DSO were leaving because of the perceived threat to their jobs. This exodus threatened to 'undermine the state's capacity to render basic security and cause harm to the constitutional order itself.'²²¹

The Court held that Glenister's challenge could not raise the risk of irreparable harm for the following simple reason: 'Parliament may choose to make significant and substantial amendments to the draft legislation or it may choose not to enact the legislation at all. Until the content of the legislation has been determined by Parliament, the effect of the legislation cannot be determined.'²²² The Chief Justice also stressed that Parliament had its own duty to uphold the Constitution and that courts should proceed on the basis that they would do so.²²³ Glenister bided his time and ultimately succeeded in having the legislation overturned after it had been passed by Parliament.²²⁴

218 *Glenister I* (supra) at para 43.

219 *Ibid* at para 43.

220 *Ibid* at para 46.

221 *Ibid* at para 49.

222 *Ibid* at para 50.

223 *Ibid* at para 55 ('I must proceed on the basis that Parliament will observe its constitutional duties rigorously. If it is correct that the draft legislation does threaten structural harm to the Constitution or the institution of the NPA, something which I expressly refrain from deciding, then Parliament will be under a duty to prevent that harm. It would be institutionally inappropriate for this Court to intervene in the process of law-making on the assumption that Parliament would not observe its constitutional obligations.')

224 *Glenister v President of the Republic of South Africa & Others* [2011] ZACC 6 ('*Glenister II*')(we discuss *Glenister II* in more detail in §§ 17.5(b) and 17.8(b) below).

The limited room for intervention identified in *Glenister I* only applies to the Constitutional Court — an order cannot be sought in the High Court. This was confirmed by the Supreme Court of Appeal in *Minister of Finance & Another v Paper Manufacturers Association of South Africa*.²²⁵ The applicant sought and obtained an interdict from the High Court preventing the Minister from introducing a Bill to Parliament. The SCA reversed the decision. It held that the High Court did not have the power to grant an interdict with regard to a Bill.²²⁶

It seems reasonable to ask, given the high threshold for intervention, what possible circumstances could prompt the Court to act. It is probably best to distinguish

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between substantive challenges (like *Glenister I*) and procedural challenges (like *Doctors for Life*). It is difficult to imagine a substantive challenge succeeding. Despite any perceived threat to democracy, or the Constitution, the Court must — as the Chief Justice tells us — assume that Parliament will uphold its constitutional duty not to pass legislation that violates the Constitution. Even if a Bill proposed to ban opposition parties or install a president for life, there is no reason for the Court not to allow Parliament the opportunity to debate and decide the issue itself in line with its constitutional responsibilities. While this may seem overly deferential, there truly are very few acts that could not be rectified by judicial action after intervention. The one substantive claim that might succeed is to legislation that would somehow preclude or delay judicial intervention or access to the judiciary by the public after the legislation was enacted. But even then, it is difficult to see how the Court would get around the argument that Parliament must be trusted to uphold the Constitution.

Procedural challenges will also be rare. As *Doctors for Life* demonstrates, procedural flaws that move people to litigation generally concern laws that were passed following a flawed procedure. That harm is not irreparable because the legislation can be set aside and the legislature can be forced to pass the law again, following the correct procedure. There is, however, one possibility: When Parliament acts unconstitutionally to *prevent* a Bill from being passed that *would have been passed* if it had followed the proper process.

The best example is a good faith tagging mistake.²²⁷ If Parliament tags a Bill as s 76, when it is objectively a s 75 Bill, there may be a risk that it will not pass because of the higher threshold set by s 76.²²⁸ In that instance, somebody who will suffer irreparable harm if the Bill is not enacted has no other recourse than a challenge during the legislative process. She cannot wait until the Bill becomes an act, because the tagging mistake has prevented that from occurring. The only solution is for the Court to intervene and re-tag the Bill as a s 75 Bill. This example avoids the 'Parliament must be trusted' argument because Parliament has acted unconstitutionally once it mistags the Bill, or at least once the Bill fails to pass. There

225 2008 (6) SA 540 (SCA).

226 Ibid at para 22.

227 We discuss tagging at length in § 17.6(b) below.

228 It is also possible (although extremely unlikely) that a Bill that would not pass as a s 75 Bill, would pass as a s 76 Bill.

may be similar instances where a procedural decision *prevents* a Bill from being passed that may warrant judicial intervention.

(b) After a Bill has been passed by Parliament, but before the President has assented

The *Doctors for Life* Court confirmed the conclusion in *UDM*: The Constitutional Court may only consider the constitutionality of a Bill at this stage when it is raised by the President in terms of FC s 79.²²⁹ After all, the wording of s 167(4)(b) — which affords the Court exclusive jurisdiction to hear s 79 claims — explicitly states that it may consider a Bill 'only in the circumstances anticipated in section 79.'

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The *Doctors for Life* applicants tried to get around this problem by arguing that there was a difference between considering the substantive constitutionality of a Bill — which was prohibited under FC s 167(4)(b) — and a challenge to the parliamentary procedure in passing the Bill — which was permitted by FC s 167(4)(e). Section 167(4)(e) affords the Constitutional Court exclusive jurisdiction to hear challenges that Parliament has failed to fulfil a 'constitutional obligation'.²³⁰ The obligation to facilitate public involvement, they argued, was such a 'constitutional obligation' that could be challenged at any time. They also submitted that the nature of a challenge about the failure to facilitate public involvement had to be enforced 'there and then', to prevent Parliament from passing a Bill without following the necessary procedure.

Ngcobo J rejected this line of argument. He held, first, that FC s 79(3) permitted the President to raise both substantive and procedural reservations to the constitutionality of a Bill.²³¹ Second, FC ss 167(4)(b) and (e) had to be read together. This would be best achieved by reading the specific s 167(4)(b) to limit the ambit of the more general s 167(4)(e).²³² Finally, he held that it is not only the Court that has a duty to ensure that Parliament fulfils its constitutional obligations in the legislative process. The President also has a constitutional duty to ensure the proper processes are followed. The separation of powers require the Court to permit her an opportunity to perform that duty.²³³ This mirrors the holding of Langa CJ about the role of Parliament in *Glenister I*. Justice Ngcobo concluded that the Court could not consider the constitutionality of the Sterilisation Amendment Act.²³⁴

(c) After a Bill is assented to, but before it comes into force

229 *Doctors for Life* (supra) at para 43.

230 For more on FC ss 167(4)(b) and (e), see S Seedorf 'Jurisdiction' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) § 4.3(b).

231 *Doctors for Life* (supra) at para 45.

232 *Ibid* at para 52.

233 *Ibid* at para 55.

234 See also, *Van Straaten v President of the Republic of South Africa & Others* 2009 (3) SA 457 (CC), 2009 (5) BCLR 480 (CC), [2009] ZACC 2 (refusing to hear a challenge to legislation that had not yet been signed by the President when the challenge was lodged.)

The Court had earlier held, in *Khosa & Others v Minister of Social Development & Others*,²³⁵ that it had the power to consider acts that had not yet been brought into force. Mokgoro J cited FC s 81 which provides that '[a] Bill assented to and signed by the President becomes an Act of Parliament'. After assent, the law is an Act and the Court can consider it under FC s 172.²³⁶ In *Doctors for Life*, the Court considered an argument not raised in *Khosa*: Does FC s 80 — which empowers 30 per cent of MPs to challenge an Act after it has been assented to — operate in a similar manner to s 79 to remove the Court's jurisdiction to consider a claim to an Act not yet in force? Justice Ngcobo held that it did not:

There is nothing in the wording of [FC s] 80 that precludes this Court or any other court from considering the validity of an Act of Parliament at the instance of the public. Nor is there anything in the scheme for the exercise of jurisdiction by this Court that precludes it from considering the constitutional validity of a statute that has not yet been brought

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into operation. The legislative process is complete, and there can be no question of interference in such a process. Once a bill is enacted into law, this Court should consider its constitutionality.²³⁷

17.5 Substantive Constraints on Legislative Authority

The national legislative authority is vested in Parliament.²³⁸ However, in exercising this authority, Parliament is bound by the Constitution and must act within its limits.²³⁹ In this section we discuss the substantive limits on its powers: (a) federalism; (b) fundamental rights; (c) extra-territorial competence; (d) separation of powers; (e) delegation constraints; (f) the legality principle; and (g) specific constraints on the power to amend the Constitution. In several of these areas, our discussion is very brief and we simply set out the basic position and refer the reader to the part of this text where the issue is more fully canvassed.

(a) Federalism constraints

In a significant departure from the Interim Constitution, the system of federalism embodied in the Final Constitution imposes clear limitations on the legislative power of Parliament. Under the Interim Constitution, the legislative competence of Parliament was plenary and subject only to a few insignificant exceptions in which provincial legislative competence was exclusive.²⁴⁰ Under the Final Constitution, however, Parliament has no express legislative competence over matters within the functional areas listed in Schedule 5. It may legislate over matters within the functional areas listed in Schedule 5 only if it meets the requirements set out in FC s

235 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC), [2004] ZACC 11.

236 *Ibid* at para 90.

237 *Doctors for Life* (supra) at para 64.

238 FC s 44(1).

239 FC s 44(4). See also *Executive Council of the Province of the Western Cape v Minister for Provincial Affairs and Constitutional Development & Another, Executive Council of KwaZulu-Natal v President of the Republic of South Africa & Others* 2000 (1) SA 661 (CC), 1999 (12) BCLR 1360 (CC), [1999] ZACC 13 at paras 25-6.

44(2). Various other constraints relating to the legislative powers of Provincial Legislatures and Municipal Councils also limit Parliament's legislative competence.²⁴¹

The Constitution imposes a further federalism-related constraint on Parliament's legislative authority. These provisions relate to conflicts between national and provincial legislation.²⁴² Thus, even if Parliament is competent to pass a particular piece of legislation, the legislation may become inoperative if it is in conflict with provincial legislation in circumstances where that provincial legislation prevails.²⁴³ The conflicts provisions of the Constitution are discussed elsewhere in this work.²⁴⁴

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(b) Fundamental rights constraints

The legislative authority of Parliament is constrained by the rights contained in the Bill of Rights. The general framework for rights-based challenges,²⁴⁵ and the constraints imposed by particular fundamental rights are discussed elsewhere in this work. Parliament must refrain from interfering with any of the rights in the Bill of Rights except to the extent that the Constitution allows. Parliament's legislative authority does not extend to limitations of rights other than those authorised by s 36, the limitations clause.²⁴⁶

However, Parliament is not only obliged to refrain from interfering with fundamental rights. It must also give effect to fundamental rights by positive action. This duty is captured in FC s 7(2)'s requirement that the state must 'respect, protect, promote and fulfill' the rights in the Bill of Rights.²⁴⁷

240 IC s 156(1B) gave provinces the exclusive competence to impose taxes in respect of casinos, gambling, wagering, lotteries and betting. Parliament had no legislative power to impose such taxes. The Interim Constitution tacitly precluded Parliament from legislating in respect of provincial official languages, IC s 3(5), and the names of the provinces, IC s 124(1).

241 See V Bronstein 'Legislative Competence' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 15.

242 FC ss 146-150.

243 FC s 149.

244 See V Bronstein 'Conflicts' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 16.

245 The general framework for rights analysis goes something like this: (a) Does the right apply? (b) What is the content of the right and has it been limited? (c) Is the limitation justifiable? and (d) What is the appropriate remedy? See S Woolman 'Application' S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 31; L Du Plessis 'Interpretation' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 32; S Woolman & H Botha 'Limitations' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34; and M Bishop 'Remedies' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 9.

246 See Woolman & Botha 'Limitations' (supra).

This injunction is repeated specifically with regard to a number of individual rights.²⁴⁸ The Constitutional Court has already pronounced on these positive obligations.²⁴⁹ 'Positive' and 'negative' obligations often inter-relate and overlap, raising difficult questions about Parliament's obligations with regard to specific rights.²⁵⁰

In *Glenister II* the Constitutional Court relied on s 7(2) to invalidate legislation that abolished one corruption-fighting organization, the Directorate of Special Operations ('the Scorpions'), and replaced it with another specialised crime-fighting body, the Directorate of Priority Crime Investigation ('the Hawks'), which was somewhat less independent of the executive.²⁵¹ We discuss the intricacies of the decision below.²⁵² At this juncture we need only look at the Court's understanding of s 7(2). In vivid language, Mosenke DCJ and Cameron J²⁵³ described the consequences of corruption:

There can be no gainsaying that corruption threatens to fell at the knees virtually everything we hold dear and precious in our hard-won constitutional order. It blatantly

247 *National Education Health and Allied Workers Union (NEHAWU) v University of Cape Town & Others* 2003 (3) SA 1 (CC), [2002] ZACC 27 at para 14, *J & Another v Director General, Department of Home Affairs & Others* 2003 (5) SA 62 (CC), 2003 (5) BCLR 463 (CC), [2003] ZACC 3 ('*J & Another*') at para 25.

248 See, for example, FC s 9(4) (equality and private discrimination), FC s 24(b) (environmental rights), FC s 25(5)-(7) (land rights), FC s 26(2) (housing), FC s 27(2) (health, food, water, and social security), FC s 32(2) (access to information), and FC s 33(3) (just administrative action).

249 See *New National Party v Government of the Republic of South Africa & Others* 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC), [1999] ZACC 5 ('*New National Party*') at para 23 ('Parliament is obliged to provide for the machinery, mechanism or process that is reasonably capable of achieving the goal of ensuring that all persons who want to vote, and who take reasonable steps in pursuit of that right, are able to do so.') *Ibid* at paras 118-9 (O'Regan J explains the positive obligations on Parliament and other parts of the state), reaffirmed in *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders (NICRO) & Others* 2005 (3) SA 280 (CC), 2004 (5) BCLR (CC), [2004] ZACC 10 at para 28. See also *J & Another* (*supra*) at para 25 ('The executive and legislature are ... obliged to deal comprehensively and timeously with existing unfair discrimination against gays and lesbians'); *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC), [2000] ZACC 19 ('*Grootboom*') at paras 41-2 (emphasising that the 'precise contours and content of the measures to be adopted are primarily a matter for the legislature and the executive' but that 'legislative measures by themselves are not likely to constitute constitutional compliance'.)

250 See *New National Party* (*supra*) at para 20. In the context of the right to vote, Yacoob J pointed out that:

Any scheme designed to facilitate the exercise of this right carries with it the possibility that some people will not comply with its provisions. But that does not make the scheme unconstitutional. The decisive question which arises for consideration in this case is the following: when can it legitimately be said that a legislative measure designed to enable people to vote in fact results in a denial of that right?

251 *Glenister v President of the Republic of South Africa & Others* 2011 (3) SA 347 (CC), [2011] ZACC 6 ('*Glenister II*').

252 See § 17.8(b) below.

253 Froneman, Nkabinde and Skweyiya JJ concurring.

undermines the democratic ethos, the institutions of democracy, the rule of law and the foundational values of our nascent constitutional project. It fuels maladministration and public fraudulence and imperils the capacity of the state to fulfil its obligations to respect, protect, promote and fulfil all the rights enshrined in the Bill of Rights. When corruption and organised crime flourish, sustainable development and economic growth are stunted. And in turn, the stability and security of society is put at risk.²⁵⁴

Specifically, the Court held, corruption impacts on the rights to 'equality, human dignity, freedom [and] security of the person, administrative justice and socio-economic rights, including the rights to education, housing, and health care.'²⁵⁵ Considering the pernicious and pervasive effects of corruption, '[t]he state's obligation to 'respect, protect, promote and fulfil' the rights in the Bill of Rights thus inevitably, in the modern state, creates a duty to create efficient anti-corruption mechanisms.'²⁵⁶

Generally, a Court should 'not be prescriptive as to what measures the state takes, as long as they fall within the range of possible conduct that a reasonable decision-maker in the circumstances may adopt.'²⁵⁷ The standard therefore goes beyond mere rationality and is some form of reasonableness review akin to that used in socio-economic rights cases, administrative review and public participation challenges. In this case, however, Moseneke DCJ and Cameron J concluded that, considering South Africa's international obligations, 'the state must create an anti-corruption entity with the necessary independence, and that this obligation is constitutionally enforceable.'²⁵⁸ According to the majority of the Court, the Hawks were insufficiently independent and Parliament was given 18 months to fix the defect.²⁵⁹

In dissent, Chief Justice Ngcobo was unwilling to take this final step.²⁶⁰ While he recognised that FC s 7(2) imposed an obligation on the state to 'take effective

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measures to fight corruption',²⁶¹ it did not oblige the state to establish an independent entity to combat corruption. The difference between the majority and the minority seems to operate on two levels. On one level, it is a disagreement

254 *Glenister II* (supra) at para 166.

255 *Ibid* at para 198.

256 *Ibid* at para 177.

257 *Ibid* at para 191.

258 *Ibid* at para 197.

259 For a discussion of this part of the judgment, see S Woolman 'Security Services' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, RS 3, May 2011) Chapter 23B.

260 Mogoeng and Yacoob JJ and Brand AJ concurring.

261 *Glenister II* (supra) at para 84.

about the role of South Africa's international obligations in interpreting the Constitution. But on another level it is about the degree of action required by FC s 7(2), and the latitude given to the state to realise its obligations. The minority stresses that '[h]ow [the FC s 7(2)] obligation is fulfilled and the rate at which it must be fulfilled must necessarily depend upon the nature of the right involved, the availability of government resources and whether there are other provisions of the Constitution that spell out how the right in question must be protected or given effect.'²⁶² In its view, the majority is guilty of 'read[ing] into our Constitution a constitutional obligation that the Constitution does not expressly create.'²⁶³ To the majority, anything other than establishing an independent entity is not a sufficient attempt to tackle corruption.²⁶⁴

Moving on from FC s 7(2), it should be noted that impermissible limitations of fundamental rights are not confined to direct infringements of those rights. Importantly, 'the implementation of an Act which passes constitutional scrutiny at the time of its enactment, may well give rise to a constitutional complaint, if, as a result of circumstances which become apparent later, its implementation would infringe a constitutional right.'²⁶⁵ Though this provision primarily implicates the executive, it should be borne in mind when Parliament adopts legislation. Furthermore, legislation could be invalid if it grants benefits to individuals on condition that they act in a manner that compromises their fundamental rights.²⁶⁶

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The Constitutional Court has repeatedly stated that if Parliament intends to limit fundamental rights, it should do so expressly and clearly.²⁶⁷ Furthermore, when Parliament enacts legislation that gives officials a discretion that could affect someone's fundamental rights, it must provide the appropriate guidance to those officials:

262 Ibid at para 107.

263 Ibid at para 109.

264 Without getting into a long debate about the correctness of either of these approaches, it is worth pointing a significant weakness of the majority decision. The Hawks share the jurisdiction to fight corruption with other units of the South African Police Service ('SAPS'). The only difference is that the Hawks investigate matters which, in the view of its Head, are national priority offences and those offences or category of offences referred to it from time to time by the National Commissioner of the SAPS, subject to any policy guidelines issued by the Ministerial Committee. The majority does not seem to consider that a vast number of the offences of corruption may be investigated by other units of the SAPS, which lack the independence the Court sought of the Hawks. Why does it fulfil the s 7(2) duty if only some corruption offences are addressed by an independent body, while many others are addressed by the clearly less independent (at least by the majority's standards) SAPS?

265 *New National Party* (supra) at para 22.

266 An example of such legislation might be a taxation statute which granted rebates to soldiers who took an oath of loyalty to the government. See *Speiser v Randall* 357 US 513, 78 S Ct 1332 (1958). This sort of case is dealt with in the United States under the 'unconstitutional conditions' doctrine. For discussion of this doctrine and the confusion surrounding its application, see KM Sullivan 'Unconstitutional Conditions' (1989) 102 *Harvard LR* 1415; C Sunstein *The Partial Constitution* (1993) Chapter 10. The Canadian Supreme Court appears to have contemplated the competence of an individual to bargain away some of his or her rights, provided that the bargaining is rational. See *Douglas College v Douglas/Kwantlen Faculty Association, Attorney-General of Canada et al, Interveners* [1990] 77 DLR (4th) 94, 3 SCR 570, 585.

It is for the legislature to ensure that, when necessary, guidance is provided as to when limitation of rights will be justifiable. It is therefore not ordinarily sufficient for the legislature merely to say that discretionary powers that may be exercised in a manner that could limit rights should be read in a manner consistent with the Constitution in the light of the constitutional obligations placed on such officials to respect the Constitution. Such an approach would often not promote the spirit, purport and objects of the Bill of Rights. Guidance will often be required to ensure that the Constitution takes root in the daily practice of governance. Where necessary, such guidance must be given. Guidance could be provided either in the legislation itself, or where appropriate by a legislative requirement that delegated legislation be properly enacted by a competent authority.²⁶⁸

At the same time, the Court has been sensitive to the fact that Parliament must be given a wide degree of latitude in its law-making provided that it acts within the constraints of the Constitution:

The duty of a court is to decide whether or not the legislature has overreached itself in responding, as it must, to matters of great social concern [W]hen giving appropriate effect to the factor of 'less restrictive means', the court must not limit the range of legitimate legislative choice in a specific area.²⁶⁹

When crafting remedies for violations of rights, the Court has articulated similar concerns and tried to avoid limiting Parliament's options.²⁷⁰

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(c) Extraterritorial competence constraints

Can Parliament legislate beyond the national boundaries? The answer before the Interim Constitution was in the affirmative.²⁷¹ This position seems to have been unaffected by the adoption of either the Interim Constitution or the Final

267 *August & Another v Electoral Commission & Others* 1999 (3) SA 1 (CC), 1999 (4) BCLR 363 (CC), [1999] ZACC 3 at para 33; *Lesapo v North-West Agricultural Bank* 2000 (1) SA 409 (CC), 1999 (12) BCLR 1420 (CC), [1999] ZACC 16 at para 9; and *National Union of Metal Workers of South Africa & Others v Bader BOP (Pty) Ltd & Another* 2003 (3) SA 513 (CC), 2003 (2) BCLR 182 (CC), [2002] ZACC 30 at para 37. See also *Ngcobo & Others v Salimba* 1999 (8) BCLR 855 (SCA), 1999 (2) SA 1057 (SCA) at para 13 (On problems of drafting legislation to meet such a demand).

268 *Dawood & Another v Minister of Home Affairs & Others* 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC), [2000] ZACC 8 ('Dawood') at para 54.

269 *S v Manamela & Another* 2000 (3) SA 1 (CC), 2000 (5) BCLR 491 (CC), 2000 (1) SACR 414 (CC), [2000] ZACC 5 at para 34. See also *S v Baloyi* 2000 (2) SA 425 (CC), 2000 (1) BCLR 86 (CC), 2000 (1) SALR 81 (CC), [1999] ZACC 19 at para 30; *S v Jordan & Others* 2002 (6) SA 642 (CC), 2002 (11) BCLR 1117 (CC), 2002 (2) SACR 499 (CC), [2002] ZACC 22 particularly at paras 25-6 and 94. See also *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders (NICRO) & Others* 2005 (3) SA 280 (CC), 2004 (5) BCLR (CC), [2004] ZACC 10 at para 35 (Court recognised that 'there may ... be cases where the concerns to which the legislation is addressed are subjective and not capable of proof as objective facts. A legislative choice is not always subject to courtroom fact-finding and may be based on reasonable inferences unsupported by empirical data. When policy is in issue it may not be possible to prove that a policy directed to a particular concern will be effective. It does not necessarily follow from this, however, that the policy is not reasonable and justifiable.')

270 See, for example, *National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others* 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC), [1999] ZACC 17 at paras 66, 76, 84-6; *J & Another* (supra) at paras 21, 26. See generally M Bishop 'Remedies' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 9.

Constitution. There are a number pieces of legislation on the statute book that have extra-territorial application.²⁷²

(d) Separation of powers constraints²⁷³

The doctrine of the separation of powers limits the legislative authority of Parliament. The separation of powers under the Constitution, though 'intended as a means of controlling government by separating or diffusing power, is not strict'.²⁷⁴

Rather the doctrine

[e]mbodies a system of checks and balances designed to prevent an over-concentration of power in any one arm of government; it anticipates the necessary or unavoidable intrusion of one branch on the terrain of another; this engenders interaction, but does so in a way which avoids diffusing power so completely that government is unable to take timely measures in the public interest.²⁷⁵

The constraint placed by the separation of powers on Parliament's authority is most obvious in the context of the separation between the powers of the judicial branch of government, on the one hand, and the legislative and executive branches, on the other. Legislation that brings judicial organs of state under the control of Parliament or the executive can be struck down under the separation of powers doctrine even if such legislation does not conflict with any of the express provisions of the Constitution.²⁷⁶

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271 *S v Fazzie & Others* 1964 (4) SA 673 (A).

272 Examples include the Regulation of Foreign Military Assistance Act 15 of 1998; the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002; the Prevention and Combating of Corrupt Activities Act 12 of 2004; the Anti-Personnel Mines Prohibition Act 36 of 2003; the Prohibition or Restriction of Certain Conventional Weapons Act 18 of 2008.

273 See generally, S Seedorf & S Sibanda 'Separation of Powers' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 12.

274 *S v Dodo* 2001 (3) SA 382 (CC), 2001 (1) SACR 594 (CC), 2001 (5) BCLR 423 (CC), [2001] ZACC 16 ('Dodo') at para 16.

275 *Ibid.*

276 See *Bernstein & Others v Bester NO & Others*, 1996 (2) SA 751 (CC), 1996 (4) BCLR 449 (CC), [1996] ZACC 2 at para 105 (The doctrine of separation of powers underpins the access to court rights protected by IC s 22. Thus many cases raising the separation of powers of the judicial branch of government can also be argued under IC s 22. Nevertheless, there remain some cases which cannot be brought within the ambit of IC s 22, but may yet be argued on the basis of the separation of powers doctrine.) See also *Ex parte Attorney-General, Namibia: In re the Constitutional Relationship between the Attorney-General and the Prosecutor-General* 1995 (8) BCLR 1070 (NmS)(Case concerned s 35 of the Criminal Procedure Act 51 of 1977. The section provided that the powers of the Prosecutor-General were to be exercised subject to the control and direction of the Attorney-General, a member of the Namibian executive. The section was held to be inconsistent with the Namibian Constitution on the grounds that it allowed a member of the executive to exercise control over the prosecutorial discretion which was the function of the judicial branch of government. The section was also found to be inconsistent with certain express provisions of the Namibian Constitution.)

However, not every legislative venture into the perceived domain of judicial decision-making is a violation of the separation of powers. For example, the Constitutional Court has stressed that it is 'pre-eminently the function of the legislature to determine what conduct should be criminalised and punished.'²⁷⁷ That said, the Court cautioned that:

The legislature's powers are decidedly not unlimited. Legislation is by its nature general. It cannot provide for each individually determined case. Accordingly such power ought not, on general constitutional principles, wholly to exclude the important function and power of a court to apply and adapt a general principle to the individual case. This power must be appropriately balanced with that of the judiciary.²⁷⁸

Attempts by the legislature to control executive policy may also raise separation of powers issues. For instance, can the legislature specify that it has to be consulted before certain executive action is taken? In one pre-1994 case, a South African court insisted on just such a procedure being followed.²⁷⁹ Such procedures are likely to have remained valid under the Final Constitution.²⁸⁰

Parliament is also constrained by its obligations to the State Institutions Supporting Constitutional Democracy.²⁸¹ These constraints are very similar to those produced by the separation of powers. With respect to these Chapter 9 bodies, Parliament's obligations are twofold. Firstly, it must not interfere with the independence and impartiality of these institutions.²⁸² Secondly, Parliament must

277 *Dodo* (supra) at para 22.

278 *Dodo* (supra) at para 26. The Court therefore upheld the validity of legislation prescribing life imprisonment unless the sentencing court was satisfied that 'substantial and compelling circumstances' exist that justify the imposition of a lesser sentence. See *S v Dlamini*; *S v Schietekat*; *S v Joubert*; *S v Dladla* 1999 (4) SA 623 (CC), 1999 (7) BCLR 771 (CC), 1999 (2) SACR 51 (CC), [1999] ZACC 8 at paras 37-44 (The Court held that Parliament was entitled to legislate to provide guidelines concerning factors relevant to the grant or refusal of bail, provided that the existence of such factors or any other factors, and the weight to be attributed to them, was left to the judgment of the presiding judicial officer.) See also *S & Others v Van Rooyen & Others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC), 2002 (8) BCLR 810 (CC), [2002] ZACC 8 ('*Van Rooyen*') (In the context of the administration of the judiciary, the *Van Rooyen* Court held that the fact that the executive and the legislature make or participate in the appointment of judges is not inconsistent with the separation of powers or the judicial independence that the Constitution requires. *Ibid* at para 106. The Court also upheld the involvement of Parliament, in appropriate circumstances, in the reduction of magistrates' pay and the removal of magistrates. *Ibid* at paras 149 and 211.)

279 *More v Minister of Co-operation and Development & Another* 1986 (1) SA 102 (A) (Court upholds the need for parliamentary resolution before executive can relocate a black traditional group against its will).

280 See, for instance, s 11(6) of the Provincial Service Commission Act 3 of 1994 (Gauteng), which required that a decision taken by that Commission to dispense with certain procedures had to be reported to the Speaker of the provincial legislature and could be overruled by the legislature.

281 These are the Public Protector; the South African Human Rights Commission; the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities; the Commission for Gender Equality; the Auditor-General; and the Electoral Commission. For discussions of these institutions, see S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS) Chapters 24A-F.

282 FC s 181(2), (3) and (4). See also *New National Party* (supra) at para 78.

provide for funding 'reasonably sufficient' to enable these institutions to carry out their constitutional mandate.²⁸³

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Separation of powers has also been central to determining on which courts can decide whether Parliament has fulfilled its constitutional obligations as contemplated in FC s 167(4)(e). Section 167(4)(e) identifies a peculiar set of circumstances in which only the Constitutional Court, as 'the highest court on constitutional matters and ... the ultimate guardian of the Constitution and its values', is suited to adjudicate.²⁸⁴ The obligation on Parliament to facilitate public involvement in its legislative and other processes, for example, is a member of the family of politically consequential questions²⁸⁵ of high importance that may only be considered by the Constitutional Court.²⁸⁶

(e) Delegation constraints

This section outlines Parliament's power to delegate its legislative function to other bodies. The primary form of delegation is legislation that affords the executive the power to make regulations. We address this first. Second, we briefly discuss the delegation of national legislative powers to provincial legislatures and municipal councils. We look, third, at the possibility for those who are delegated powers to sub-delegate them to another actor, including private parties. Finally, we consider whether delegated laws are subject to more stringent review than laws made directly by the national legislature.

(i) Delegation to the executive

The Interim Constitution was silent on the question whether Parliament could delegate its authority to legislate. In *Executive Council, Western Cape Legislature & Others v President of the Republic of South Africa & Others* ('*Executive Council 1995*'),²⁸⁷ the Constitutional Court — in its first year — highlighted that delegating subordinate regulatory authority was not only constitutionally permissible, but was necessary for effective governance.²⁸⁸ However, the Court also ruled that there were limitations, under the Interim Constitution, on the legislative authority that Parliament could delegate. The 'delegation doctrine' that imposes such limits is derived from the separation of powers doctrine: that law-making,

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as the proper domain of the legislature, should not be delegated excessively to the executive branch of government.²⁸⁹ In *Executive Council 1995*, the Court was asked

283 *New National Party* (supra) at para 98. These institutions are also accountable to the National Assembly and must submit reports on their performance at least once a year. FC s 181(5).

284 2006 (12) BCLR 1399 (CC), 2006 (6) SA 416 (CC), [2006] ZACC 11 ('*Doctors for Life*') at para 22.

285 These instances are listed in section 167(4)(e).

286 *Doctors for Life* (supra) at para 22.

287 *Executive Council, Western Cape Legislature & Others v President of the Republic of South Africa & Others* 1995 (4) SA 877 (CC), 1995 (10) BCLR 1289 (CC), [1995] ZACC 8 ('*Executive Council 1995*').

to address the constitutionality of s 16A of the Local Government Transition Act.²⁹⁰ The section purported to confer on the President a power to amend the Act itself by Proclamation. A majority of the Constitutional Court held this delegation of legislative power went beyond constitutionally acceptable limits:

In a modern state detailed provisions are often required for the purposes of implementing and regulating laws, and Parliament cannot be expected to deal with all such matters itself. There is nothing in the Constitution which prohibits Parliament from delegating subordinate regulatory authority to other bodies. The power to do so is necessary for effective law-making. It is implicit in the power to make laws for the country and I have no doubt that under our Constitution Parliament can pass legislation delegating such legislative functions to other bodies. There is, however, a difference between delegating authority to make subordinate legislation within the framework of a statute under which the delegation is made and assigning plenary legislative power to another body, including, as s 16A does, the power to amend the Act under which the assignment is made.²⁹¹

288 Ibid at para 51. After surveying the approach in several foreign jurisdictions, the Court concluded that limited guidance could be found from foreign precedent and that 'where Parliament is established under a written constitution, the nature and extent of its power to delegate legislative powers to the executive depends ultimately on the language of the Constitution, construed in the light of the country's own history.' Ibid at para 61. See also, ibid at para 136 (Mahomed DP, concurring)('The competence of a democratic Parliament to delegate its law-making function cannot be determined in the abstract. It depends inter-alia on the constitutional instrument in question, the powers of the legislature in terms of that instrument, the nature and ambit of the purported delegation, the subject-matter to which it relates, the degree of delegation, the control and supervision retained or exercisable by the delegator over the delegatee, the circumstances prevailing at the time when the delegation is made and when it is expected to be exercised, the identity of the delegatee and practical necessities generally.')

289 That the excessive delegation doctrine was developed in the United States by American courts intent on frustrating the New Deal does not undermine the coherence of policy considerations underlying it. See *Panama Refining Co v Ryan* 293 US 388, 55 S Ct 241 (1935)(Congress had set no policy to guide the President in deciding whether to authorize administrative codes to regulate interstate shipment of oil); *Schechter Poultry Corp v United States* 295 US 495, 55 S Ct 837 (1935) (Legislation giving force of law to regulatory codes drawn up by industry associations struck down; in general, delegation of law-making power to private groups disfavoured). More recently, however, the influence of the delegation doctrine in the US has weakened and cases have turned on whether the delegated power touches constitutionally protected rights. Broad grants to administrative agencies that do not affect constitutionally protected rights have been upheld. See *Lichter v United States* 334 US 742, 68 S Ct 1294 (1948) (Statute empowering administrative agency to apply standard of 'excessive profits' upheld because sufficient administrative practice had built up to make standard specific).

In countries where the executive is accountable to the legislature the delegation doctrine has not been applied to any significant extent. See *City View Press v An Chomhairle Oiluina* [1980] IR 381, 399 (In Ireland, the delegation doctrine exists, but not applied in this case: 'the test is whether that which is challenged as an unauthorized delegation of parliamentary power is more than a mere giving effect to principles and policies which are contained in the statute itself'); *Victoria Stevedoring Co v Dignan* 46 CLR 73 (1931) (Australian court refuses to apply delegation doctrine); *Hodge v The Queen* (1883) App Cas 117 (Canadian) (Refusing to apply delegation doctrine).

290 Act 209 of 1993.

291 *Executive Council 1995* (supra) at para 51. See also *Minister of Health & Another v New Clicks South Africa (Pty) Ltd & Others* 2006 (2) SA 311 (CC), 2006 (8) BCLR 872 (CC), [2005] ZACC 14 ('New Clicks') at para 113 (Chaskalson CJ)('The making of delegated legislation by members of the executive is an essential part of public administration. It gives effect to the policies set by the legislature and provides the detailed infrastructure according to which this is to be done.')

Permitting the President to amend statutes would be subversive of the provisions of the Interim Constitution that dictate how Parliament can pass laws,²⁹² and 'could be used to introduce contentious provisions into what was previously uncontentious.'²⁹³ Although *Executive Council 1995* seems to exclude the possibility that Parliament can ever delegate the power to amend legislation, it leaves open

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the possibility that such a power might be delegable in times of war or national emergency.²⁹⁴

Like the Interim Constitution, the Final Constitution is silent on the question of delegating legislative authority to the executive. The constitutional position therefore remains the same.²⁹⁵ Parliament may generally still delegate subordinate regulatory authority to members of the executive, but may not assign plenary legislative power to the executive (save for exceptional circumstances).²⁹⁶ This delegation doctrine has the virtue of balancing the need for efficiency in government against the need to avoid subverting the constitutional legislative framework.²⁹⁷ As we discuss in more detail below,²⁹⁸ the Constitution also permits delegation of legislative powers to private actors.²⁹⁹

While this is an accurate description of the general approach, the Constitutional Court pointed out in *Executive Council 1999* that the specific enquiry is

whether the Constitution authorises the delegation of the power in question. Whether there is constitutional authority to delegate is therefore a matter of constitutional interpretation. The language used in the Constitution and the context in which the provisions being construed occur are important considerations in that process.³⁰⁰

292 *Executive Council 1995* (supra) at para 62.

293 *Ibid* at para 63.

294 *Executive Council 1995* (supra) at para 62 and para 140 (Mahomed DP, concurring).

295 See *Executive Council of the Province of the Western Cape v Minister for Provincial Affairs and Constitutional Development & Another, Executive Council of KwaZulu-Natal v President of the Republic of South Africa & Others* 2000 (1) SA 661 (CC), 1999 (12) BCLR 1360 (CC), [1999] ZACC 13 ('*Executive Council 1999*') at para 124 (Holding that the same principles apply to the Final Constitution.) See also *Van Rooyen* (supra) at para 118-9 (Constitutional Court applied the holding in *Executive Council 1995* in evaluating the constitutionality of a delegation of subordinate regulatory authority.)

296 *Executive Council 1995* (supra) at para 62.

297 *Ibid* at para 62-3.

298 See § 17.5(e)(iii) below.

299 *AAA Investments (Proprietary) Limited v Micro Finance Regulatory Council & Another* 2007 (1) SA 343 (CC), 2006 (11) BCLR 1255 (CC), [2006] ZACC 9.

300 *Executive Council 1999* (supra) at para 124.

The issue in *Executive Council 1999* was whether s 24(1) of the Local Government Municipal Structures Act,³⁰¹ which permitted a Minister to determine the terms of municipal councils, was an unconstitutional delegation considering that FC s 159 requires Councils' terms to be 'determined by national legislation.' Ngcobo J stressed that the Constitution uses a range of expressions when it confers legislative power upon the national legislature with regard to local government. Where the Constitution states that 'national legislation must' or 'as determined by national legislation', this constitutes a strong indication that the legislative power cannot be delegated by the legislature.³⁰² Justice Ngcobo accordingly found that s 24(1) was an unconstitutional delegation of a power that the Constitution determined could only be exercised by the legislature.

Executive Council 1999 raised, but technically left un-answered, two important, related questions about the limits Parliament must place on delegations: (a) whether Parliament must provide clear criteria for the exercise of the delegated power; and (b) whether a delegation must contain safeguards against the abuse

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of the delegated power.³⁰³ The Court answered (a) In *Affordable Medicines Trust & Others v Minister of Health & Another*.³⁰⁴ The challenge concerned a delegation to the Director General of Health to prescribe the conditions under which a medical practitioner could be issued a licence to compound and dispense medicine. The challenger complained that there was no direct guidance about the types of conditions the Director General could attach to a licence. Ngcobo J emphasised that, as a general rule, Parliament was permitted to afford those to whom it delegated powers discretion in how they exercise the power.³⁰⁵ 'However,' he continued,

the delegation must not be so broad or vague that the authority to whom the power is delegated is unable to determine the nature and the scope of the powers conferred. For this may well lead to the arbitrary exercise of the delegated power. Where broad discretionary powers are conferred, there must be some constraints on the exercise of such power so that those who are affected by the exercise of the broad discretionary powers will know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision. These constraints will generally appear from the provisions of the empowering statute as well as the policies and objectives of the empowering statute.³⁰⁶

While the power was not directly limited, it was 'limited by the context in which [the] powers [were] to be exercised.'³⁰⁷ Ngcobo J reasoned that the power must be exercised in the light of the purpose of the legislation, the purpose of providing the

301 Act 117 of 1998.

302 *Executive Council 1999* (supra) at paras 125-6.

303 *Executive Council 1999* (supra) at paras 116-8.

304 2006 (3) SA 247 (CC), 2005 (6) BCLR 529 (CC), [2005] ZACC 3 ('*Affordable Medicines*').

305 Ibid at para 33 citing *Dawood & Another v Minister of Home Affairs & Others* 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC), [2000] ZACC 8 at para 53.

306 *Affordable Medicines* (supra) at para 34.

Director General with discretionary powers, and the obligations of medical practitioners. 'All this,' he concluded, 'provides sufficient constraint on the exercise of the discretionary powers conferred by the sub-section.'³⁰⁸

This is a fairly narrow restraint on Parliament's ability to delegate. It stands in contrast to the limits the Court has placed on the exercise of administrative discretion that affect fundamental rights. In *Dawood*,³⁰⁹ the Court held that legislation that gives administrators discretion to take decisions that might infringe a fundamental right must provide guidelines for the exercise of that discretion. As O'Regan J explained:

There is . . . a difference between requiring a court or tribunal in exercising a discretion to interpret legislation in a manner that is consistent with the Constitution and conferring a broad discretion upon an official, who may be quite untrained in law and constitutional interpretation, and expecting that official, in the absence of direct guidance, to exercise the discretion in a manner consistent with the provisions of the Bill of Rights. Officials are often extremely busy and have to respond quickly and efficiently to many requests or applications. The nature of their work does not permit considered reflection on the scope of constitutional rights or the circumstances in which a limitation of such rights is justifiable.³¹⁰

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Should delegated lawmaking powers that have the potential to affect constitutional rights be less strictly guided than the implementation of laws with the same effect? Arguably, yes. The concerns that seem to motivate the *Dawood* Court concern the pressures of urgent decision-making. Drafting regulations is a more extended process where the executive will have greater opportunity for reflection on the consequences for constitutional rights. It is therefore sensible to apply the *Affordable Medicines* standard to all secondary legislation, whether it affects rights or not. However, it would also be plausible to adopt a slightly stricter standard of review for delegations of powers that impact on rights. The Court has yet to take a firm position.

As to (b) — which is arguably just a variant of (a) — the best answer comes in *Executive Council 1999*. Although professing to leave the issue undecided, Ngcobo J basically wrote off the idea that a delegation could be invalid because it was open to abuse: '[T]he enquiry is not whether the delegated power is open to abuse. ... The enquiry is whether there is constitutional authority to delegate the power in question. ... If delegated power is abused, the conduct of those abusing the power would be unconstitutional and therefore open to challenge.'³¹¹ It is difficult to see how that line of thought could ever permit a challenge based on a delegated power's potential to be misused.

307 Ibid at para 38.

308 Ibid.

309 *Dawood & Another v Minister of Home Affairs & Others* 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC), [2000] ZACC 8 ('*Dawood*').

310 Ibid at para 46 (The legislation at issue in *Dawood* concerned the granting of residence permits for foreign spouses.)

311 *Executive Council 1999* (supra) at para 117.

Although we appreciate the logic that informs the Court's answers to both (a) and (b), we remain somewhat uncomfortable with the endpoint. *Affordable Medicines* suggests that it will be difficult to find a delegation where the discretion is imperfectly circumscribed. All legislation will have an over-arching purpose or goal, and if adhering to that goal constitutes sufficient guidance for the exercise of delegated law-making power, only the rare legislation that lacks a coherent goal could possibly contain a delegation that gave overbroad discretionary powers. And, as we noted, the Court has in reality excluded the possibility of challenges based on the potential for abuse. This opens the door for Parliament to confer virtually unfettered discretion on the executive to draft laws as long as: (a) it does not alter the text of legislation; and (b) there is no specific constitutional mandate for the legislature to act. The potential for such transfers of power does not sit easily with traditional notions of the separation of powers.

The answer — which the Court itself gives in *Executive Council 1999* — is that it remains possible to challenge the exercise of a delegated power, just not the delegation of the power. That is, of course, true. But the basis for the challenge is different. A challenge to the exercise of a delegated power alleges that the executive actor has exceeded the bounds of the delegation. A challenge to the delegation alleges that it was improper to afford the executive actor such wide powers, no matter how they are in fact exercised.

There are two problems with relying on exercise-challenges. First, since the Court does not require guidelines, it will be difficult to tell whether the exercise of the power falls within the terms of the delegation. If a power is bound only by the general purposes of the legislation, courts are likely to defer to the executive's interpretation of that purpose. Therefore, although attacks on the exercise of a

RS3, 05-11, ch17-p50

delegated power are possible in theory, they will seldom succeed in practice, *precisely because* the Court does not require guidelines on how the power must be exercised. Second, an exercise-challenge is a reaction; one must wait until the power is used before attacking it. This creates difficulties for the minority of challenges that will, in fact, succeed. The executive might in good faith interpret legislation to permit it to make a regulation, only to find out later that it has exceeded its powers. In addition, it is likely that the public will be affected by the illegal use of the regulatory power before its illegality is remedied.

While we do not take a strong stance for or against the Court's approach to the limits of the legislature's delegating powers, we do believe that it needs to think more carefully about the consequences of its approach than it has to date. It may be wise to impose slightly stricter constraints. The Court in *Glenister II* could be read to have backtracked slightly on its earlier position. The issue was not technically about delegation, but whether the Hawks — which Parliament had created to deal with national priority offences, including serious corruption — were sufficiently independent from the executive. In concluding that they did not enjoy the necessary degree of independence, Moseneke DCJ and Cameron J were particularly concerned about a provision that permitted a Ministerial Committee to set policy guidelines for the institution. While those guidelines could be 'broad and harmless', 'the power of the Ministerial Committee to determine guidelines appears to be untrammelled. The guidelines could, thus, specify categories of offences that it is not appropriate for the [Hawks] to investigate — or, conceivably, categories of political office-bearers whom

the [Hawks are] prohibited from investigating.³¹² The problem for the Court was that the legislation did not 'rule out far-fetched inhibitions on effective anti-corruption activities. On the contrary, it leaves them open.'³¹³ The thought process of the *Glenister II* majority suggests that the Court might be more open to complaints about the lack of guidelines for delegated law-making; not only when rights are directly at stake, as in *Dawood*, but also when the independence of an institution is threatened.

Finally, we must note that the delegation doctrine cannot be used to challenge the validity of delegated legislation that was made before the Interim Constitution came into effect.³¹⁴ It seems likely, however, that the doctrine does apply to regulations

RS3, 05-11, ch17-p51

made after the commencement of the Interim Constitution but in terms of an enabling statute that was passed before 27 April 1994.³¹⁵

(ii) Delegation to provincial legislatures and municipal councils

FC s 44(1)(a)(iii) explicitly allows Parliament to assign its legislative powers, except the power to amend the Constitution, to provincial legislatures and municipal councils. This power is known as legislative inter-delegation.

The assignment of legislative competence proceeds by Act of Parliament.³¹⁶ An assignment extends legislative powers to the provincial legislature for as long as the Act of Parliament is in force. If the Act is repealed, provincial laws already made under it would continue to be valid. However, the province would not be

312 *Glenister v President of the Republic of South Africa & Others* 2011 (3) SA 347 (CC), [2011] ZACC 6 ('*Glenister II*') at para 230.

313 *Ibid* at para 231.

314 *Ynuico Ltd v Minister of Trade and Industry & Others* 1996 (3) SA 989 (CC), 1996 (6) BCLR 798 (CC), [1996] ZACC 12 ('*Ynuico*'). The doctrine drew its constitutional force from IC s 37, which vested the legislative authority of the Republic in Parliament. IC s 37 could have no bearing on the validity of regulations that were made before it came into existence, because the Interim Constitution did not have retroactive effect. In terms of IC s 229, these regulations continued in force. As Didcott J pointed out in *Ynuico*, IC s 229 was designed to avoid the impracticality of dismantling all existing statutory law on 27 April 1994. In so doing it gave continued effect to laws whose genesis was tainted. Whether that taint arose out of the racially exclusive nature of the old Parliament or the fact that legislative authority was vested in executive actors did not affect the operation of IC s 229. *Ibid* at para 8.

315 See *Ynuico* (supra) at para 5. *Ynuico* does not make clear the attitude of the Court to this question. However, it is submitted that the doctrine must apply to such legislation. The basis of the doctrine is that, with effect from 27 April 1994, the legislative authority of the Republic vested in Parliament. After that date no law could vest plenary legislative authority in an organ other than Parliament. Whether the law itself was passed before or after 27 April 1994 is irrelevant to this inquiry.

In terms of IC s 229 any law passed before the commencement of the Constitution continued in force subject to the Constitution. Provisions of such a law, which purported to confer plenary legislative authority on an executive organ of state, would therefore have been of no force and effect after 27 April 1994. Likewise, Item 2(1) of Schedule 6 of the Final Constitution provides that all law that was in force when the 1996 constitution took effect continues in force subject to consistency with the new Constitution.

able to make any further laws in respect of matters covered by the Act because it would no longer have the assigned legislative competence to do so.

National legislation prevails over conflicting provincial laws made under an assigned legislative competence.³¹⁷ It does not invalidate that legislation. Parliament does not have the legislative competence to repeal provincial laws — whether those laws are made under an original or an assigned competence.³¹⁸

(iii) Sub-delegation

Not only is it possible for the legislature to delegate a power to another, it is also permissible for the delegatee, in turn, to 'sub-delegate' that power to another. It is possible to sub-delegate not only executive and administrative powers — the implementation of regulations — but also legislative powers. This includes the possibility of delegating to private actors.

But see *Janse van Rensburg NO v Minister van Handel en Nywerheid* 1999 (2) BCLR 204, 213-214 (T)(Van Dijkhorst J reached the contrary conclusion. The learned judge erred by approaching the problem from the incorrect starting point. The constitutional source of the delegation doctrine was that IC s 37 vested the legislative authority of the Republic in Parliament. The effect of IC s 37 was a constitutional principle that no law could vest plenary legislative authority in a body other than the Interim Constitution Parliament. The rule that Parliament under the Interim Constitution could not delegate plenary legislative authority to any other body was a rule which flowed from this constitutional principle, but it was not the beginning and end of the principle itself. In *Janse van Rensburg*, Van Dijkhorst J assessed the constitutionality of s 12 of the Harmful Business Practices Act 71 of 1988 by looking only at the delegation rule and not at the underlying constitutional principle. The applicant in *Janse van Rensburg* argued that s 12 delegated unfettered legislative authority to the Minister of Trade and Industry and was therefore unconstitutional. Van Dijkhorst J rejected this argument on the following grounds: because the Parliament which had passed s 12 was not bound by the delegation rule; the delegation of legislative authority had been valid in 1988; it was therefore preserved by IC s 229 and FC Item 2 of Schedule 6 and remained valid today. By holding that the status of the original delegation of legislative authority in 1988 was decisive of the validity of s 12 after 27 April 1994, Van Dijkhorst J conflated the broad constitutional principle of parliamentary legislative authority with the delegation rule which is but one manifestation of this principle. Both IC s 229 and FC Schedule 6 Item 2 preserved existing legislation only 'subject to the Constitution'. IC s 37 (and FC s 43(a)) created a constitutional principle that no law could vest legislative authority in a body other than Parliament. From 27 April 1994, therefore, the validity of s 12 of the Harmful Business Practices Act 71 of 1988 depended not on whether it had been valid in 1988, but on whether it impermissibly purported to clothe the Minister of Trade and Industry with the type of legislative power which IC s 37 vested exclusively in Parliament. If it did, then it was inconsistent with IC s 37 and became prospectively invalid when the Interim Constitution took effect.)

- 316 It might be argued that the assignment of legislative power could take place by proclamation. There are, however, indications in the Constitution that this is not permissible. FC s 104(1)(b)(iii) provides that assignment must take place by 'national legislation'. This suggests an Act of Parliament rather than a proclamation. Moreover, FC s 44(1)(a)(iii) vests the power to assign legislative competence in the National Assembly. There is no corresponding power of assignment vested in the President or any other functionary who makes proclamations.
- 317 A conflict between provincial legislation of this nature and a national law would not fall under FC s 146 or FC s 147(2) because the provincial legislation would likely not relate to matters within Schedules 4 and 5. Thus the conflict would, in all likelihood, be one which 'cannot be resolved by a court' within the meaning of FC s 148, and in terms of that section the national legislation would prevail.
- 318 See *Ex parte Speaker of the National Assembly: In re Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill No 83 of 1995* 1996 (3) SA 289 (CC), 1996 (4) BCLR 518 (CC), [1996] ZACC 3 at paras 16-19. See also FC s 149.

In general, the legislature may provide for sub-delegation directly in legislation. It may, for example, delegate a regulation-making power to the Minister, and expressly provide that he may delegate some of those powers to the Director General. That is perfectly ordinary and permissible. The difficulty arises where the legislation is silent about sub-delegation. The general principle in those cases is *delegatus delegare non potest* which translates as: 'a person who is delegated a power to do something may not delegate it further.'³¹⁹ This is by no means a strict rule, but a starting point for analysis. Sub-delegation will still be permissible where it is 'reasonably necessary' to fulfil the purpose of the statute.³²⁰

AAA Investments v (Pty) Ltd v Micro Finance Regulatory Council & Another is an excellent example of how these principles play out. Section 15A of the Usury Act³²¹ permitted the Minister of Finance to exempt certain categories of loans from the strict provisions of the Act. This provision was designed to permit the functioning of the micro-finance industry which could not operate under the stringent limitations of the Act that applied to ordinary lenders. The Minister was also entitled to set the conditions for an exemption in order to provide some consumer protections. The Minister created a set of rules for exemption which included a requirement that lenders register with a regulatory authority. The only authority recognized by the Minister was the Micro Finance Regulatory Council ('the Council'), a not-for-profit company set up by various private and government institutions. The Council in turn created its own set of rules for membership.

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AAA Investments complained that the rules of the Council were effectively new conditions for exemption that, in terms of s 15A, could only be set by the Minister. It argued that the Council had improperly exercised legislative power, and any implied sub-delegation by the Minister was impermissible.

The High Court had upheld the challenge on the grounds that the Council, as a private body, could not exercise legislative powers.³²² The Supreme Court of Appeal reversed, viewing the matter entirely as a question of the Council's powers under company law.³²³ The Constitutional Court disagreed, holding that the Council did exercise public, legislative powers. Provided the powers had been properly delegated to it, it was perfectly constitutional for a private body to, in effect, legislate. In Justice Yacoob's words:

[T]he Council exercised ... a rule-making power aimed at fulfilling the duties imposed by the Minister. They are legislative. But the Council does not, by making rules, or by exercising legislative power properly delegated to it, usurp national, provincial or

319 *AAA Investments (Proprietary) Limited v Micro Finance Regulatory Council & Another* 2007 (1) SA 343 (CC), 2006 (11) BCLR 1255 (CC), [2006] ZACC 9 ('AAA Investments') at para 117 (O'Regan J, concurring).

320 *Ibid* at para 82 (Langa CJ, dissenting).

321 Act 73 of 1968.

322 *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council & Another* 2004 (6) SA 557 (T).

323 *Micro Finance Regulatory Council v AAA Investments (Pty) Ltd & Another* 2006 (1) SA 27 (SCA).

municipal legislative power. It makes binding rules authorised by law and with the force of law in the fulfilment of a national legislative purpose as set out in section 15A.³²⁴

O'Regan J (in a concurrence) stressed the necessity of this privatisation of legislative power in the same terms used to justify delegation to the executive in *Executive Council 1995*:

The power to delegate subordinate legislative authority in a modern state is an important power. No modern state could hope to regulate all its affairs through legislation passed in the national, provincial and local spheres of government. Courts should therefore be cautious to avoid adopting unduly restrictive rules in this area which will limit the possibility of effective ordering of our society by organisations which may not form part of government.³²⁵

The majority of the Court did not address whether delegations to private bodies should be treated any differently from delegations to the non-legislative branches of the state. However, in dissent Langa CJ made the following commendable observations:

[A]ccountability is a central value of our Constitution. This means that our law must be developed and interpreted in a manner that ensures that all bodies exercising public power are held accountable. However, to my mind, it also means that courts should be slow to infer the delegation of power to bodies that cannot be held directly accountable through ordinary political processes. ... [A]lthough the Council exercises public powers and may be classified as an organ of state, it remains a private company. ... The Council is not elected nor is it directly accountable to the public. It is only accountable through the very limited control exercised by the Minister.³²⁶

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While this did not rule out the possibility of affording private parties the power to make laws, it did countenance caution in monitoring the degree of power private bodies are allowed to exercise. We agree with the Chief Justice. But, although the majority did not contradict his views, they did not support them either. We should also note that, although in *AAA Investments* the Council received its legislative power through sub-delegation, direct delegation from the legislature would be equally permissible.

While the Court was unanimous that the Council could exercise rule-making powers, it split over whether the Minister's rulemaking powers had indeed been properly delegated to the Council. Justice Yacoob wrote for the majority holding that the powers were properly delegated. First, because *AAA Investments* had not challenged the validity of the regulation requiring lenders to register with the Council, it had to be assumed that the delegation was valid.³²⁷ Second, there was no problem with the Council going beyond the confines of the rules created by the Minister to create its own rules. He held that 'the legislative purpose of empowering the Minister to set the conditions was ... to make it possible for the Minister to ensure that the micro-lending industry is sufficiently controlled and that borrowers

324 *AAA Investments* (supra) at para 49.

325 *Ibid* at paras 122-123.

326 *Ibid* (Langa CJ, dissenting) at paras 89-90.

327 *AAA Investments* (supra) at paras 47-48.

are appropriately protected.³²⁸ The Minister chose to do that through a regulatory institution. Once that decision had been taken, the Council had to be afforded all the powers necessary to meet the goal of the legislation, including the power to make rules.³²⁹

O'Regan J (joined by Ngcobo J) and Langa CJ both wrote separate opinions in which they considered the question of delegation in much greater depth. In their view, the decision to regulate through a private institution was not sufficient to justify whatever rules that institution might make. The Court still had to ask: (a) Did the Usury Act in fact permit some sub-delegation to the Council? (b) If it did, were the rules the Council made within the bounds of permissible sub-delegation? Langa CJ and O'Regan J agreed that some delegation was permissible, but disagreed on the extent of the delegation. Langa CJ would only have permitted rules that were necessary to implement the regulations passed by the Minister, not rules that 'create new hurdles for exemption.'³³⁰ He would have found invalid several rules that imposed requirements unrelated to the conditions established by the Minister. O'Regan J, on the other hand, gave the Council much greater latitude and would have upheld all the rules the Council had made. While there is not much to separate the two judgments, the Chief Justice's approach is ultimately preferable. He is the only judge to give sufficient weight to the private character of the Council. Affording private bodies legislative powers too easily risks undermining the important principles of accountability that are built into our constitutional system.

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Minister of Health & Another v New Clicks South Africa (Pty) Ltd & Others involved a more run-of-the-mill case of improper sub-delegation.³³¹ The case concerned medicine-pricing regulations. Although the Court was splintered on a variety of issues, it unanimously identified three impermissible sub-delegations. First, the Court held that it was impermissible for the Minister of Health to delegate the responsibility to determine the methodology by which prices would be benchmarked to international prices to her Director General. While it was acceptable for the Director General to do the calculations to set individual prices, allowing her to determine the methodology in effect gave her the power to set prices, a power that the legislation reserved for the Minister and a specialist Pricing Committee.³³² Second, the Court set aside a regulation that delegated the duty to conduct an annual review of prices to the Minister, when the Act assigned that duty to both the Minister and the Pricing Committee.³³³ Lastly and in a similar vein, while the Act required the Minister to set a logistics fee on the recommendation of the Pricing

328 Ibid at para 51.

329 Ibid at para 54.

330 Ibid at para 93.

331 *Minister of Health & Another v New Clicks South Africa (Pty) Ltd & Others* 2006 (8) BCLR 872 (CC), 2006 (2) SA 311 (CC), [2005] ZACC 14 ('*New Clicks*').

332 Ibid at para 281.

333 Ibid at para 286.

Committee, the regulations impermissibly assigned the duty to the Minister alone.³³⁴ *New Clicks* demonstrates the importance of both the language of the delegating legislation, and the relative expertise of the various actors involved in determining whether a sub-delegation is permissible. It also shows that it can be an invalid sub-delegation to assign a power that was meant to be exercised jointly to a single actor.

(iv) Reviewing delegated powers

An important consequence of delegating legislative powers — rather than exercising them directly — is that they are likely to become subject to stricter judicial scrutiny. Prior to the Interim Constitution, it was accepted that regulations made in terms of delegated powers were administrative action subject to judicial review.³³⁵ The position under the Final Constitution is, surprisingly, far less clear. This issue is discussed in more detail elsewhere in this work,³³⁶ but we provide an outline of the current position.

The proximate cause of the confusion is the Constitutional Court's splintered judgment in *New Clicks*.³³⁷ The Court rejected the High Court's finding that regulations are administrative action under FC s 33(1), but not under the Promotion of Administrative Justice Act ('PAJA'),³³⁸ but still managed to take four different positions, none of which garnered a majority. Writing for himself and Justice O'Regan, Chief Justice Chaskalson held that all regulation making (ie. delegated lawmaking) is subject to the control of both FC s 33(1)

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and PAJA. Ngcobo J, joined by two other Justices,³³⁹ held that the specific regulations at issue in *New Clicks* were administrative action, but was unwilling to extend that finding to all regulations. Four of the remaining Justices³⁴⁰ signed on to Moseneke J's opinion, which simply avoided the issue. Last, Sachs J held that regulations are not administrative action, but should be subject to a wide conception of legality.

The Court has provided no further guidance since *New Clicks*, so the exact position remains uncertain. The recent change in composition of the Court makes the eventual answer even less predictable.³⁴¹ However, it is almost certain that regulations will be subject to some additional level of scrutiny, even if it is not full administrative review. There are very good reasons for courts to show less deference

334 Ibid at para 300.

335 Ibid at paras 101-106 (Chaskalson CJ, plurality).

336 For a full analysis of the Court's cases on the topic, see G Penfold & J Klaaren 'Just Administrative Action' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) §63.3(b)(vi).

337 *New Clicks* (supra).

338 Act 3 of 2000.

339 Langa DCJ and Van der Westhuizen J.

340 Madala, Mokgoro, Skweyiya and Yacoob JJ.

to regulations than they do to legislation. Permitting some delegation is, as we discussed earlier, necessary for a modern state to function. But: The principled justifications for wide judicial deference to legislative rule-making do not apply when the legislature chooses to assign its central function to the executive. Regulations are not made by elected and accountable representatives. They are generally not the result of an open, deliberative, legislative process. Courts should therefore ensure that when legislative powers are exercised by non-legislative bodies, they are subject to some additional scrutiny.

(f) Constraints imposed by the legality principle

The rule of law is one of the founding values of the Final Constitution.³⁴² The legality principle that flows from the rule of law is binding on all legislative and executive organs of state in all spheres of government. The legality principle was first articulated by the Constitutional Court in *Fedsure v Greater Johannesburg Metropolitan Council*.³⁴³ The *Fedsure* Court held that the legality principle provided that legislative and executive organs of state 'may exercise no power and perform no function beyond that conferred upon them by law'.³⁴⁴ Thus stated, the legality principle was hardly controversial and would have no impact on the national legislature outside the federalism constraints already discussed. Indeed, its only relevance to the outcome in *Fedsure* concerned questions of jurisdiction, rather than questions of substantive law.³⁴⁵ However, the far-reaching significance of the legality principle lies in the rationality and vagueness doctrines.

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(i) Rationality

In *New National Party of SA v Government of the RSA & Others*,³⁴⁶ Yacoob J stated that laws and acts that are not rationally related to a legitimate government purpose are unconstitutional because arbitrariness is inconsistent with the legality principle. That the rule of law prohibits all irrational laws was reaffirmed by the Constitutional Court in *United Democratic Movement v President of the RSA*,³⁴⁷ and has been regularly applied since. The legality principle extends the Final Constitution's

341 Three of the five justices supporting Chaskalson CJ or Ngcobo J have left (Chaskalson CJ, Langa DCJ and O'Regan J) as have two of those who sided with Moseneke J (Madala and Mokgoro JJ). Sachs J, too, has retired.

342 FC s 1(c).

343 *Fedsure v Greater Johannesburg Metropolitan Council* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC), [1998] ZACC 17 ('*Fedsure*') at para 58.

344 *Ibid.*

345 *Ibid.* See also *President of the Republic of South Africa v South African Rugby Football Union & Others* 1999 (2) SA 14 (CC), 1999 (2) BCLR 175 (CC), [1998] ZACC 21 at para 28.

346 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC), [1999] ZACC 5 ('*New National Party*') at para 24 ('Courts do not review provisions of Acts of Parliament on the grounds that they are unreasonable. They will do so only if they are satisfied that the legislation is not rationally connected to a legitimate government purpose. In such circumstances, review is competent because the legislation is arbitrary. Arbitrariness is inconsistent with the rule of law which is a core value of the Constitution.')

commitment to the rule of law and constitutionalism such that even where an Act of Parliament does not affect fundamental rights, it must be rationally related to a legitimate governmental purpose in order to be valid.³⁴⁸

That said, the legality principle's rationality standard is a relatively easy one for Parliament to meet. It must not be conflated with the more stringent test of 'reasonableness'³⁴⁹ applied in limitations analysis and certain other contexts.³⁵⁰ In *Pharmaceutical Manufacturers*,³⁵¹ the Court explained the rationality standard as follows:

[It] does not mean that the courts can or should substitute their opinions as to what is appropriate, for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a court cannot interfere with the decision simply because it disagrees with it or considers that the power was exercised inappropriately.³⁵²

In *United Democratic Movement*, the Court confirmed that this relatively lenient standard applies 'also and possibly with greater force to the exercise by Parliament

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of the powers vested in it by the Constitution, including the power to amend the Constitution.³⁵³

- 347 2003 (1) SA 488 (CC), 2002 (11) BCLR 1213 (CC), [2002] ZACC 33 ('*United Democratic Movement*' or '*UDM*') at para 55.
- 348 This standard is virtually identical to the one imposed by FC s 9(1). Under s 9(1), any differentiation between groups of people must be rationally related to a legitimate government purpose. Technically, the rationality standard rooted in the rule of law does not require a differentiation. However, in practice virtually any law can be framed as a differentiation. Nonetheless, the range of the legality-based rationality standard is wider than its s 9(1) relative because it applies to the limited set of cases that are not covered by the Bill of Rights, particularly constitutional amendments.
- 349 The greater scrutiny involved in a reasonableness enquiry is best illustrated by comparing the majority judgment of Yacoob J in *New National Party* with the dissenting judgment of O'Regan J. Yacoob J believed a rationality approach was appropriate. *New National Party* (supra) at para 24. O'Regan J believed a reasonableness test should be applied. Ibid at paras 122-3. Naturally, they reached different conclusions. See also *Bel Porto School Governing Body v Premier of the Province of the Western Cape*, 2002 (3) SA 265 (CC), 2002 (9) BCLR 891 (CC), [2002] ZACC 2 at para 46. See also, A Price 'The Content and Justification of Rationality Review' (2010) 25 *SAPL* 345, 358 ('Whereas an act is reasonable if the reasons for it defeat the reasons against it, an act is merely rational if, notwithstanding the reasons against it, there is at least one reason or rationale for it.')
- 350 See, eg, the rights to administrative action, FC s 24, and some socio-economic rights, FC ss 26 and 27.
- 351 *Ex parte President of the RSA: In re Pharmaceutical Manufacturers Association of South Africa* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC), [2000] ZACC 1.
- 352 Ibid at para 90. Footnote omitted.
- 353 *United Democratic Movement* (supra) at para 68. *United Democratic Movement* illustrates well the relatively low level of scrutiny that a rationality enquiry entails. The Court rejected the argument that it was irrational for Parliament to limit defections by members of a legislature to two window periods in the life of a legislature and, in doing so, emphasised the conflicting views expressed in Parliament on the issue and the expert opinions that had been obtained. Ibid at para 69. The Court

In dealing with the rule of law and the legality principles in *United Democratic Movement*, the Court emphasised the need to distinguish a legitimate governmental purpose from the motive of those who voted for the legislation. In response to an argument that the purpose of the defection legislation was to enable the African National Congress and New National Party to take advantage of the break-up of the Democratic Alliance, the *United Democratic Movement* Court held that:

Courts are not ... concerned with the motives of the members of the legislature who vote in favour of particular legislation, nor with the consequences of legislation unless it infringes rights protected by the Constitution, or is otherwise inconsistent with the Constitution.³⁵⁴

A fuller discussion of rationality jurisprudence lies outside the scope of this chapter. Fortunately, the intricacies of the rationality test are addressed in more detail elsewhere in this work,³⁵⁵ and one of the authors has provided an extensive account of it in *South African Public Law*.³⁵⁶ For now, we simply note that rationality review is far more complicated, malleable and subjective than it may, at first, appear.

(ii) Vagueness

In addition to irrational legislation, the legality principle also prohibits vague legislation. The standard statement of the law comes from *Affordable Medicines*:

The doctrine of vagueness is founded on the rule of law, which, as pointed out earlier, is a foundational value of our constitutional democracy. It requires that laws must be written in a clear and accessible manner. What is required is reasonable certainty and not perfect lucidity. The doctrine of vagueness does not require absolute certainty of laws. The law

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must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly.³⁵⁷

also stressed that even though other parties would not necessarily have been affected by the break-up of the Democratic Alliance which prompted the legislation, 'it cannot be said to be irrational to pass a law of general application to deal with a concrete situation, rather than a law which would apply only to members of the DA, the DP and the NNP.' Ibid at para 70.

The Court also held that it was not irrational to apply differing procedures to the first defection period while applying the same procedure to all subsequent defection periods. Ibid at para 70. Lastly, the Court held that it was not irrational, in the event of the death or expulsion of a member of parliament who had defected, to allow the new party of the member to fill the seat in question. Ibid at para 74.

354 *United Democratic Movement* (supra) at para 56.

355 C Albertyn & B Goldblatt 'Equality' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 35.

356 M Bishop 'Rationality is Dead! Long Live Rationality! Saving Rational Basis Review' (2010) 25 *SAPL* 312. See also A Price 'The Content and Justification of Rationality Review' (2010) 25 *SAPL* 345; M Bishop 'Vampire or Prince? The Listening Constitution and *Merafong Demarcation Forum v President of the Republic of South Africa*' (2010) 2 *Constitutional Court Review* 313; A Price 'Rationality Review of Legislation and Executive Decisions *Poverty Alleviation Network and Albutt*' (2010) 127 *SALJ* 580.

357 *Affordable Medicines Trust and Others v Minister of Health and Another* 2006 (3) SA 247 (CC), 2005 (6) BCLR 529 (CC), [2005] ZACC 3 at para 108.

Relying on this test, the Court found a regulation that listed factors to be taken into account when granting a medical practitioner a licence to dispense medicines unconstitutionally vague because the government had stated in the litigation that the factors were irrelevant. This contradiction rendered it impossible for medical practitioners to know how their applications would be determined.³⁵⁸

The best example of the vagueness principle is the Court's decision in *South African Liquor Traders Association & Others v Chairperson Gauteng Liquor Board & Others* to invalidate provincial legislation regulating shebeens.³⁵⁹ The problem was the definition of a 'shebeen'. The legislation defined a shebeen as a 'any unlicensed operation whose main business is liquor and is selling less than ten (10) cases consisting of 12 x 750ml of beer bottles'. Unhelpfully, the law did not specify the period within which the 10 cases could be sold: Per day? Per week? Per month? As O'Regan J put it, the legislation's 'meaning cannot ... be ascertained with any precision. It is simply not clear which unlicensed liquor traders will fall within the definition and which without.'³⁶⁰ The Court read-in the phrase 'per week' to cure the vagueness.

While the legislation in *Liquor Traders* was obviously vague, in *Bertie Van Zyl*, the Court split over whether a definition of 'security service' was impermissibly vague.³⁶¹ Section 20(1)(a) of the Private Security Industry Regulation Act³⁶² made it a crime for anybody not registered in terms of the Act to perform a 'security service'. The Act defined 'security service' to include 'protecting or safeguarding a person or property in any manner'. The applicant's employees were charged with violating s 20(1)(a) for acting as security guards on its farms. It argued that the definition was impermissibly vague, as it was unclear how far it extended. A person providing child care services could be seen as 'safeguarding a person'. Would they have to register under the Act?

The majority of the Court, per Mokgoro J, held that, when read in context, the definition was not unconstitutionally vague. 'The provisions of the Act themselves might not provide absolute clarity,' the Justice wrote, 'in that there may be cases on the margins where it may not immediately be determined whether or not registration is required under the Act. That, however, is the inevitability of broadly stated legislation.'³⁶³ She interpreted the definition, in terms of FC s 39(2), to provide a much more precise meaning than its text would suggest.

Justice O'Regan dissented. 'Language', she held, 'is often imprecise and in many cases it will not be possible to draw with complete certainty the boundaries of a

358 Ibid at paras 120-121.

359 2009 (1) SA 565 (CC), 2006 (8) BCLR 901 (CC), [2006] ZACC 7 ('*Liquor Traders*').

360 Ibid at para 26.

361 *Bertie Van Zyl (Pty) Ltd & Another v Minister for Safety and Security & Others* 2010 (2) SA 181 (CC), 2009 (10) BCLR 978 (CC), [2009] ZACC 11 ('*Bertie Van Zyl*').

362 Act 56 of 2001.

363 *Bertie Van Zyl* (supra) at para 52.

legislative prohibition. ... However, where a provision has no certain core meaning at all, or where it has a significant penumbral scope of uncertainty, it will probably be constitutionally impermissible.³⁶⁴ The need for certainty is particularly strong in criminal provisions like s 20(1)(a). She held that the provision could not be interpreted to contain the degree of certainty demanded by the principle of legality.

The disagreement between Mokgoro and O'Regan JJ is both about the content of the vagueness principle and the proper limits of statutory interpretation. In any vagueness challenge, these two elements will inevitably overlap; the more willing a judge is to impute meaning to a statute that is not explicit in the text, the easier it will be for her to find that the statute is not vague. In our view, Mokgoro J stretches the bounds of statutory interpretation too far — and thereby allows impermissibly vague legislation.³⁶⁵ While it may be possible for judges with the benefit of dense legal argument and ample time to reflect to divine the proper meaning of 'security service', the average policeman, prosecutor or citizen would likely not be able to do so. And if legislation — especially criminal legislation — is impenetrable to those who are bound by it and those who must enforce it, it cannot be constitutional.

(g) Constraints on the power to amend the Constitution

There are no expressly stated substantive limits on the power of Parliament to amend the Final Constitution.³⁶⁶ The narrow scope, if any, for substantively challenging constitutional amendments has been made clear by the Constitutional Court:

Amendments to the Constitution passed in accordance with the requirements of s 74 of the Constitution become part of the Constitution. Once part of the Constitution, they cannot be challenged on the grounds of inconsistency with other provisions of the Constitution. The Constitution, as amended, must be read as a whole and its provisions must be interpreted in harmony with one another. It follows that there is little if any scope for challenging the constitutionality of amendments that are passed in accordance with the prescribed procedures and majorities.³⁶⁷

This principle was upheld in *Matatiele I*.³⁶⁸ The Court was confronted with an amendment to the Constitution that changed provincial boundaries and, as a result, also necessitated changes to municipal boundaries. The applicants argued

364 *Bertie Van Zyl* (supra) at para 102.

365 For a discussion of *Bertie Van Zyl*, see M Bishop & J Brickhill 'Constitutional Law' (2009) 2 *Juta's Quarterly Review* §2.3.

366 Compare s 74 of the Interim Constitution, which stated that Parliament had no power to amend any of the provisions of chapter 5, the chapter dealing with the adoption of the Final Constitution by the Constitutional Assembly. Some provisions of chapter 5 of the Interim Constitution were not amendable. See IC s 74(1). The remaining provisions could be amended only by a two-thirds majority of the Constitutional Assembly. See IC s 74(2). There are procedural restraints on the amending power of Parliament under the Final Constitution. See § 17.3(a) supra.

367 *United Democratic Movement* (supra) at para 12 (footnote omitted).

368 *Matatiele Municipality & Others v President of the Republic of South Africa & Others (1)* 2006 (5) BCLR 622 (CC), 2006 (5) SA 47 (CC), [2006] ZACC 2 ('*Matatiele I*').

that the power to change municipal boundaries was assigned by FC s 155(3)(b) exclusively to the Municipal Demarcation Board and Parliament could not, even by constitutional amendment, usurp that power. Ngcobo J held that Parliament had the power to amend provincial boundaries through a constitutional amendment, and that included the power to amend municipal boundaries if doing so was reasonably necessary for changing provincial territories.³⁶⁹ What Parliament could not do by ordinary legislation, it could accomplish through constitutional amendment.

In addition, *UDM* appears to have to put paid to any suggestion that the Constitutional Principles contained in Schedule IV to the Interim Constitution could place substantive limits on Parliament's amending power.³⁷⁰ The Court held that although Constitutional Principle VIII required an election system resulting in proportional representation, the founding values in s 1 of the Constitution omitted any reference to proportional representation while including each of the other aspects of Constitutional Principle VIII.³⁷¹ *UDM* indicates that while the Constitutional Principles remain useful at the level of interpretation, they cannot provide substantive limits on Parliament's ability to amend the Constitution.

There is, however one accepted substantive limit on Parliament's power to amend the Constitution: amendments must be rational. The rationality of a constitutional amendment has been attacked on three occasions: *UDM*, *Merafong* and *Poverty Alleviation Network*. Interestingly, the Court never explicitly states that the rationality requirement applies to constitutional amendments. Its holdings all seem to be carefully ambiguous. In *UDM* the Court writes that the limited role of the rationality principle 'applies also and possibly with greater force to the exercise by Parliament of the powers vested in it by the Constitution, including the power to amend the Constitution.'³⁷² This could fairly be interpreted as applying the rationality standard to constitutional amendments. Yet, in *Matatiele I*, the Court directed the parties to address them on whether constitutional amendments are subject to rationality review.³⁷³ It then avoids the issue in *Matatiele II* because it invalidates the amendment on procedural grounds. In *Merafong*, the Court repeats the *UDM* dictum and then writes that, in view of the fact that it rejects the rationality challenge, 'it is not necessary to take this specific point any further.'³⁷⁴ In *Poverty Alleviation*, the Court never explicitly considers the issue, seeming to assume that

369 *Matatiele I* (supra) at paras 49-53.

370 This suggestion was based on the fact that the Final Constitution could not take effect until the Constitutional Court had certified that it complied with all the Principles contained in Schedule IV. See IC s 71(2). It thus appeared anomalous to allow Parliament to amend the Final Constitution so as to introduce provisions that did not comply with the Constitutional Principles, and which thus could not have formed part of the original text of the Final Constitution. However, in the previous edition of this work, Chaskalson and Klaaren evaluated this argument and correctly concluded that as a matter of both legal logic and political necessity, it was not sustainable. M Chaskalson & J Klaaren 'National Government' in M Chaskalson et al (eds) *Constitutional Law of South Africa* (1st Edition, RS5, 1999) Chapter 3.

371 *United Democratic Movement* (supra) at para 28-9.

372 *Ibid* at para 68.

373 *Matatiele I* (supra) at para 86.

the standard applies to constitutional amendments.³⁷⁵ In our view, despite the lack of an unambiguous statement, the Court's practice indicates that it is willing to hold constitutional amendments to the rationality standard, although it will very seldom find that the standard has been breached.

A more controversial, far-reaching limitation is the 'basic structure doctrine'. This doctrine originated in India where the Supreme Court held that despite the Indian Parliament's apparently unlimited power of amendment,³⁷⁶ the amending power did not extend to any amendment which would alter the basic structure of the constitution.³⁷⁷ In *Kesavananda v State of Kerala* the court held:

We may now deal with the question as to what is the scope of the power of amendment under Article 368. This would depend upon the connotation of the word 'amendment'. Question has been posed during arguments as to whether the power to amend under the above article includes the power to completely abrogate the Constitution and replace it by an entirely new Constitution. The answer to the above question, in my opinion, should be in the negative. ... Although it is permissible under the power of amendment to effect changes, howsoever important, and to adapt the system to the requirements of changing conditions, it is not permissible to touch the foundation or to alter the basic institutional pattern.³⁷⁸

While the basic structure doctrine has been confirmed by the Indian Supreme Court in later cases, it is applied with caution. For the most part it has been invoked by the Supreme Court to strike down only those constitutional amendments that affect the rule of law and the separation of powers between the judiciary and the legislature.³⁷⁹

374 *Merafong Demarcation Forum & Others v President of the Republic of South Africa & Others* 2008 (5) SA 171 (CC), 2008 (10) BCLR 968 (CC), [2008] ZACC 10 ('Merafong') at para 64.

375 *Poverty Alleviation Network & Others v President of the Republic of South Africa & Others* 2010 (6) BCLR 520 (CC), [2010] ZACC 5 ('Poverty Alleviation Network').

376 Article 368 of the Indian Constitution provides:

- (1) Notwithstanding anything in the Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article.
- (2) An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President who shall give his assent to the Bill and thereupon, the Constitution shall stand amended in accordance with the terms of the Bill.

377 The German Basic Law contains an express provision to this effect. Article 79(3) states: 'Amendments to this Basic Law affecting ... the principles laid down in Articles 1 and 20 shall be prohibited.' The basic structure doctrine has, however, been rejected by the courts of Sri Lanka and Singapore. See *In re Thirteenth Amendment to the Constitution and the Provincial Councils Bill* [1990] LRC (Const) 1, 13h-14g and *Teo Soh Lung v Minister for Home Affairs & others* [1990] LRC (Const) 490, respectively.

378 AIR 1973 SC 1461, 1859-1860 at para 1437

379 See, for example, *Indira Gandhi v Raj Narain* AIR 1975 SC 2299; *Minerva Mills v Union of India* AIR 1980 SC 1789; *SP Gupta v President of India* AIR 1982 SC 149.

Outside of this domain, the court has allowed Parliament an almost unfettered power of amendment. Even the repeal of particular fundamental rights has been held not to affect the basic structure of the Constitution.³⁸⁰

In *Premier, KwaZulu-Natal*,³⁸¹ the Constitutional Court left open the possibility that it might subsequently incorporate the basic structure doctrine into South African constitutional law:

It may perhaps be that a purported amendment to the Constitution, following the formal procedures prescribed by the Constitution, but radically and fundamentally restructuring and reorganising the fundamental premises of the Constitution, might not qualify as an 'amendment' at all.³⁸²

However, in both *Premier, KwaZulu-Natal*³⁸³ and *United Democratic Movement*,³⁸⁴ the Court held that even if this doctrine was to be recognised as part of South African constitutional law, none of the amendments dealt with in either case could 'conceivably fall within [the] category of amendments so basic to the Constitution as effectively to abrogate or destroy it.'³⁸⁵

One potential barrier to the adoption of the basic structure doctrine under the Constitution is FC s 74(1). Section 74(1) expressly contemplates the amendment of s 1: the provision that sets out the founding values of the Republic of South Africa.³⁸⁶ If the founding values of s 1 are subject to amendment — albeit only by a vote with the support of 75 per cent of the NA and the support of six provinces in the NCOP — then it is difficult to argue that the basic structure doctrine means that other provisions of the Constitution are unamendable. However, it may be possible to reconcile s 74(1) with the basic structure doctrine by reading s 1 as shaping the operation of a slightly more limited basic structure doctrine. If s 1 is interpreted to

380 In the case which first recognized the doctrine, the repeal of the right to property was held not to affect the basic structure of the constitution. See *Kesavananda v State of Kerala* AIR 1973 SC 1461.

381 *Premier, Kwazulu-Natal & Others v President of the Republic of South Africa & Others* 1996 (1) SA 769 (CC), 1995 (12) BCLR 1561 (CC), [1995] ZACC 10 ('*Premier, KwaZulu-Natal*').

382 *Ibid* at para 49.

383 *Ibid* at para 47.

384 *United Democratic Movement* (supra) at para 17.

385 *Premier, Kwazulu-Natal* (supra) at para 49.

386 The foundational values are:

(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.

(b) Non-racialism and non-sexism.

(c) Supremacy of the Constitution and the rule of law.

(d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

delimit the basic structure of the Constitution, amendments inconsistent with the values of s 1 would be impermissible under the basic structure doctrine unless s 1 itself was amended by the special provisions of s 74(1).³⁸⁷ It was, arguably, the absence of an equivalent of s 74(1) in the Indian Constitution that motivated the Supreme Court to develop the basic structure doctrine. The presence of s 74(1) in our Constitution makes the basic structure doctrine unnecessary.

17.6 Procedural Constraints on Legislative Authority

This section deals with constitutional limits on the procedure that Parliament must follow in enacting legislation. We discuss the two topics that have been

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litigated thus far: public participation in the legislative process; and tagging of legislation.

As a preliminary note, failure to comply with the procedures discussed in § 17.3 will result in invalidity. We do not discuss these 'manner and form' provisions here in order to avoid duplication. It is enough to say that if they are not followed, the legislation will be invalid.

(a) Public Participation

According to FC s 59(1)(a), 'the National Assembly must facilitate public involvement in the legislative and other processes of the Assembly and its committees.' FC s 72(1)(a) imposes an identical duty on the NCOP, as does FC s 118(1)(a) for provincial legislatures. We refer to these three provisions collectively as 'the public involvement provisions'. Without doubt they pursue a laudable goal. But is it an enforceable constitutional obligation?

Yes. In 2005, Doctors for Life International — a group of medical doctors opposed to abortion — challenged the constitutionality of four acts related to health issues passed in 2004 and 2005: the Choice on Termination of Pregnancy Amendment Act ('the Choice Act');³⁸⁸ the Sterilisation Amendment Act;³⁸⁹ the Traditional Health Practitioners Act ('the Traditional Health Act');³⁹⁰ and the Dental Technicians Amendment Act ('the Dental Act').³⁹¹ They argued that the NCOP had failed in their duty to facilitate public involvement. In *Doctors for Life*³⁹² the Constitutional Court

387 In *United Democratic Movement* while not addressing the issue directly, the Constitutional Court appeared to reach a similar conclusion, but without using the basic structure doctrine. *UDM* (supra) at paras 18-20 and 75.

388 Act 38 of 2004.

389 Act 3 of 2005.

390 Act 35 of 2004.

391 Act 24 of 2004.

392 *Doctors for Life International v Speaker of the National Assembly & Others* 2006 (6) SA 416 (CC), 2006 (12) BCLR 1399 (CC), [2006] ZACC 11 ('*Doctors for Life*').

held that the failure to facilitate public involvement rendered both the Choice Act and the Traditional Health Act invalid.

The Constitutional Court has applied that holding in four subsequent cases: *Matatiele II*; *Merafong*; *Poverty Alleviation Network*; and *Glenister II*. We discuss the five participation cases in three parts. First, we discuss the preliminary issues of jurisdiction and the timing of the challenge. Next we consider the heart of the debate: the reasonableness standard the Court has set to determine whether the obligation has been met. We consider the views of both the majority and minority in *Doctors for Life* and then analyse how the standard has been applied in subsequent cases. Lastly, we provide an assessment of the current state of public participation doctrine and its prospects for future.

(i) Jurisdiction, standing and timing

The first question in *Doctors for Life* was whether the Constitutional Court had jurisdiction to consider the challenge as a Court of first instance. The Court's jurisdiction is addressed in detail elsewhere in this book.³⁹³ Here we just outline the Court's the basic position. The Constitutional Court has, under FC

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s 167(4)(e), exclusive jurisdiction to 'decide that Parliament ... has failed to fulfil a constitutional obligation'. The *Doctors for Life* Court had to decide whether the public involvement provisions imposed a 'constitutional obligation' in terms of FC s 167(4)(e). Not every obligation imposed on Parliament is a 'constitutional obligation' under s 167(4)(e). Justice Ngcobo held that only obligations that concerned 'crucial political' questions should be reserved for the Constitutional Court. A crucial political issue would arise 'where the obligation requires Parliament to determine in the first place what is necessary to fulfil its obligation'.³⁹⁴ The obligation to facilitate public involvement was precisely that sort of question and the Court therefore had exclusive jurisdiction to determine it.

In order to limit the potentially destabilising effect of its newly-minted doctrine, the *Doctors for Life* Court established two requirements for a party to have standing to bring a participation challenge: (1) the applicant must have 'sought and been denied an opportunity to be heard on the Bills'; and (2) the applicant must have 'launched his or her application for relief in this Court as soon as practicable after the Bills have been promulgated'.³⁹⁵ As Ngcobo J explained: 'Rules of standing of this sort will prevent legislation being challenged ... many years after the event by those who had no interest in making representations to Parliament at the time the legislation was enacted. ... In my view, this restricted form of standing further reflects this Court's concern to protect the institutional integrity of Parliament, while at the same time seeking to ensure that the duty to facilitate public involvement is given adequate protection'.³⁹⁶ In *Doctors for Life* and *Matatiele II*³⁹⁷ the cases were brought timeously.

393 See S Seedorf 'Jurisdiction' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 4.

394 *Doctors for Life* (supra) at para 26.

395 *Ibid* at para 216.

396 *Ibid* at para 219.

However, in *Merafong*, *Poverty Alleviation Network* and *Glenister II*, the government argued that the challenge had come too late. In *Merafong*, the legislation was initially passed in March 2006. It was then subject to a participation challenge in *Matatiele II*. While the residents of Merafong waited for the outcome of *Matatiele II*, they still waited almost a year before launching their participation challenge. While noting that the delay was 'troublesome', and reiterating the need for disputes to be resolved speedily, the Court found the applicants' explanation sufficient.³⁹⁸ In *Poverty Alleviation Network*, the Matatiele community was back in court to challenge the constitutional amendment which re-instated the law that they had successfully challenged in *Matatiele II*. However, the second time round they waited nearly nine months to challenge the legislation. They argued that the delay was caused by their attempts to resolve the matter through negotiations with the ANC and submissions to the Human Rights Commission.³⁹⁹ For Nkabinde J, the

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explanation was 'not entirely satisfactory'.⁴⁰⁰ However, the Court did not decide whether the delay was so serious as to prevent the challenge since the Court in any event found against Matatiele's residents on substantive grounds. In *Glenister II* the applicant had delayed the challenge because the other grounds on which it sought to challenge the legislation would ordinarily be raised in the High Court.⁴⁰¹ The applicant only raised the public participation challenge together with its appeal from the High Court — a year and three months after the President signed the legislation. The Court unanimously held that the explanation was unacceptable and that this delay barred the claim.⁴⁰² Instead of approaching the High Court and the Constitutional Court separately, Glenister should have attempted to urge the Constitutional Court to consider his other claims together with the public participation challenge.⁴⁰³

While challenges should be brought early, they should not be brought too early. The *Doctors for Life* Court had to decide whether a challenge to Parliament's failure to facilitate public involvement could be brought before the legislative process was complete. We discuss the problem of bringing a challenge to parliamentary procedure too early elsewhere in this chapter, as it applies to all procedural

397 *Matatiele Municipality & Others v President of the Republic of South Africa & Others* (2) 2007 (1) BCLR 47 (CC), [2006] ZACC 12 ('*Matatiele II*').

398 *Merafong Demarcation Forum & Others v President of the Republic of South Africa & Others* 2008 (5) SA 171 (CC), 2008 (10) BCLR 969 (CC), [2008] ZACC 10 ('*Merafong*') at para 15.

399 *Poverty Alleviation Network & Others v President of the Republic of South Africa & Others* 2010 (6) BCLR 520 (CC), [2010] ZACC 5 ('*Poverty Alleviation Network*') at para 26.

400 *Poverty Alleviation Network* (supra) at para 29.

401 *Glenister v President of the Republic of South Africa & Others* 2011 (3) SA 347 (CC), [2011] ZACC 6 ('*Glenister II*').

402 *Ibid* at para 28.

403 *Ibid* at para 27.

challenges.⁴⁰⁴ In short, except in exceptional circumstances, the challenge can only be brought *after* the President has signed the Bill and it has become an act.

(ii) The place of public participation in the South African democracy and the reasonableness enquiry

Doctors for Life provides a rich trove of thought on the complex nature of democracy in South Africa, and a paean to the value of civic participation. The Court describes South African democracy as being constituted by 'mutually-supportive' representative and participatory elements.⁴⁰⁵ The majority of the Court held that this is implicit in the preamble to the Constitution and the founding values in FC s 1(d). These provisions envisage a democracy where citizens delegate law-making power to elected representatives by participating in periodic elections and in turn the elected representatives must exercise this power in an accountable, responsive and open manner by facilitating public involvement in their governing processes. In Justice Ngcobo's words:

General elections, the foundation of representative democracy, would be meaningless without massive participation by the voters. The participation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of government and become familiar with the laws as they are made. It enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to

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produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people. Finally, because of its open and public character it acts as a counterweight to secret lobbying and influence peddling. Participatory democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist.⁴⁰⁶

In order to protect the participatory elements of our democracy, public involvement in the processes of Parliament are considered a fundamental right given effect by the positive obligations in the public involvement provisions.

In summing up the Court's account of the place of public participation in South Africa's conception of democracy, one of the authors has written elsewhere that:

[*Doctors for Life*] signifies an intensive effort by the Constitutional Court to declare the place and meaning of public involvement in the legislative process within our conception of democracy. This was an exercise of contextual, purposive and historical interpretation of the Constitution. The position, which is now settled, is that our democracy embraces representative and participatory elements which are mutually supportive or at least in constructive tension with each other. This warrants a peculiarly constructive relationship between the government and the governed, where the people elect representatives who are in turn mandated to govern by guaranteeing meaningful consideration of the will of the people in the law-making process. This is constitutive of a right of members of the public to participate in the legislative process and the

404 See §17.4 above

405 *Doctors for Life* (supra) at para 115.

406 *Doctors for Life* (supra) at para 115.

correlative duty on the concerned legislature to facilitate such public involvement. This is enforceable by the Constitutional Court using the reasonableness standard.⁴⁰⁷

It is against this background that the Court developed the meaning and the scope of the constitutional obligation to facilitate public involvement. The Court split on this question. The majority⁴⁰⁸ would require Parliament to take reasonable measures to facilitate public involvement in the passage of each piece of legislation. The dissenters⁴⁰⁹ would have limited the Court's role to considering whether Parliament had passed rules that could facilitate public involvement. We unpack the majority's decision in some detail, and then consider the minority's counter-arguments. Finally, we look at how the majority's reasonableness standard has been applied, and what it really means for public participation in Parliament.

(aa) The *Doctors for Life* majority

The majority construed 'facilitate' to mean that Parliament has a duty to 'promote', 'help forward' or 'make it easy or easier' for the public to participate in the legislatures' processes.⁴¹⁰ In short, the legislature must 'tak[e] steps to ensure that the public participate in the legislative process.'⁴¹¹ The Court 'will consider what Parliament has

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done in [each] case.'⁴¹² Merely passing rules to permit or facilitate public involvement would not be sufficient.

What standard would the Court use to evaluate what Parliament had done? The majority concluded that 'reasonableness' was the standard of review that adequately discharged the underlying purpose of the public involvement provisions. 'Reasonableness,' Justice Ngcobo explained 'is an objective standard which is sensitive to the facts and circumstances of a particular case. "...[C]ontext is all important."⁴¹³ The Court noted that 'reasonableness' is 'used as a measure throughout the Constitution' including, most obviously, as the yardstick for whether the state has fulfilled its positive obligation to realise socio-economic rights.⁴¹⁴

407 N Raboshakga 'The Adequacy of the Reasonableness Approach in Public Involvement Cases' LLM Research Report, University of the Witwatersrand (2009, on file with authors) 17.

408 Ngcobo J, joined by Langa CJ, Moseneke DCJ, Madala J, Mokgoro J, Nkabinde J, O'Regan J and Sachs J. Sachs J also wrote a concurring judgment.

409 Yacoob J wrote the chief dissent, joined by Skweyiya J. Van der Westhuizen J wrote a separate dissent, largely supporting Yacoob J.

410 *Doctors for Life* (supra) at para 119.

411 *Ibid* at para 120.

412 *Doctors for Life* (supra) at para 146.

413 *Ibid* at para 127 quoting *Khosa & Others v Minister of Social Development & Others* 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC), [2004] ZACC 11 at para 49.

Ultimately, Parliament must provide a *meaningful and effective* opportunity for public participation in the law-making process.⁴¹⁵ In determining whether the legislature has done enough, 'the Court must balance, on the one hand, the need to respect parliamentary institutional autonomy, and on the other, the right of the public to participate in public affairs.'⁴¹⁶

In that vein, while stressing that 'Parliament and the provincial legislatures must be given a significant measure of discretion in determining how best to fulfil their duty to facilitate public involvement,'⁴¹⁷ the Court also gave fairly specific guidelines on how the legislatures' attempts to facilitate participation would be judged. To begin, the Court held that there are 'at least two aspects of the duty to facilitate public involvement': (a) 'the duty to provide meaningful opportunities for public participation in the law-making process'; and (b) 'the duty to take measures to ensure that people have the ability to take advantage of the opportunities provided.'⁴¹⁸ The first involves the traditional acts of inviting written representations, holding public hearings, or any other structures that provide a space for people to be heard. The second duty acknowledges the legacy of apartheid that left the majority of the population without the 'education, financial resources, access to knowledge and other areas that are crucial for effective participation in the law-making process. Merely to allow public participation in the law-making process is, in the prevailing circumstances, not enough. More is required.'⁴¹⁹ Steps to close this gap could include 'road shows, regional workshops, radio programs

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and publications aimed at educating and informing the public about ways to influence Parliament'.⁴²⁰

Trying to put a bit more meat on the bones of the 'reasonableness' test, Ngcobo J listed the following factors as relevant to determining the reasonableness of a legislature's acts in any case: (a) 'rules, if any, adopted by Parliament to facilitate public participation'; (b) 'the nature of the legislation under consideration'; (c) 'whether the legislation needed to be enacted urgently'; (d) 'what Parliament has assessed as being the appropriate method';⁴²¹ and (e) 'practicalities such as time

414 *Doctors for Life* (supra) at para 126. The Court also identified the sections which permit legislatures to take 'reasonable measures' to regulate access to their hearings. FC ss 59(1)(b), 72(1)(b) and 118(1)(b). Other obvious uses of 'reasonableness' in the Constitution are: the guarantee of 'reasonable' administrative action (s 33); and the general limitations clause which only permits limitations of rights that are 'reasonable and justifiable in an open and democratic society' (s 36).

415 *Doctors for Life* (supra) at para 129 ('In the end ... the duty to facilitate public involvement will often require Parliament and the provincial legislatures to provide citizens with a meaningful opportunity to be heard in the making of the laws that will govern them. Our Constitution demands no less.' Ibid at para 145.)

416 Ibid at para 146.

417 Ibid at para 124.

418 Ibid at para 129.

419 Ibid at para 130.

and expense, which relate to the efficiency of the law-making process'.⁴²² Of course, the best explication of what sort of efforts will meet the reasonableness bar is to look at how the Court has dealt with the cases that have come its way.

Justice Ngcobo also dealt with the constraints imposed by the doctrine of separation of powers when reviewing compliance with the constitutional obligations of Parliament. He held that legislatures 'have broad discretion to determine *how best* to fulfil their constitutional obligation to facilitate public involvement in a given case [which 'may be fulfilled in different ways and is open to innovation on the part of the legislatures'], so long as they act reasonably'.⁴²³ His approach appropriately views the doctrine of the separation of powers as rights enforcement. The Justice's approach structures the analysis as follows: (1) the true meaning of the Constitution is first construed; (2) the Court determines the minimum way to give it effect, and (3) Parliament is allowed to choose the best way to achieve the constitutional goal while observing the minimum content defined. The majority emphatically rejected the minority's fears that judicial review of the conduct of the legislature in terms of a broad reasonableness test is 'too intrusive into the domain of the legislature'.⁴²⁴

To summarise, the majority held: (i) a court must examine whether public participation has been facilitated with regard to each piece of legislation; (ii) the NA, the NCOP and the provincial legislatures all bear an obligation with regard to each piece of legislation; (iii) the steps the legislatures take must be reasonable; (iv) what is reasonable will depend on the legislation in question; and (v) the Court will show appropriate deference to the legislatures in 'determining how best to fulfil their duty to facilitate public involvement'.

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(bb) The *Doctors for Life* dissents

Yacoob, Van der Westhuizen and Skweyiya JJ took a very different approach regarding the place and the fundamentality of public involvement in our democracy. Although their view did not carry the day, they offer a compelling argument based on text and principle. Ultimately, experience may suggest that their approach — particularly the somewhat cynical realism of Van der Westhuizen J — more

420 *Doctors for Life* (supra) at para 132. It is unclear from the judgment whether a challenge to a specific law can raise these broader, education-related duties. Can a general failure to hold road shows and radio programs result in the invalidity of a piece of legislation? Generally, we do not think so. In our view, challenges to legislation will almost always rely on the first duty, not the second. A case could be brought to force Parliament to do more to fulfil the second part of the duty, but it would aim at a mandamus to force Parliament to change its ways, not the invalidity of a law. There may be some cases where the importance of the legislation is so great that a failure to educate about the specific possibilities to participate would make Parliament's acts unreasonable. But we do not believe the Court requires Parliament to operate a separate education campaign for each act it passes.

421 Ibid at para 146.

422 Ibid at para 128.

423 Ibid at paras 123 and 124 and *Matatiele Municipality & Others v President of the Republic of South Africa & Others* SA 2007 (1) BCLR 47 (CC), [2006] ZACC 12 ('*Matatiele II*') at para 67.

424 Raboshakga (supra) at 28 and 40.

accurately depicts the role that the Court can play in promoting participation in the legislative process.

Yacoob J's departure from the majority's opinion can be split into three parts. First, he has a philosophical disagreement about the role that participation should play in a democracy, and tells a very different story about South Africa's history:⁴²⁵

Citizens of this country cast their votes in favour of political parties represented in the National Assembly and the provincial legislatures. ... It is these elected representatives that govern the people and their representative activities are activities of the people. ... To undermine these representatives is to undermine the political will of the people and to negate their choice at free and fair elections. ... Constitutionally speaking, it is the people of our country who, through their elected representatives pass laws.

...

The oppression and exploitation of people in apartheid was not the result of the absence of public participation in government processes in the sense in which it is used in the Constitution. Oppression and exploitation during apartheid was the result of the painful fact that the majority of people had no vote and were not represented in Parliament. ... The failure to accord due weight to the actions and decisions of the representatives of the people of South Africa would demean the very struggle for democracy. ... [I]t would, in my view, require the clearest language to justify the construction of any 'public involvement' provision to mean that these elected representatives exercising the power of the people consequent upon their vote cannot pass a law unless they have public hearings or give the public an opportunity to make written or oral submissions before that law can be validly passed.⁴²⁶

Yacoob J sees the type of participation at issue in *Doctor for Life* as secondary to the primary means of participation in a democracy: voting and standing for office. The subsidiary form of democracy should not be permitted to undermine the primary. His reading of the Constitution impacts on his criticism and rejection of the reasonableness standard.

Second, he rejects the majority's 'reasonableness' standard for public participation challenges. There is nothing in the text of the Constitution to suggest that the legislature must act reasonably. Indeed, FC s 72(1)(a), which is the source of the obligation to facilitate public involvement, does not make any reference to reasonableness. Instead, the term 'reasonable' is only used in FC s 72(1)(b) and FC s 72(2). FC s 72(1)(b) allows the legislature to take 'reasonable measures' to regulate public access and search people attending NCOP sittings. Under

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FC s 72(2) the Council may exclude the media or the public if it is 'reasonable and justifiable'. In Yacoob J's view, the fact that these two sub-sections use the term reasonable, while s 72(1)(a) does not, is compelling textual evidence that reasonableness is not an appropriate standard.⁴²⁷ He also dismisses the assertion that the phrase 'to ensure accountability, responsiveness and openness' in FC s 1(d)

425 For a discussion of the different perceptions of history in *Doctors for Life*, see M Bishop 'Transforming Memory Transforming' in W le Roux & K Van Marle (eds) *Law Memory and the Legacy of Apartheid: Ten Years after AZAPO v President of South Africa* (2007) 31, 41-44.

426 *Doctors for Life* (supra) at paras 292 and 294. Van der Westhuizen J offers a similar justification. *Ibid* at para 244.5.

427 *Doctors for Life* (supra) at para 317.

has any relation to public participation in the law-making process. He claims that it only relates to 'a universal franchise, a national voters' roll, regular elections and multi-party system of democracy'.⁴²⁸

Third, Justice Yacoob stresses that '[t]he process by which legislation is passed ... must be clear, specific and sufficiently comprehensible to enable legislators to know exactly what steps they need to pass any legislation.'⁴²⁹ The danger of the 'reasonableness' standard is that it is vague and creates uncertainty about whether legislation is valid or not. While this is a legitimate concern, in our view the majority's approach will not introduce undue doubt. For one, there is a strict time limit on when participation challenges can be brought. Moreover, the Court's attitude in applying the standard after *Doctors for Life* has tended to be somewhat deferential. It is unlikely that a court will find that a legislature that honestly attempted to facilitate public involvement has failed to do so. This prediction has been borne out: Since the Court announced the reasonableness standard in *Doctors for Life*, and reaffirmed it *Matatiele II*, all three public participation challenges have failed.

Ultimately, the dissenters preferred an interpretation of the Constitution that reads the obligation to facilitate public involvement in the legislative process and the obligation to make rules with due regard to public involvement together as narrowly requiring Parliament to adopt rules which make provision for public involvement.⁴³⁰ Accordingly, Parliament would only default on its constitutional obligations if it adopted rules which made no such provision or failed to adopt any rules.⁴³¹

Justice Van der Westhuizen's judgment largely supports and re-iterates the sentiments expressed by Justice Yacoob. But he also made the following prescient observation:

I do not necessarily know how I might respond if members of the legislature decide to pursue the policies of their political party and in the process reject or ignore submissions made to them by a member of the public, which I may regard as eminently more reasonable. If the will of the Parliamentary majority will in the end mostly prevail in any event, and all that is required is to 'involve' the public by for example mechanically holding public hearings for every piece of legislation — or to make sure that hearings are not promised as in this case — participatory democracy would appear to be quite cosmetic and empty, in spite of any idealistic and romantic motivation for promoting it.⁴³²

Although the dissenters ultimately lost the fight, their arguments for a more limited judicial role in ensuring public participation have continued to haunt the Court in

428 Ibid.

429 Ibid at para 316.

430 This requires that FC ss 72(1)(a) and 70(1)(b) be read together in relation to the NCOP; and FC ss 59(1)(a) and 57(1)(b) in relation to the National Assembly. See *Doctors for Life* (supra) at para 322.

431 *Doctors for Life* (supra) at para 325.

432 Ibid at para 244 (10).

its application of the reasonableness standard. They also show that the majority had to manipulate the text of the Constitution to establish the strong obligation to facilitate involvement in every legislative exercise. As we discuss in more detail later, the dissenters also tacitly adopt a different answer to the difficult question of what role the judiciary should play in regulating Parliament's internal processes.⁴³³

On the other hand, the dissenters fail to recognise the Constitution's 'deep principle of democracy'. This principle includes mutually-supportive representative and participatory elements.⁴³⁴ Their drier account of South African democracy does not seem to fit as well with the aspirational and transformative nature of the Constitution. In addition, Yacoob J's interpretation of history and its relevance is debatable. The assertion that the oppression and exploitation of people in apartheid was limited to black people's disenfranchisement is simply judicial notice taken too far. It ignores the fact that even when black people did not vote they also did not participate in law-making in any other manner. It also ignores other patterns of discrimination; colonial and apartheid policies were hostile to women and homosexual people. Even more importantly, in our view, it undermines the corrective nature of the Constitution, which is to prevent recurrence of en masse disregard of sections of society without them having inevitably to approach courts for redress.

Ultimately, the application of the reasonableness standard will demonstrate whether the majority adopted a sustainable approach.

(cc) Application of reasonableness standard

The *Doctors for Life* test has now been applied in five cases. In two cases, the legislation has been set aside. We consider all five cases in order to try and draw some lessons about the impact and future of *Doctors for Life*.

(1) Doctors for Life

We begin with the different results in respect of the public involvement challenges to the legislation under consideration in *Doctors for Life*. First, we must note that there was no complaint about the processes followed in the NA. *Doctors for Life International* complained about the lack of participation in the NCOP and the provincial legislatures. The NCOP had decided that, considering the importance of, and public interest in, the Bills, public hearings should be held for the Choice Act and the Traditional Health Act. The Choice Act concerned abortion, always a hot-button issue. The Traditional Health Act had also generated significant public interest and controversy. In addition, the NCOP determined that the hearings should be held by the provincial legislatures, not by the NCOP itself. Justice Ngcobo noted that it was both more practical and more effective for the provinces to hold public hearings across the country than for the NCOP to do

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433 See §17.7 below.

434 See T Roux 'Democracy' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 10: see also Raboshakga (supra) at 13-17.

so.⁴³⁵ However, taking the decision was not enough — the hearings would actually have to occur to meet the NCOP's obligation.

In the case of the Traditional Health Act, only three provinces held hearings or invited written submissions. The participation in the Choice Act was even more paltry. Although four provinces wanted to hold public hearings, only Limpopo in fact did so. Justice Ngcobo noted that several provinces had wished to hold public hearings, but had been unable to do so because of the time constraints imposed by the NCOP's legislative timetable. While acknowledging that time was a relevant consideration, he held that 'the temptation to cut down on public involvement must be resisted. Problems encountered in speeding up a sluggish timetable do not ordinarily constitute a basis for inferring that inroads into the appropriate degree of public involvement are reasonable. The timetable must be subordinated to the rights guaranteed in the Constitution, and not the rights to the timetable.'⁴³⁶

The Court in *Doctors for Life* concluded that, given the importance of the legislation and that the NCOP itself had decided that hearings were necessary, the NCOP had acted unreasonably. Within the framework the Court had created, the decision was fairly easy. The Court did not have to impose its own view of what was appropriate. The Court could simply tell the NCOP that it had failed to follow the process that it had deemed necessary.

(2) *Matatiele II*

The Court was able to perform a similar manoeuvre in *Matatiele II*. The legislation concerned the alteration of provincial boundaries, specifically the boundary between KwaZulu-Natal and the Eastern Cape. Accordingly, under FC s 74(8), each provincial legislature had to approve the amendment.⁴³⁷ The decision was based on each provincial legislature's duty under FC s 118(1)(a), not the general duty of the NCOP under FC s 72(1)(a). The Eastern Cape held hearings in seven affected areas and invited submissions from relevant stakeholders. The Court therefore concluded that it had fulfilled its obligation.⁴³⁸ On the contrary, the KwaZulu-Natal legislature held no hearings and did not invite written submissions. Considering the impact the Bill would have on the province's citizens, and the fact that many within the legislature and the NCOP had called for public hearings, the Court found this failure unreasonable.⁴³⁹

By contrast to the big issues at stake in *Matatiele II* and the two *Doctors for Life* Bills discussed above, the Dental Act was somewhat inconsequential. Considering its lesser importance, and the fact that it had generated no public interest, the NCOP did not propose public hearings or invite written submissions for the Dental Act.

435 *Doctors for Life* (supra) at paras 160-161.

436 *Ibid* at para 194.

437 See §17.3(a) above.

438 *Ibid* at paras 70-73.

439 *Ibid* at paras 76-84.

Ngcobo J agreed that, considering the mundane nature of the Bill, it was reasonable not to attempt to solicit further public interest that did not exist.⁴⁴⁰

(3) Merafong

In hindsight, *Doctors for Life* and *Matatiele II* were relatively easy applications of the reasonableness standard. *Merafong* presented a much more difficult question.⁴⁴¹ The Merafong Demarcation Forum ('MDF') challenged the same constitutional amendment at issue in *Matatiele*. This challenge concerned incorporating the whole of the Merafong municipality, the boundaries of which fell mostly in Gauteng, into the North West Province. The twist was that the Gauteng Provincial Legislature ('GPL') had in fact held a public hearing on the Bill, taken account of the community's view and sent a negotiating mandate to the NCOP recommending that the legislation be amended to keep Merafong in Gauteng, thus seemingly having been persuaded during the participation process. However, Gauteng's NCOP delegation was informed that they could not propose amendments to the Bill — they had to either accept it or reject it.⁴⁴² Faced with that choice, the GPL reversed course and instructed its delegates to the NCOP to support the Bill.

The MDF had three reasons for alleging that the participation was nonetheless unreasonable. First, they complained that the decision had been taken by the ANC's National Executive Committee, and that the GPL was therefore not open to persuasion. Van der Westhuizen J rejected this argument for lack of evidence. It did not explicitly decide if a claim of this nature might succeed with sufficient evidence. The Court intimates that it could: 'Public involvement cannot be meaningful in the absence of a willingness to consider all views expressed by the public.'⁴⁴³ If an applicant could show that legislators were not willing to consider the public's representations because they were committed to implementing party policy, it is possible that the participation would not be 'meaningful'. However, that will always be nearly impossible to prove.

Second, MDF submitted that participation was not 'meaningful' because the MDF's desires did not prevail. The Court easily rejected this argument. 'There is no authority', the Court wrote, 'for the proposition that the views expressed by the public are binding on the legislature if they are in direct conflict with the policies of Government. Government certainly can be expected to be responsive to the needs and wishes of minorities or interest groups, but our constitutional system of government would not be able to function if the legislature were bound by these views.'⁴⁴⁴

440 Ibid at para 192.

441 For a full discussion of *Merafong*, see M Bishop 'Vampire or Prince? The Listening Constitution and *Merafong Demarcation Forum & Others v President of the Republic of South Africa & Others*' (2009) 2 *Constitutional Court Review* 313.

442 See §17.3(a) above for a discussion on why the conclusion that provincial delegations cannot propose amendments to s 74(8) Bills — which the Court supported — is wrong. See also, Bishop 'Vampire or Prince?' (supra) at 345-347.

443 *Merafong* (supra) at para 51.

Finally, in oral argument, Justice Sachs suggested that the GPL should have returned to the Merafong community after discovering that it could not propose the required amendment to explain its change of heart as well as the limitations of the legislative process. The majority rejected this proposal. While it may have been 'desirable' for the GPL to have explained themselves to the people of Merafong,

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it was not constitutionally required. 'If they had gone back to Merafong to explain the situation to the people,' Justice Van der Westhuizen hypothesised, 'a better understanding might have been fostered, but it is unlikely that the majority would have been sufficiently impressed by the explanation to change their strongly held views.'⁴⁴⁵ A further danger loomed that 'continuing discussion which does not result in a changed outcome, could strengthen possible perceptions that the consultation was not meaningful.'⁴⁴⁶

Sachs J would have upheld this complaint. Although 'participatory democracy does not require constant consultation by the Legislature with the public',⁴⁴⁷ in the unique circumstances of this case, further engagement was required. He held that 'when expectations of candour and open dealing have been established and certain unambiguous commitments have been made', a change of commitment without further consultation can be disruptive of the constitutionally-required relationship of dialogue between the legislature and members of the public.⁴⁴⁸ Only continued dialogue would have satisfied the standard of reasonableness and the lack thereof violated the primary purpose of public involvement in law-making.⁴⁴⁹ The 'abrupt about-turn' violated the 'civic dignity' of participants; it 'denied any spirit of accommodation and produced a total lack of legitimacy for the process and its outcome in the eyes of the people'; and it gave rise to a strong perception that the GPL in the end merely rubber-stamped a political decision and that the public involvement process was a sham.⁴⁵⁰ Considering the importance of the legislation and its impact on the people of Merafong, it was unreasonable not to engage in further discussion.

(4) Poverty Alleviation Network

444 Ibid at para 50.

445 *Doctors for Life* (supra) at para 59.

446 Ibid.

447 Ibid at para 293.

448 Ibid at para 291.

449 Ibid at para 292. See *Doctors for Life* (supra) at para 115. Sachs J came to this conclusion upon taking cognisance of the consciousness on the part of the Legislature's Portfolio Committee that a further consultation with the community may be required but without explanation, they in fact do not do so. *Merafong* (supra) at para 289.

450 *Merafong* (supra) at para 292.

*Poverty Alleviation Network*⁴⁵¹ possesses a strong family resemblance to *Merafong*. The case was the third time the residents of Matatiele approached the Constitutional Court to try and remain in KwaZulu-Natal. After they successfully set aside the Constitution Twelfth Amendment Act, Parliament passed another constitutional amendment (the Constitution Thirteenth Amendment Act) again altering provincial boundaries to place Matatiele in the Eastern Cape. Parliament learnt its lesson, and this time round, Nkabinde J held, 'there [could] be no doubt that public participation was indeed facilitated by both Parliament and the KwaZulu-Natal Provincial Legislature.'⁴⁵² The NA and the NCOP invited written submissions and the NCOP held hearings. The provincial legislatures of both provinces held separate and joint hearings where opponents of the legislation were allowed to freely

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express their views. The vast majority again opposed moving Matatiele to the Eastern Cape. Nonetheless, the KwaZulu-Natal Legislature again assented to the alteration of its borders.

The applicants acknowledged the legislature's position, but still contended that the Legislature had not acted reasonably. First, they argued that they should have been consulted as a 'discrete group'. This argument was based on the following statement in *Matatiele II*: 'The more discrete and identifiable the potentially affected section of the population, and the more intense the possible effect on their interests, the more reasonable it would be to expect the Legislature to be astute to ensure that the potentially affected section of the population is given a reasonable opportunity to have a say.'⁴⁵³ This statement does not mean, Justice Nkabinde held, that 'when seeking to involve an identifiable and *discrete* group, participation of only this group, to the exclusion of all others, is required.'⁴⁵⁴ It merely requires that the group, like all others, be afforded a reasonable opportunity to state its views.

Second, they contended that the NA should have accepted oral, in addition to written, submissions. The Court held that the applicants had had numerous other opportunities to voice their concerns. In addition, 'in the context of a constitutional amendment that affects provinces, public participation is facilitated at various levels.'⁴⁵⁵ The applicants had made oral submissions to the provincial legislatures.

Third, the Matatiele residents made a similar argument to that made by the residents of Merafong: although they were heard, the decision to move Matatiele had already been taken and 'the public hearings were a formalistic sham'.⁴⁵⁶ While allowing that 'lawmakers should keep an open mind and consider the input by the

451 2010 (6) BCLR 520 (CC), [2010] ZACC 5.

452 *Ibid* at para 38.

453 *Matatiele II* (supra) at para 68, quoted in *Poverty Alleviation Network* (supra) at para 52.

454 *Poverty Alleviation Network* (supra) at para 53.

455 *Ibid* at para 58.

456 *Ibid* at para 59.

populace',⁴⁵⁷ the Court gave the same answer it gave the residents of Merafong: 'Although due cognisance should be taken of the views of the populace, it does not mean that Parliament should necessarily be swayed by public opinion in its ultimate decision. Differently put, public involvement and what it advocates do not necessarily have to determine the ultimate legislation itself.'⁴⁵⁸ The record of the participation indicated that the legislature had listened to its constituents concerns, but had ultimately rejected them.

In addition to its public participation challenges, the residents argued that moving them to the Eastern Cape was irrational because it was not related to a legitimate government purpose. The *Poverty Alleviation Network* Court rehearsed the argument made in *Merafong*: abolishing cross-boundary municipalities is a legitimate government purpose. That end is achieved irrespective of whether Matatiele is placed in KwaZulu-Natal or the Eastern Cape and it is not for the Court to second guess the legislature where an end can be achieved in two

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ways. We think there are limits to this reasoning.⁴⁵⁹ For now we just want to draw attention to the relationship between rationality review and public participation. Doctrinally, it makes sense to treat them as separate, unrelated challenges. However, in substance, a great deal connects them. As one of the authors has argued:

rationality is . . . connected to deliberation and participation. How carefully the Court is willing to scrutinise the rationality of government action determines the outer boundaries of the quality of deliberation the Constitution demands. The more exacting the Court is, the closer it pushes the legislative (and executive) branch to the ideal of deliberation where only public reasons count and the decision-maker acts only after considering all views. The less demanding the Court's review, the more space it provides for unprincipled decision-making based on private interests and for government to take decisions without listening to alternatives, whether from political parties, interest groups or the general public.⁴⁶⁰

It helps to understand the Court's approach in both *Merafong* and *Poverty Alleviation Network* to see this link between rationality and participation.

(5) Glenister II

As we discuss elsewhere, *Glenister II* concerned a challenge to legislation replacing one corruption-fighting organ with another. Although the primary motivation behind the challenge was a concern that the new body was not sufficiently independent, one of the grounds for the challenge was that Parliament had failed to facilitate public involvement. The applicant acknowledged that Parliament had held public hearings, but argued that the Bill should not have been treated as urgent. The law

457 Ibid at para 60.

458 Ibid at para 62.

459 See M Bishop 'Vampire or Prince? The Listening Constitution and *Merafong Demarcation Forum v President of the Republic of South Africa*' (2009) 2 *Constitutional Court Review* 313, 343-345 and M Bishop 'Rationality is Dead! Long Live Rationality! Saving Rational Basis Review' in D Bilchitz & S Woolman (eds) *Is This Seat Taken? Conversations at the Bar, the Bench and the Academy* (2011).

460 Bishop 'Vampire or Prince' (supra) at 334.

was a result of a resolution taken at the ANC's December 2007 Polokwane Conference. It was approved by Cabinet in April 2008, hearings were held in the NA in August and September, and in the provinces in September and October. The law was passed on 23 October 2008, and signed by the President on 27 January 2009. Ngcobo CJ did not directly engage the urgency complaint, but by looking at the time that was spent on public hearings concluded that Parliament had facilitated public involvement and that the applicant had been given a fair hearing.⁴⁶¹ The lesson seems to be that self-imposed urgency is not a problem when Parliament still acts reasonably to involve the public.

(iii) Assessment

The previous section described the judicial application of the public participation rule. In this section, we evaluate the Court's approach, and consider its future.⁴⁶²

When it was decided, *Doctors for Life* seemed to be a brave decision that would force the legislature to take the concerns of ordinary people to heart. That view

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was confirmed by *Matatiele II*: a decision that over-turned a constitutional amendment no less. However, *Merafong* and *Poverty Alleviation Network* starkly illustrate the emergence of the initial fears of minority judges in the rest of the Court and points to what are seemingly very real limits of the participation doctrine.

Doctors for Life gave effect to the deep principle of democracy envisioned in the Constitution. This principle possesses supportive, representative, and participatory elements. In turn, according to the *Doctors for Life* Court, this deep principle must inform a reasonableness standard characterised by a meaningful and effective facilitation of public involvement by Parliament. Justice Ngcobo's approach positions the doctrine of separation of powers in a manner that does not undermine the deep principle of democracy.⁴⁶³ So the *Doctors for Life* Court hopes.

The majority decision in *Merafong* notably de-emphasised the participatory element of our democracy in determining the margins of what constituted reasonable facilitation of public involvement in the circumstances of this case. Van der Westhuizen J found that, notwithstanding the subsequent disregard for their views, a single public hearing afforded the people of Merafong a *real and meaningful opportunity* to be heard. The message from the *Merafong* majority is that politicians hold the upper hand in our democracy. That conclusion reflects the same vision of democracy that Yacoob J endorsed in his *Doctors for Life* dissent. And yet in *Doctors for Life*, the majority had so eloquently repudiated Yacoob J's position in favour of one that placed representative and participatory democracy on a more equal footing. Although the rhetoric remains the same, one is left with the feeling that either something changed or that *Merafong* is merely an aberration.

Not only does *Merafong* undermine the deep principle of democracy pronounced in *Doctors for Life*, it turns what seemed to be a substantive duty to involve people in decision-making into a procedural, tick-the-boxes requirement that can be met

461 *Glenister v President of the Republic of South Africa & Others* 2011 (3) SA 347 (CC), [2011] ZACC 6, ('*Glenister II*') at paras 35-38.

462 This section draws, in part, from Bishop 'Vampire or Prince' (supra) and Raboshakga (supra).

463 See Raboshakga (supra) at 40.

without ever actually considering the merits of people's submissions. This pathology manifests in two ways.

First, the majority of the Court in *Merafong* holds the view that where a single public hearing in which interested persons had an opportunity to express their views has been held in good faith, the obligation to facilitate public involvement is fulfilled.⁴⁶⁴ The conclusion by Van der Westhuizen J that an ongoing dialogue between interested members of the public and the legislature is not required by previous jurisprudence of the Court is questionable. In *Doctors for Life and Matatiele II*, the Court's account of what reasonable facilitation of public involvement in the legislative process entails that there be 'a *meaningful and effective* opportunity for public participation in the law-making process'. Depending on the circumstances of the matter at issue, reasonableness will entail 'a continuum [ranging] from

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providing information and building awareness, to partnering in decision-making'.⁴⁶⁵ Surely, 'partnering in decision-making' potentially requires an ongoing dialogue between the legislature and interested members of the public where the legislature explains its response to the community's concerns and seeks further feedback? The question the Court ought to have answered is whether the circumstances of the case required a bare minimum of merely providing a forum for the community to air its views, or a more substantive, ongoing dialogue with the community.⁴⁶⁶

Second, while the Court states in both *Merafong* and *Poverty Alleviation Network* that legislatures must act with an open mind, as a practical matter in most cases it will be virtually impossible to prove that legislators were not open to persuasion. There were good reasons in both cases to suspect that the provincial legislators were simply taking orders from their political superiors, yet the Court accepted their assurance that they merely came to a different policy conclusion than their constituents. The Court was probably right to take this course — absent very strong evidence, it would be imprudent for a court to find that legislators had failed to fulfil their constitutional obligation to consider the views of the people. The probability is that such strong evidence will seldom be forthcoming.⁴⁶⁷

If we are correct in this assertion, then we are left with a situation where all the legislature need do to fulfil its duty is perform the formal function of holding public hearings or inviting written submissions. Whether those acts have any potential to

464 *Merafong* (supra) at para 59 (Van der Westhuizen J held: 'In all probability little would have been achieved by another round of exchanging views, other than to inform and perhaps educate the community. *Whereas speculation about the likely outcome of further consultation is not ultimately decisive, the fact is that the community had a proper opportunity to air their views. The previous decisions of this Court, on which the applicants rely, do not require an ongoing dialogue.*' (our emphasis)).

465 *Doctors for Life* (supra) at para 129. See *Matatiele II* (supra) at paras 54 and 97.

466 See Raboshakga (supra) at 34-35.

467 But see *Mlokoti v Amathole District Municipality & Another* 2009 (6) SA 354 (E) (The Court invalidated a decision by the Municipal Council to appoint a municipal manager. The judgment rested, in part, on a letter by the Mayor to the head of the Regional ANC Executive Committee acknowledging that the Council had ignored the appointment process and recommendations and acted solely on the orders of the ANC.)

influence the legislation is irrelevant. This outcome is precisely what Van der Westhuizen predicted in his *Doctors for Life* dissent:

If the will of the Parliamentary majority will in the end mostly prevail in any event, and all that is required is to 'involve' the public by for example mechanically holding public hearings for every piece of legislation — or to make sure that hearings are not promised as in this case — participatory democracy would appear to be quite cosmetic and empty, in spite of any idealistic and romantic motivation for promoting it.⁴⁶⁸

Now that the participation cases have largely run their course, we appear to be left with a doctrine that is 'quite cosmetic and empty'. Skweyiya J, whose views were concurred in by Yacoob J and Van der Westhuizen J, recognises this disquieting possibility in his concurrence in *Merafong*. For him, the Court has no role to play in the differences between the legislature and members of the public in the process of deciding what is right and wrong.⁴⁶⁹ 'While the Constitutional Court is the highest court in the land, it cannot and should not be seen as a panacea.'⁴⁷⁰ If politicians act discourteously, disrespectfully or dishonestly, voters should hold them

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accountable in periodic elections.⁴⁷¹ This tilts the scale almost entirely in favour of representative democracy and away from participatory democracy.

Defenders of the Court could proffer four arguments that identify some substance in our public participation doctrine post-*Merafong*. The Court in *Doctors for Life* initially crafted a strong approach to participation and the possibilities of the *Doctors for Life* approach might redeem the current, less hopeful position.

First, they could argue that there really was no workable alternative. Requiring ongoing engagement or inquiring too deeply into the motives of legislators is neither practically workable nor theoretically desirable. That high level of court involvement would place too heavy a burden on legislators and courts and would vitiate the separation of powers doctrine. There is certainly something to this — courts should be careful not to take over the role of legislators, or to make the business of legislating so complicated or uncertain that legislators cannot pass laws efficiently. Yet, we do not believe the approach proposed by Justice Sachs would have resulted in such an outcome. Sachs J was very careful to note that the obligation to return to the community depended on the circumstances of the case. It is possible that, as Van der Westhuizen argued, continuing dialogue would not have made any practical difference. But it would have recognised the importance of participatory governance and demonstrated respect for the citizens of *Merafong*. As it would only arise occasionally, and would be fairly limited in scope, we believe Sachs J identified a happy medium that does not result in judicial overreach.

468 *Doctors for Life* (supra) at para 244(10).

469 *Merafong* (supra) at 306.

470 *Ibid* at para 307.

471 *Merafong* (supra) at para 308 ('A democracy such as ours provides a powerful method for voters to hold politicians accountable when they engage in bad or dishonest politics: regular, free and fair elections.') The majority judgment also records a similar sentiment. Van der Westhuizen J expressed that 'politicians, who are perceived to disrespect their voters or fail to fulfil promises without explanation, should be held accountable [through] the democratic system [provided for by] regular elections.' See *Merafong* at para 60.

Even if it did, there is a weaker option that would have improved the position: reason-giving.⁴⁷² Legislators need not go back and engage with the community in further hearings if they reject their views, but they should provide reasons for rejecting the main submissions made by the public. The members of a committee that conduct a public participation process should, presumably, write a report for the legislature on what submissions were made, and why they were accepted or rejected. Requiring that a similar document be made easily available to those who made the submissions does not seem like an undue burden. The advantage of reason-giving is that it holds the lawmakers directly accountable for their decisions and forces them to actively listen. They cannot simply go through the motions; they must provide reasons that the public might find acceptable. If they cannot do so, the voters will know that there is some other reason why their suggestions were rejected.

Second, what if the staunch adherence to separation of powers in *Merafong* is momentary and will only be applied in certain cases that are too politically sensitive?

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Relying on Theunis Roux's analysis of the decision of the Constitutional Court in *UDM*,⁴⁷³ Raboshakga has argued as follows:

Without having adequately recognized the deep principle of democracy and the nature of the proposed amendment and its circumstantial impact on the Merafong community, the majority could not set a minimum content for reasonableness that met the *meaningfulness* requirement. Similarly, the invocation of the separation of powers was also misplaced in the Court's mistaken methodology.

... .

The failure by the majority to follow precedent without offering a viable alternative approach suggests an unwarranted reluctance to contradict the Gauteng Legislature's political decision finally to support the incorporation of Merafong into North West. It may be inferred from the Court's attitude in this regard that it was applying the meta-principle of deferring to [politicians] in politically sensitive cases. Accordingly the *Merafong* decision is ... not to be seen as a rejection of the developments in *Doctors for Life International* and *Matatiele II*, but as a once-off compromise of principle in what was clearly a politically sensitive case. After all, a political solution was found in this dispute upon further lobbying of politicians by the community of Merafong.⁴⁷⁴

472 For a fuller discussion of this option, see Bishop 'Vampire or Prince?' (*supra*) at 340-342.

473 *United Democratic Movement* (*supra*). See T Roux 'Democracy' in Woolman & Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) at § 10-69. Roux submits that:

'[UDM] cannot be said to have altered the more extended principle discernible in the entire constitutional text. By declining to engage with the substantive values underpinning multi-party democracy, UDM does not stand for a countervailing interpretation of the democratic principle, but for an independent principle of judicial deference in politically sensitive cases, such as those involving the design of the electoral system. Whatever one thinks of the correctness of UDM, therefore, it cannot be said to impact on the principle of democracy. Rather, UDM stands for the meta-principle that where the principle of democracy and the principle of judicial deference in politically sensitive cases conflict, the latter principle must prevail. As it so happens, that part of the UDM decision strikes one as intuitively wrong, but it is not necessary to make a case for that intuition here. It is sufficient to conclude that the statement of the principle of democracy discernible in the constitutional text need not be altered in order to accommodate UDM.'

474 Raboshakga (*supra*).

This passage was written before the Court had decided *Poverty Alleviation Network* and thus did not consider whether the same argument could apply to both cases. The merit of Raboshakga's argument cannot be established until the Court decides one or more participation cases involving different circumstances in future.

The third defence of *Merafong* is that, even if it is purely procedural, it is better than nothing. Even if legislators begin the process with no intention of changing their views, they may nonetheless be convinced or enlightened by the views of the public. As Czapinskiy and Manjoo note: 'It may be difficult ... for legislators to listen to people as the decision requires and not take their views into account, at least to some degree. By listening, legislators may learn about the lives of people different from themselves. They may open the door to understanding and empathy.'⁴⁷⁵ This is undoubtedly true, and there is no doubt that a procedural right is better than no right at all. But a substantive right is better.

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The fourth defence is the most complicated. One of the current authors has argued that *Merafong* needs to be understood in the context of the different types of participation open to the public.⁴⁷⁶ Citizens can participate in public affairs outside of formal hearings and requests for submissions. They can march, protest, write petitions and use the media and social networks to get their point across to government and their fellow citizens. Such radical participation is quite consciously contemplated by our Constitution.⁴⁷⁷ Moreover, the history of the downfall of apartheid and the recent revolutions in North Africa and the Middle East demonstrate its power. Participation also happens in a more mutual way — citizens engaging with government (normally at a local level) to solve shared problems. All three forms of participation — traditional, radical and mutual — are useful and important. The argument in favour of *Merafong* is that citizens have a limited amount of energy to spend on participation. If the courts were to intervene to make traditional participation more substantive, citizens will be more likely to use it to express their grievances, rather than engaging in radical or mutual participation. This is a danger because, even with greater court intervention, formal participation is limited because government sets the agenda and ultimately holds all the cards. By limiting courts' role in making formal participation substantive, Courts funnel citizens energy into other forms of participation that are, arguably, more productive.

We believe the tale of public participation challenges has already had its climax. First, as we have argued above, the requirement is almost entirely formal — as long as Parliament invites submissions and holds hearings, it will — absent unlikely admissions that the process was a farce — comply with its constitutional obligations. Now that Parliament knows what it is required to do, it is arguable that it is unlikely (especially with important or controversial legislation) that it will make the mistake of failing to go through the motions of facilitating public involvement. On this argument, there will be few future challenges, as there will be no basis to bring

475 S Czapanskiy & R Manjoo 'The Right of Public Participation in the Law-Making Process and the Role of Legislature in the Promotion of this Right' (2008) 19 *Duke Journal of Comparative and International Law* 1 at 19.

476 Bishop 'Vampire or Prince?' (supra).

477 See also S Woolman 'My Tea Party, Your Mob, Our Social Contract: Freedom of Assembly and the Constitutional Right to Rebellion in *Garvis v SATAWU (Minister of Safety & Security, Third Party)*. 2010 (6) SA 280 (WCC)' (2011) 27 *SAJHR* (forthcoming).

challenges. In some sense, this should be seen as a real success of *Doctors for Life*. Whatever the limitations of the Court's attitude, it undoubtedly will increase the opportunities for the public to participate in the legislative process. We have also sought to demonstrate that perhaps only future cases will determine whether the *Doctors for Life* hope is sustained or is completely trumped by the Court's fears or other considerations revealed by *Merafong* and *Poverty Alleviation Network*. Whatever happens, one thing is clear: *Doctors for Life* is a success story and it lives on in our constitutional democracy — but its future role in litigation is uncertain.

A particularly contentious issue that could arise in future cases will be where evidence clearly demonstrates that decisions have been taken by a political party and imposed on legislatures. In his *Doctors for Life* dissent, Yacoob J suggested that the Constitution anticipated that elected representatives would be held accountable

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by political parties.⁴⁷⁸ Yet, the Court has still held that 'lawmakers should keep an open mind and consider the input by the populace'.⁴⁷⁹ And in *Merafong*, Sachs J, in coming to the conclusion that there had not been reasonable facilitation of public involvement, specifically considered the perception by members of the community that the Gauteng Legislature had rubber-stamped the decision taken by the African National Congress.⁴⁸⁰ Judging from the pronouncements of the Court in *Doctors for Life International*, *Merafong* and *Poverty Alleviation Network*, the current position must be: the policies of political parties must be seen as mere recommendations to Parliament or provincial legislatures until public involvement has been facilitated by such legislatures where appropriate and the legislatures have made the final decision to enact that legislation or not. Where evidence shows that the party instructed its members to vote in a certain way and neither the MPs nor the party were open to persuasion based on public participation, there may be reason to invalidate the legislation. Again, evidence of this nature will be very hard to come by. To manage potential hostility between the political party and its representatives in the legislature, the party may be further consulted by members of the legislature upon the completion of the public involvement process: as long as rubber-stamping or mere disregard of the views of members of the public does not make itself manifest. We discuss the relationship between party and parliament in more detail below.⁴⁸¹

(b) Tagging

The different procedures prescribed by the Constitution for different types of Bills create a problem which was probably not contemplated by the Constitutional Assembly. In order to enact a Bill, Parliament has to determine correctly at the outset of the legislative process whether the Bill falls to be processed by FC s 74, s 75, s 76

478 *Doctors for Life International* at para 278. He held: 'The citizen's right to participate in the activities of a political party is the route by which any citizen would, in a real way, be able to bring influence to bear on the way in which that representative performs her functions in the relevant legislature... . This is how a multi-party system of democracy ensures accountability, responsiveness and openness.'

479 *Poverty Alleviation Network* (supra) at para 60.

480 *Merafong* (supra) at para 292.

481 §17.7 below.

or s 77. This process — called 'tagging' — may seem simple, but it is not. The Joint Rules of Parliament create a special procedure — the Joint Tagging Mechanism ('JTM') — to tag Bills. The JTM consists of the National Assembly's Speaker and Deputy Speaker and the NCOP's Chairperson and permanent Deputy Chairperson. For the purposes of parliamentary proceedings, the JTM's classification of a Bill is final and binding on both Houses.⁴⁸²

While it is relatively easy to determine whether a Bill amends the Constitution or is a money Bill — and must be passed under FC s 74 or s 77 respectively — the distinction between FC s 75 and s 76 Bills is much less precise. While we focus exclusively on the distinction between FC ss 75 and 76, keep in mind that the same principles will apply to mistakes in tagging FC ss 74 and 77 Bills.

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Recall: FC s 76 must be used in three general sets of circumstances: (a) when Parliament changes its seat in terms of FC s 42(6); (b) if the legislation concerns the specific constitutional provisions listed in FC ss 76(3)-(4); and (c) if the Bill 'falls within a functional area listed in Schedule 4'.⁴⁸³ It is the third, general rule that makes tagging a complicated business.

Whether a Bill 'falls within' a Schedule 4 functional area will often be a matter open for considerable debate. To begin with, the functional areas are couched in wide terms — 'trade', 'environment', 'cultural matters' and 'population development', for example — which cover a huge range of potential legislation and cannot easily be defined. Moreover, many Bills deal with multiple topics or impact on areas adjacent to the primary focus of the law. Does 'fall within' mean the Bill must deal only with Schedule 4 issues, that it must directly address a Schedule 4 functional area, or that it must merely affect one of the areas of concurrent competence? And, if a court finds that a Bill was incorrectly tagged, what is the result? Is the legislation automatically invalid? Does it depend on whether Parliament acted in good faith, or on what degree of support the Bill attracted?

As these questions suggest, the two primary questions in tagging jurisprudence are: (a) What is the appropriate test to determine if a Bill is a s 76 Bill? and (b) What are the consequence of incorrect tagging? Both questions have (largely) been answered by a pair of Constitutional Court decisions. We discuss each issue in turn.

(i) The appropriate test

Until recently, Parliament relied on the 'pith and substance' test⁴⁸⁴ imported from Canadian, English and Indian law to tag legislation. This test asks what the 'true nature and character of the legislation [is] in order to ascertain the class of subject

482 See Joint Rules 151-8.

483 This is the wording used in FC s 77(3). FC s 44(1)(b) — which confers legislative authority on the NCOP — uses slightly different wording. It gives the NCOP the power to pass, in accordance with FC s 76, 'legislation with regard to any matter within a functional area listed in Schedule 4'. We do not believe that the slight difference in phrasing has any significance.

484 C Murray & R Simeon "'Tagging" Bills in Parliament: Section 75 or Section 76?' (2006) 123 SALJ 232, 244. See also, *Tongoane & Others v National Minister for Agriculture and Land Affairs & Others* 2010 (6) SA 214 (CC), 2010 (8) BCLR 741 (CC), [2010] ZACC 10 ('*Tongoane*') at para 47 (Reproducing the Speaker of the NA's defence of Parliament's tagging process based on the 'pith and substance' test).

to which it really belongs.⁴⁸⁵ It is the test endorsed by the Constitutional Court for determining whether the national or provincial legislatures has the competence to legislate in a particular subject area.⁴⁸⁶ To pith and substance adherents, every Bill has a single ultimate character, and all other issues addressed by the Bill are incidental and therefore irrelevant for tagging. Despite Parliament's preference for this essentialist approach, the Constitutional Court has considered the question

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on two occasions, and has twice rejected the 'pith and substance' test in favour of one that accounts for the multiple purposes that modern legislation often serves.

In *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* the Court considered a challenge to national legislation attempting to regulate liquor licensing.⁴⁸⁷ 'Liquor licenses' is listed in Schedule 5 as an area of exclusive provincial competence. The primary dispute in *Liquor Bill* was whether Parliament could invoke the FC s 44(2) override to legislate in the zone ordinarily reserved for the provinces. The tagging question arose in the following way. The Bill had been passed in terms of FC s 76. When the matter came to Court, the Government tried to avoid the complaint that the Bill didn't satisfy FC s 44(2) by arguing that in reality the Bill was primarily concerned with issues within the national competency and only incidentally affected liquor licenses. The Western Cape government — who opposed the Bill — retorted that, if that was true, the legislation was really a national concern, and should have been tagged as a s 75 Bill, not a s 76 Bill.

Ultimately, the *Liquor Bill* Court found that Parliament had properly followed the s 76 procedure. Cameron AJ held that, s 76(3) 'must be understood as requiring that any Bill whose provisions in *substantial measure* fall within a functional area listed in Schedule 4 be dealt with under section 76.'⁴⁸⁸ Even if the Bill did not trench on the exclusive Schedule 5 power to regulate liquor licenses, it did 'fall within' the Schedule 4 functional areas of 'trade' and 'industrial promotion' and was therefore properly tagged as a s 76 Bill.⁴⁸⁹

In *Tongoane & Others v National Minister for Agriculture and Land Affairs & Others* the Court endorsed the 'substantial measure' test developed in *Liquor Bill* and explicitly rejected the pith and substance approach.⁴⁹⁰ Various communities affected by the Community Land Rights Act ('CLARA')⁴⁹¹ challenged it on the basis that it had been incorrectly tagged. The Act had been tagged as a s 75 Bill. The

485 *Russel v The Queen* (1882) 7 App Cas 829, 839-40.

486 See *Western Cape Provincial Government & Others: In re DVB Behuising (Pty) Ltd v North West Provincial Government & Another* 2001 (1) SA 500 (CC), 2000 (4) BCLR 347 (CC), [2000] ZACC 2 at para 36; and *Ex parte Speaker of the KwaZulu-Natal Provincial Legislature: In re KwaZulu-Natal Amakhosi and Iziphakanyiswa Amendment Bill of 1995* 1996 (4) SA 653 (CC), 1996 (7) BCLR 903 (CC), [1996] ZACC 15 at para 19; *Tongoane* (supra) at para 49. See generally, V Bronstein 'Legislative Competence' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 15.

487 2000 (1) SA 732 (CC), 2000 (1) BCLR 1 (CC), [1999] ZACC 15 ('*Liquor Bill*').

488 *Ibid* at para 26 (our emphasis).

489 *Ibid* at paras 27-9.

applicants argued that, although the legislation was targeted primarily at land reform, it would have a substantial impact on indigenous law — a functional area listed in Schedule 4 — and therefore should have been tagged as a s 76 Bill. The High Court agreed with the applicants that CLARA had been incorrectly tagged, but for reasons we discuss below, held that this should not render the Act invalid.⁴⁹² The communities took their complaint to Braamfontein.

Chief Justice Ngcobo upheld the High Court's finding that CLARA had been incorrectly tagged. First, the Court endorsed the 'substantial measure' test enunciated in *Liquor Bill*. The Court explained how it differed from the 'pith and substance' test: 'Under the [pith and substance test], provisions of the legislation

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that fall outside of its substance are treated as incidental. By contrast, the tagging test . . . focuses on all the provisions of the Bill in order to determine the extent to which they substantially affect functional areas listed in Schedule 4 and not on whether any of its provisions are incidental to its substance.⁴⁹³ In sum, the 'substantial measure' test would require Bills to be tagged as s76 Bills when 'the main substance ... falls within the exclusive national competence, but the provisions ... nevertheless substantially affect the provinces.'⁴⁹⁴

The need for two different tests for seemingly similar concerns was dictated by the specific purpose served by establishing different mechanisms for legislation affecting the provinces:

Tagging is not concerned with determining the sphere of government that has the competence to legislate on a matter. Nor is the process concerned with preventing interference in the legislative competence of another sphere of government. The process is concerned with the question of how the Bill should be considered by the provinces and in the NCOP, and how a Bill must be considered by the provincial legislatures depends on whether it affects the provinces. The more it affects the interests, concerns and capacities of the provinces, the more say the provinces should have on its content.⁴⁹⁵

As Ngcobo CJ notes, if the s 76 procedure only applied where provinces were competent to legislate concurrently, it would have little practical purpose as they could simply enact their own, preferred laws. 'Yet it is where matters substantially

490 For commentary on *Tongoane*, see Rassie Malherbe 'Parlementêre Prosedure as Demokratiese Instrument: Inagneming van Provinsiale Standpunt in Parlementêre Besluitneming' (2010) *TSAR* 826; M Bishop & J Brickhill 'Constitutional Law' 2010(2) *Juta's Quarterly Review* § 2.1.

491 Act 11 of 2004.

492 *Tongoane & Others v National Minister for Agriculture and Land Affairs & Others* 2010 (8) BCLR 838 (GNP) [2009] ZAGPPHC 127.

493 *Tongoane* (supra) at para 59.

494 *Ibid* at para 72.

495 *Ibid* at para 60.

affect them *outside* their concurrent legislative competence that it is important for their views to be properly heard during the legislative process.⁴⁹⁶

Applying this reasoning, the Court concluded that CLARA had been incorrectly tagged. CLARA's purpose was 'to introduce a new regime that will regulate the use, occupation and administration of communal land'.⁴⁹⁷ That task was currently regulated, largely, by indigenous law. This was sufficient to satisfy the 'substantial measure' test.

(ii) Consequences of mistaken tagging

Probably because it did not need to decide the issue (as it found the Bill had been properly tagged) the *Liquor Bill* Court fudged the question of the consequence of bad tagging. Cameron AJ first highlighted the three principal differences between the s 75 procedure and the s 76 procedure.⁴⁹⁸ First, s 76 gives more weight to the position of the NCOP, primarily because of the role of the Mediation Committee.⁴⁹⁹ The second difference is that where a s 76 Bill is introduced in the National Assembly, the Assembly can override the objections of the NCOP only by passing the Bill with a two-third majority. By contrast, under s 75, only a simple majority in the Assembly is needed to override the objections of the NCOP.⁵⁰⁰

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Third, when the NCOP votes on a s 76 Bill, each province has a single vote cast on its behalf by the head of the province's delegation and five votes are required to pass the Bill. By contrast, when the NCOP votes on a s 75 Bill, each delegate to the NCOP has a vote on the Bill.⁵⁰¹ The Court stressed that the third difference, is 'of import since whether a provincial delegation votes corporately through its head of delegation, as prescribed by s 65, or individually by each member casting a vote, as prescribed by s 75(2), may in defined circumstances be determinative as to whether the NCOP passes a Bill.'⁵⁰²

Cameron AJ then made the following *obiter* comment about what the consequences might be if a Bill were incorrectly tagged:

It would be formalistic in the extreme to hold a Bill invalid on the ground that those steering it through Parliament erred in good faith in assuming that it was required to be dealt with under the s 76 procedure, when the only consequence of their error was to give the NCOP more weight, and to make passage of the Bill by the National Assembly in the event of inter-cameral disputes more difficult. It is hard to see how a challenge

496 Ibid at para 63.

497 Ibid at para 95.

498 *Liquor Bill* (supra) at para 25.

499 Ibid.

500 Ibid.

501 *Liquor Bill* (supra) at para 25.

502 Ibid.

based on the first two differences between the relevant parliamentary procedures can invalidate the enactment of a statute.⁵⁰³

If we applied Cameron AJ's approach, tagging would only result in invalidity if Parliament acted in bad faith. The final sentence suggests that invalidity might also result if there is evidence to suggest that the Bill would not have passed if the vote had been taken by mandates instead of individually (or vice versa).

Relying on this statement, the High Court in *Tongoane* did not declare CLARA invalid. Despite finding that it had been improperly tagged, Ledwaba J held that as Parliament had acted in good faith, and the provinces had an adequate hearing, CLARA was valid.⁵⁰⁴

The Constitutional Court in *Tongoane* reversed both the High Court and the *Liquor Bill* approach to tagging. It held that where a Bill that was objectively a s 76 Bill was passed as a s 75 Bill, the result would always be invalidity. It rejected the suggestion in *Liquor Bill* that invalidity should not be the result when Parliament had acted in good faith. Quoting *Doctors for Life*, Ngcobo CJ re-iterated that '[f]ailure to comply with manner and form requirements in enacting legislation renders the legislation invalid. ... [The Constitutional] Court not only has a right but also has a duty to ensure that the law-making process prescribed by the Constitution is observed. And if the conditions for law-making processes have not been complied with, it has the duty to say so and declare the resulting statute invalid.'⁵⁰⁵ However, the Court was not willing to commit itself on the consequences of the reverse situation: where a s 75 Bill was incorrectly passed under the more onerous s 76 procedures. 'It may well be,' the Chief Justice mused, 'that different

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considerations apply where the section 76 procedure is followed instead of the one prescribed by section 75.'⁵⁰⁶

(iii) Discussion

In sum, the law on tagging is: A Bill must be tagged as s 76 if it will affect in 'substantial measure' any of the functional areas in Schedule 4. If a Bill is mistakenly tagged s 75 instead of s 76 and passed on that basis, the resultant Act is invalid. It is uncertain what the consequences are if the Bill is tagged s 76 when it should have been tagged s 75. *Tongoane* provides a lucid explanation of the law and rightly rejects the 'pith and substance' approach. Yet, certain difficulties remain.

First, it is difficult to conceive why Bills mistakenly tagged s 75 should be treated differently from those incorrectly tagged s 76. The logic justifying the conclusion that incorrect tagging must result in invalidity is that any failure to follow a constitutionally prescribed process renders the resulting legislation invalid. The only meaningful difference is that, because the s 76 procedure requires more votes from

503 Ibid at para 26.

504 *Tongoane & Others v National Minister for Agriculture and Land Affairs & Others* 2010 (8) BCLR 838 (GNP), [2009] ZAGPPHC 127 at paras 24-26.

505 *Tongoane* 2010 (6) SA 214 (CC) at para 106, quoting *Doctors for Life* (supra) at paras 208 and 211.

506 *Tongoane* (supra) at para 103.

the NCOP (and the NA if it wishes to override the NCOP) it is only when Bills are mistakenly tagged s 75 that they will be passed without the necessary number of votes. There are two gaps in this argument.

One, it omits the theoretical possibility that, because s 76 is a mandated procedure and s 75 is not, a Bill that would pass in the NCOP under s 76 might not pass under s 75. It is also possible that the NA would decide not to override the NCOP. The Constitution clearly contemplates that the NA might decide not to use the override — even though it had already passed the Bill — otherwise there is no purpose in requiring the NA to reconsider the legislation.

Two, and more importantly, the Court has made clear in its public participation cases — *Doctors for Life*, *Matatiele* and *Merafong* — that it is irrelevant whether following the proper procedure would affect the outcome of the legislative process. If we were concerned only with whether following the correct procedure would have changed the result, then we should enquire even in a case like *Tongoane* how many votes the legislation received. If it had been passed with 90 per cent of the votes in both Houses, it would still have been passed had the correct, s 76 procedure been followed. The *Tongoane* Court is uninterested in this vote-counting exercise precisely because the practical consequences of following the wrong procedure do not matter. And if that is true, there is no room to prevaricate about the alternative, *Liquor Bill* scenario.

If we accept that mistaken tagging in either way results in invalidity,⁵⁰⁷ then a bigger dilemma raises its head. While the 'substantial measure' test is easier to apply consistently than the 'pith and substance' approach, it does not provide

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bright line rules. In some cases there will be room for reasonable debate about how to tag a Bill. We can assume that the accumulation of judicial opinion will, over time, provide greater guidance as to exactly where the line between ss 75 and 76 lies, but in the interim Parliament is stuck with a difficult conundrum. Even acting with the best of intentions, it might accidentally tag a Bill incorrectly. The consequence (if the law is challenged) will be invalidity either way, resulting in a huge waste of government resources. To avoid that, we need a more finely grained test than *Tongoane* supplies.

Murray and Simeon have suggested a nifty five-part tagging test that could help to provide greater clarity. Although proposed prior to *Tongoane*, the Murray-Simeon test tries to give more definite content to the 'substantial measure' approach.⁵⁰⁸ It does so by identifying the circumstances where a province should legitimately have a greater say in the passage of law — either for reasons of federalism, or efficacy. The test is as follows:

507 If you are convinced that only Bills like CLARA that are wrongly tagged as s 75 Bills should be declared invalid, a different difficulty awaits. The consequence will be that Parliament will be incentivized to tag any Bill where there is any doubt as a s 76 Bill to avoid the possibility of it being declared invalid. This will skew the balance the Constitution tries to strike between the powers of the national and provincial governments. Some Bills that should be passed under s 75 (with less provincial input) will be passed under s 76 (with greater provincial influence). We may think this is a good thing, but it is probably not what the Constitution envisages.

508 C Murray & R Simeon ' "Tagging" Bills in Parliament: Section 75 or Section 76?' (2006) 123 *SALJ* 232.

- (a) Does the Bill expect provinces to implement any part of it under FC s 125(2)(b)? If so, the Bill should follow the s 76 procedure.
- (b) Does the Bill contain provisions that would normally fall for implementation by the provinces under s 125(2)(b) but over which the national government retains the responsibility for implementation? If so, the Bill should follow the s 76 procedure.
- (c) Could this law, in the future, conflict with a provincial law? Or, in other words, are there provisions in this law that deal with matters over which a province has jurisdiction? If so, the Bill should follow the s 76 route.
- (d) Does the Bill have implications for any policy or law which provinces are already implementing or may implement? If so, the Bill should follow the s 76 procedure.
- (e) Is the intrusion of the national Bill on a Schedule 4 matter trivial? If so, the Bill should follow the s 75 route.⁵⁰⁹

Were Parliament and the Court to adopt this test — or something similar — it would bring much greater clarity to the tagging process. While there may be some Bills that still escape easy classification, it is likely to be a far smaller set.

The alternative solution to the tagging problem, that Parliament has in fact adopted, is to create a new procedure to deal with difficult to classify Bills. In an effort to alleviate some of the difficulties involved in classifying and separating s 75 and s 76 matters, the Joint Rules of Parliament provide for a Bill to be classified as a 'mixed section 75/76 Bill'.⁵¹⁰ This is a Bill which contains provisions that must to be passed under s 75 as well as provisions that must to be passed under s 76. The Joint Rules provide that such a Bill may only be proceeded with where the Bill is of a nature that a dispute between the two houses is unlikely to arise, where the Bill is drafted in a way that its s 75 and s 76 components can be isolated if necessary and where the Bill is unlikely to lead to any unmanageable procedural complications.⁵¹¹ The procedure to be used for passing mixed Bills attempts to ensure that the requirements of both s 75 and s 76 are met. For example, mixed

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Bills may not be introduced in the NCOP⁵¹² as this would conflict with s 75, and when the NCOP considers a mixed Bill it must first vote by province to satisfy s 76 and then by individual member to satisfy s 75.⁵¹³ Where a mixed Bill runs into procedural difficulties, such as where the two houses disagree, it must be split into separate s 75 and s 76 Bills and these separate Bills must be retabled accordingly.

While this is a novel solution, it is, alas, unconstitutional. The Constitution makes no reference at all to mixed Bills — the procedure and classification derives solely from the Joint Rules of Parliament. It is presumably for this reason that although the

509 Ibid at 256-259.

510 Joint Rules 191-201.

511 Joint Rule 191.

512 Joint Rule 193.

513 Joint Rule 197.

procedure for mixed Bills has been approved by the Joint Rules Committee, it has not yet been implemented pending clarity on its validity.⁵¹⁴ It could be argued that the mixed Bill procedure is constitutionally unobjectionable because it is more onerous than the constitutionally required procedure.⁵¹⁵ The Court's suggestions in both *Liquor Bill* and *Tongoane* that Bills mistakenly classified as s 76 might not be invalid gives some credence to that line of thought.

However, as we argued earlier, the reasoning involved in accepting the mixed Bills procedure is flawed. The mixed Bills procedure is not merely more onerous than the s 75 and s 76 procedures; it is different to these procedures and is in fact unknown to the Constitution. While it may well be within Parliament's power to make the passing of particular Bills more complex by, for example, requiring extra consultation with the public or local government, it is altogether a different matter when Parliament imposes additional voting requirements on certain Bills that may prevent them being passed at all — thus undermining the constitutional legislative process. Therefore, however much the mixed Bills procedure may be considered a pragmatic solution to the difficulties involved in separating and classifying s 75 and s 76 Bills, the courts should be slow to accept the procedure as being consistent with the Constitution.

A final interesting question is worth considering. Thus far, we have only considered tagging challenges to a Bill that was passed. But would there be any recourse if a Bill was incorrectly tagged and for that reason failed to pass? Imagine Parliament mistakenly tags a s 75 Bill as a s 76 Bill. The NA passes it with a slim majority. The NCOP rejects it, mediation fails, and the NA is unable to muster the two-thirds necessary for an override. Could somebody with an interest in the Bill being passed challenge the tagging of the Bill and force Parliament to reconsider it under the correct procedure? We deal with the general form of this question earlier,⁵¹⁶ and suggest that this would be one example where a court might be justified in interfering before Parliament concludes the legislative process.

(c) Bills requiring extra-parliamentary consultation

The Constitution provides that certain categories of Bills may not be passed by Parliament unless appropriate bodies have been consulted or have had the

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opportunity to make representations beforehand. The following is a list of the categories with the corresponding bodies to be consulted:

- Bills affecting the status, institutions, powers or functions of local government: organized local government, municipalities and other interested parties (s 154(2));
- Bills providing for the equitable distribution of national revenue between national, provincial and local governments: provincial governments, organised local government and the Financial and Fiscal Commission (s 214(2));

514 See the comment in the Joint Rules, at Joint Rule 191.

515 See I Currie and J De Waal *The New Constitutional and Administrative Law* (2001) 188.

516 See § 17.4 above.

- Bills regulating the powers of national, provincial and local governments to raise and to guarantee loans: the Financial and Fiscal Commission (ss 218(2) and 230(2));
- Bills providing a framework for the salaries, allowances and benefits of elected representatives and traditional leaders: the commission on the remuneration of elected representatives and traditional leaders (s 219(3)); and
- Bills regulating the taxing powers of provinces and local governments: the Financial and Fiscal Commission (ss 228(2)(b) and 229(5)).

17.7 Internal Regulation of Parliament

While the Constitution determines a great deal of how Parliament functions, the day-to-day details of parliamentary process are left for Parliament to figure out for itself. The Constitution affords the NA and the NCOP the power to control their internal proceedings and to make rules and orders to manage their business. This section examines the limits of those powers. First, we discuss Parliament's general power to regulate its proceedings and the ancient principle that the judiciary should not interfere in the inner workings of the Legislature. Second, we consider Parliament's rule-making power. We ask what the limits of the power to make rules are, and what consequences (if any) flow from breaking the rules. Last, we look at the right of MPs to speak their mind in legislative proceedings.

(a) Control over the internal proceedings of Parliament

Sections 57(1)(a) and 70(1)(a) of the Final Constitution confer on the NA and the NCOP, respectively, the general power to 'determine and control [their] internal arrangements, proceedings and procedures'. The subsequent grant of power to create rules and orders — FC ss 57(1)(b) and 70(1)(b) — is best understood as an element of that power.

The right of legislatures to regulate their own proceedings without interference by other branches of government is a hallmark of democratic government. As long ago as 1884, Lord Coleridge held:

What is said or done within the walls of Parliament cannot be inquired into in a court of law. ... The jurisdiction of the Houses over their own members, their right to impose discipline within their walls, is absolute and exclusive.⁵¹⁷

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In *Bloem & Another v State President of the Republic of South Africa & Others*, MT Steyn J quoted this passage and confirmed that, prior to 1994, the principle of Parliamentary immunity was part of South African law.⁵¹⁸

Apartheid South Africa was by no means alone; the House of Lords,⁵¹⁹ the Supreme Court of Canada,⁵²⁰ the High Court of Australia⁵²¹ and the Supreme Court of

517 *Bradlaugh v Gossett* (1884), 12 QBD 271, 275 (Eng QB).

518 1986 (4) SA 1064 (O)(The court quoted extensively from *Bradlaugh* and other English decisions, and concluded that 'the exclusive right of Parliament to establish and control its own domestic procedure and the denial of jurisdiction to the Courts of law to pronounce thereon, [has] been embodied in our own Constitution.' Ibid at 1088E.)

the United States⁵²² all endorse some variation on the theme that, as long as the lawmaking branch complies with the manner and form provisions of the Constitution, courts should not inquire into how Parliament manages its domestic affairs. While the jurisdictions differ on the details, the position in most is that once a court decides that an act falls under one of the recognised 'parliamentary privileges', a court has no jurisdiction to question its exercise, even if it might violate a constitutional right.⁵²³

A trio of Canadian cases demonstrates how this rule operates. The Supreme Court of Canada has held that a broadcaster could not rely on the right to freedom of expression to gain permission to film the sessions of a provincial legislature because the right to remove strangers from Parliament and to regulate visitors' behaviour is a

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- 519 *British Railways Board v Pickin* [1974] AC 765, 790 (Lord Morris of Borth-y-Gest)('It must be for Parliament to decide whether its decreed procedures have in fact been followed. It must be for Parliament to lay down and to construe its Standing Orders and further to decide whether they have been obeyed: it must be for Parliament to decide whether in any particular case to dispense with compliance with such orders.')
- 520 *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)* [1993] 1 SCR 319 ('*New Brunswick*')(McLachlin J held that 'Canadian legislative bodies properly claim as inherent privileges those rights which are necessary to their capacity to function as legislative bodies.' Ibid at para 125. Once a court established that a certain type of conduct or decision was necessary, Parliament's decisions in that area were completely immune from judicial review, including compatibility with the Charter. The court held that the right to exclude strangers from proceedings and to regulate their conduct was such a power. A broadcasting company could not, therefore, rely on the right to freedom of expression for permission to film the proceedings of the Nova Scotia House of Assembly.)
- 521 *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157, 162, ('it is for the courts to judge of the existence in either House of Parliament of a privilege, but, given an undoubted privilege, it is for the House to judge of the occasion and of the manner of its exercise.' Quoted with approval in *Egan v Willis* [1998] HCA 71 at para 27.)
- 522 *Marshall Field & Co v Clark* 143 US 649, 12 S.Ct. 495 (1892)(The court created what is known as the 'enrolled bill doctrine'. The doctrine holds: 'The signing by the speaker of the house of representatives, and by the president of the senate ... of an enrolled bill, is an official attestation by the two houses of such bill as one that has passed congress And when a bill, thus attested, receives [the President's] approval, and is deposited in the public archives, its authentication as a bill that has passed congress should be deemed complete and unimpeachable The respect due to coequal and independent departments requires the judicial department to ... accept, as having passed congress, all bills authenticated in the manner stated'. Ibid at 672, as paraphrased in I Bar-Siman-Tov 'Legislative Supremacy in the United States?: Rethinking the "Enrolled Bill" Doctrine' (2009) 97 *Georgetown LJ* 323, 328-329. This principle, it seems, does not exclude courts from examining *constitutional* manner and form requirements, only from compliance with its own rules. *United States v Munoz-Flores* 495 US 385 (1990)(The court held that it could enquire whether Congress had complied with the constitutional requirement that revenue bills originate in the House of Representatives.))
- 523 The US is different. It requires Congress to abide by the Bill of Rights in all its internal processes. *United States v Ballin* 144 US 1, 5, 12 S.Ct. 507, 509 ('The constitution empowers each house to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained. But within these limitations all matters of method are open to the determination of the house, and it is no impeachment of the rule to say that some other way would be better, more accurate, or even more just.')

parliamentary privilege.⁵²⁴ However, the Court also held that parliament's privileges did not extend to hiring and firing its chauffeurs, and so held that an ex-chauffeur could sue Parliament for discrimination.⁵²⁵ Applying these precedents, the Ontario Court of Appeal held that a provincial legislature was immune from a challenge that its practice of reading a prayer at the start of each session violated the religious liberty rights of one of its members.⁵²⁶ It reasoned that since standing rules were an element of Parliament's exclusive zone of competence, and the prayer was required by the rules, a court could not intervene.

Before we go further, a quick note about terminology is necessary. The phrase 'parliamentary privilege' is used in two ways. It is used to describe both the right of Parliament as an institution to be free from outside interference, and the right of individual MPs to speak their minds when in Parliament. The second is really an element of the first, but to avoid confusion, we try to use the phrase 'parliamentary immunity' when referring to the first, institutional guarantee, and 'parliamentary privilege' when discussing the second, individual protection. However, the case law does not make a similar distinction, so readers should be careful to note the context in which the phrase 'parliamentary privilege' is employed.

There is a dual rationale behind the rule of parliamentary immunity. First, the separation of powers requires each branch to permit the other to perform its functions without interference. As one commentator has put it:

The reason for, and purpose of, parliamentary [immunity] is not to protect parliament and parliamentarians from individuals; rather it is to protect them from the Courts and the Executive. ... Parliamentary [immunity] provides the constitutional space for free and democratic discourse to take place.⁵²⁷

While it may often appear to immunise Parliament from legal standards that apply to all other bodies — an appearance that may sometimes be justified — that is deemed necessary to guarantee Parliament's independence.

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The second, and more practical, justification for parliamentary immunity is to ensure the smooth functioning of Parliament. The business of Parliament would be far more difficult — if not impossible — if every internal decision could be reviewed

524 *New Brunswick* (supra).

525 *Canada (House of Commons) v Vaid* [2005] 1 SCR 667 (SCC)

526 *Ontario (Speaker of the Legislative Assembly) v Ontario (Human Rights Commission)* 201 DLR (4th) 698 at paras 19 and 23 ('In the case under appeal, the privilege asserted by the Speaker on behalf of the Legislative Assembly is the right to establish and regulate the House's own internal affairs without any interference from the other two branches of government, the executive and the judicial. In addressing the problem in this case, we are weighing the constitutional rights of a citizen of the state against the right of legislative assemblies, hard won over the centuries, to control their own affairs independent of the Crown. ... The question is not whether the prayers are necessary, but whether the Standing Orders governing the conduct of the business of the Assembly are necessary. If the Standing Orders are determined to be necessary to the proper functioning of the House - and they include the prayers - that is the end of the inquiry. The Standing Orders are protected by parliamentary privilege and neither the courts nor any quasi-judicial body have the right to inquire into their contents or to question whether a particular part of the Standing Orders (including the recitation of prayers) is necessary or indeed lawful.')

527 S Chaplin 'House of Commons v. Vaid: Parliamentary Privilege and the Constitutional Imperative of the Independence of Parliament' 2 *Journal of Parliamentary & Political Law* 153.

in the courts. To employ an evocative phrase from an earlier age: 'They would sink into utter contempt and inefficiency without it.'⁵²⁸ Or in the words of McLachlin J: 'The rule that the legislative assembly should have the exclusive right to control the conditions in which that debate takes place is ... of great importance, not only for the autonomy of the legislative body, but to ensure its effective functioning.'⁵²⁹

With this strong historical precedent, foreign support and principled and practical justification, one might expect our Constitutional Courts to adopt a similar approach. But one would be wrong. Although there is not a developed jurisprudence on this issue, the constitutional text and the few cases we have indicate that courts in South Africa will be far less deferential to the legislature. To begin with, FC s 2 states: 'The Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.' And FC s 8(1) explicitly states that the Bill of Rights 'binds the legislature'. The most obvious interpretation of these provisions is that the legislature is as bound by the Constitution as any other public body. However, they need to be read in conjunction with the provisions that afford Parliament the ability to determine its own rules. It could be argued that ss 57(1)(a) and 70(1)(a) create a constitutional bubble of immunity for the legislature when regulating its internal functions. There can be no constitutional conflict, the argument goes, because the Constitution itself envisions that Parliament will not be subject to the ordinary strictures of the Constitution.⁵³⁰

The Supreme Court of Appeal has firmly rejected this interpretation. In *Speaker of the National Assembly v De Lille* Mahomed CJ wrote:

[T]he Constitution of the Republic of South Africa ... is Supreme — not Parliament. It is the ultimate source of all lawful authority in the country. No Parliament, however bona fide or eminent its membership, no President, however formidable be his reputation or scholarship and no official, however efficient or well meaning, can make any law or perform any act which is not sanctioned by the Constitution. Section 2 of the Constitution expressly provides that law or conduct inconsistent with the Constitution is invalid and the obligations imposed by it must be fulfilled. It follows that any citizen adversely affected by any decree, order or action of any official or body, which is not properly

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authorised by the Constitution is entitled to the protection of the Courts. No Parliament, no official and no institution is immune from Judicial scrutiny in such circumstances.⁵³¹

528 *Bradlaugh v Gossett* (1884), 12 QBD 271, 275 (Eng QB).

529 *New Brunswick* (supra) at para 140.

530 This is similar to the argument that convinced the Supreme Court of Canada to exempt the legislative branch from compliance with the Canadian Charter. *New Brunswick* (supra).

531 *Speaker of the National Assembly v De Lille & Another* 1999 (4) SA 863 (SCA), 1999 (11) BCLR 1339 (SCA) ('*De Lille*') at para 14. See also, *De Lille & Another v Speaker of the National Assembly* 1998 (3) SA 430 (C), 1998 (7) BCLR 929 (C) ('*De Lille HC*') at para 22 ('In terms of s 2 the Constitution is the supreme law of the Republic and any law or conduct inconsistent with it is invalid. Section 8(1) also provides that the Bill of Rights applies to all law and binds the Legislature, the Executive, the Judiciary and all organs of State. Thus any privilege inconsistent or incompatible with the Constitution is invalid. Surely the extent of privilege is inextricably bound with the exercise thereof. In other words, the determination of the extent of privilege must surely relate to its exercise. The contrary view is untenable. Otherwise Parliament would have a blank cheque to set the limits of its own powers. The Constitution, particularly s 2 thereof, enjoins us to ensure that the obligations imposed by the Constitution - which is the supreme law - must be fulfilled.')

As we discuss in greater depth below,⁵³² *De Lille* concerned whether the National Assembly had the power to suspend one of its members as a punishment for remarks made during a debate. The Supreme Court of Appeal held that, although FC s 57(1)(a) gave the NA the power to suspend a member to prevent disruption of a debate, it did not afford it the power to use suspension as a punishment. It did not actually reach the question of whether the NA would be bound by the Bill of Rights — or any other restraints — in exercising a power afforded to it by the Constitution,⁵³³ although the tenor of the judgment suggests that it would.

The High Court in *De Lille* was not so hesitant. It held:

The National Assembly is subject to the supremacy of the Constitution. It is an organ of State and therefore it is bound by the Bill of Rights. All its decisions and acts are subject to the Constitution and the Bill of Rights. ... It is subject in all respects to the provisions of our Constitution. It has only those powers vested in it by the Constitution expressly or by necessary implication or by other statutes which are not in conflict with the Constitution. It follows therefore that Parliament may not confer on itself or on any of its constituent parts, including the National Assembly, any powers not conferred on them by the Constitution expressly or by necessary implication.⁵³⁴

Hlophe J (joined by King DJP) found that the decision to suspend De Lille violated her rights to freedom of expression, access to courts and administrative justice.

The endorsement of constitutional supremacy and the limited weight afforded parliamentary immunity in both *De Lille* judgments is indirectly supported by the Constitutional Court's attitude in *Doctors for Life*.⁵³⁵ Recall⁵³⁶ that the majority, over the vociferous dissent of Yacoob J, read the seemingly bland obligation to 'facilitate public involvement' as a requirement for the validity of legislation and, although affording Parliament significant deference, was willing to examine whether Parliament had acted reasonably in meeting that duty with regard to each and every law that it passed. The Court could have found — as the dissenters did — that

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Parliament need merely enact some rules to promote public involvement, but that courts could not enquire any further than that.

However, *Doctors for Life* does build in a limited form of judicial deference in another way: Courts must — absent exceptional circumstances — wait until Parliament completes the legislative process before it intervenes.⁵³⁷ This only applies when the internal function at issue concerns the passing of legislation. When — as

532 See § 17.7(c) below.

533 Ibid at para 32 (The Court declined to decide the issue that had been at issue in *New Brunswick: Whether Parliament is bound by the Bill of Rights*.)

534 *De Lille HC* (supra) at para 25.

535 *Doctors for Life International v Speaker of National Assembly & Others* 2006 (6) SA 416 (CC), 2006 (12) BCLR 1399 (CC), [2006] ZACC 11 ('*Doctors for Life*').

536 See §17.6(a) above.

537 See § 17.4 above.

was the case in *De Lille* — there is no legislative process to complete, the judiciary can intervene at any stage.

The general principles that emerge from the case law are these:

- (a) Parliament can only act if there is a legal source for its power;
- (b) FC ss 57(1)(a) and 70(1)(a) are not blank cheques; a court can decide whether Parliament has exceeded its power to 'determine and control its internal arrangements';
- (c) The exercise of all Parliament's powers is constrained by the Bill of Rights and the Constitution;
- (d) A court is likely to show significant deference to how Parliament chooses to regulate its processes;
- (e) Courts cannot intervene before legislation has been passed.

This power is constrained by other provisions of the Constitution, in particular ss 59 and 72, which oblige the Assembly and the NCOP to facilitate public involvement in their processes and to conduct their business in an open manner and in public. The Assembly and the NCOP are entitled to take reasonable measures to regulate public and media access to their proceedings.⁵³⁸ However, the general public and the media may be excluded from the proceedings of committees of the Assembly and the NCOP only when it is reasonable and justifiable to do so in an open and democratic society.⁵³⁹

(b) Rules and orders of the National Assembly and the NCOP

The Assembly⁵⁴⁰ and the NCOP⁵⁴¹ have the power to make rules and orders concerning the conduct of their business. In addition, FC s 45 requires the two houses to 'establish a joint rules committee to make rules and orders concerning [their] joint business'. In this section we ask two questions about the rule-making power: (a) what are the limits on Parliament's power to make rules? (b) what are the consequences, if any, if Parliament fails to comply with a rule?

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(i) The limits on Parliament's rule-making power

We first consider the explicit limits on the rule-making power, then implicit constraints. For the first part, we consider the joint and individual rule-making powers separately, while when discussing the tacit limits we discuss the power to make rules generally.

538 It is not clear that this power would entitle the NA or the NCOP to refuse permission for their proceedings to be broadcast on television. Cf *New Brunswick Broadcasting Co v Nova Scotia* 100 DLR (4th) 212 (SC), [1993] 1 SCR 319.

539 FC s 59(2) and 72(2). See also NA Rule 152 and NCOP Rule 110.

540 FC s 57(1)(b).

541 FC s 70(1)(b).

There are two explicit constraints on the houses' individual rule-making power in the Constitution. First, it has to be exercised with due regard to representative and participatory democracy, accountability, transparency, and public involvement.⁵⁴² This limitation has not yet been tested, but it seems likely that a court will give Parliament a great degree of deference in deciding whether a rule runs contrary to these principles. The principles are vague, so there will always be some doubt whether a rule fails to respect transparency or public participation. In addition, the Constitution does not require that the rules promote or comply with the listed principles, merely that they are adopted 'with due regard' to those principles. Even rules that may seem to inhibit, for example, transparency would pass constitutional muster if it was adopted with an attempt to limit the impact on transparency, or for some other justifiable reason. Finally, as the rule-making power concerns the inner working of the legislature, the judiciary will rightly be hesitant to intervene. Absent obviously undemocratic rules, the principled limits in ss 59(1)(b) and 70(1)(b) will act primarily as largely unenforceable guidelines for Parliament, or as an interpretive guide when rules are unclear.

Secondly, ss 57(2) and 70(2) prescribe constitutionally mandated content for the rules and orders that differs slightly for each house:

- (a) In both houses: The establishment of committees;⁵⁴³
- (b) In the NA: Recognise the leader of the largest opposition party as the leader of the opposition;⁵⁴⁴
- (c) In both houses: The participation of minority parties in parliamentary and committee proceedings in a manner consistent with democracy.⁵⁴⁵ The Constitutional Court has held that the 'purpose of these provisions is to ensure that minority parties can participate meaningfully in the deliberative processes of parliament.'⁵⁴⁶
- (d) In the NA: Ensure that all parties represented in the NA are given sufficient financial and administrative assistance to operate effectively in the Assembly;⁵⁴⁷ and

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542 FC ss 57(1)(b) and 70(1)(b). These provisions are reinforced by the requirements of openness imposed by ss 59 and 71, discussed in § 17.6 (a) supra.

543 FC s 57(2)(a) and 70(2)(a) read: 'the establishment, composition, powers, functions, procedures and duration of its committees'. The different roles of committees in the Assembly and the NCOP are discussed in §§ 17.1 (a) and (b)(ii) supra.

544 FC s 57(2)(d).

545 FC s 57(2)(b) and 70(2)(c). When applied to the NCOP, the provision only applies to s 75 Bills, because that is the only time delegates have an individual vote. When voting as a delegation, party affiliation is irrelevant. See *First Certification Judgment* (supra) at para 224 (Constitutional Court emphasized that this requirement was capable of judicial enforcement.)

546 *Democratic Alliance & Another v Masondo NO & Another* 2003 (2) SA 413 (CC), 2003 (2) BCLR 128 (CC), [2002] ZACC 28 ('Masondo') at para 18.

547 FC s 57(2)(c).

- (e) In the NCOP: The participation of all the provinces, 'in a manner consistent with democracy'.⁵⁴⁸

Requirements (a) and (b) are basic and are unlikely to provoke controversy. By contrast, the remaining requirements are vital bulwarks against the abuse of the rule-making power by the majority party. Like all other decisions, the adoption of the rules is taken by a simple majority vote.⁵⁴⁹ A party with a clear majority could amend the rules to exclude or weaken minority parties and make it easier to push its agenda through without debate.⁵⁵⁰ The limits in FC ss 57(2) and 70(2) are a real, enforceable tool to prevent that.

FC s 45 creates a number of specific tasks for the Joint Rules Committee:

- (a) It must 'determine procedures to facilitate the legislative process, including setting a time limit for completing any step in the process'. This is an important power; as we discuss in more detail shortly, the Constitution is taciturn about the details of the legislative process and the rules need to provide those details.
- (b) Establish joint committees to report on s 74 and s 75 Bills;
- (c) Establish a joint committee to review the Constitution at least annually;
- (d) Regulate the business of all the joint committees;

Unlike FC ss 57 and 70, FC s 45 does not place any value-based limits on the joint rule-making power. When acting together, the NA and the NCOP are not explicitly required to consider participatory democracy, the representation of minority parties and so on. Should those limits also apply to the writing of the joint rules? Yes. There is no reason of principle to exempt the Joint Rules from respecting basic principles of democracy. Sections 57 and 70 can easily be read to constrain each house's power to make rules whether it is exercising it individually or in conjunction with the other house.

In addition to these two direct limits on the rule-making power, there are also implicit constitutional limits on the rules Parliament can make. Can Parliament make rules that add requirements to the processes set out in FC ss 74-77? The obvious answer is: No. But the real answer is more complicated. The starting point is an obiter remark of the Constitutional Court in *Executive Council of the Province of the Western Cape v Minister for Provincial Affairs and Constitutional Development & Another*.⁵⁵¹ The Court was concerned, not with Parliament's rule-making power, but with the similar power FC s 160(6) assigns municipal councils to make by-laws

548 FC s 70(1)(b).

549 FC ss 53(1)(c) and 65(1)(b).

550 For more on the possibility of the legislative process being distorted by a dominant party, see §17.8(b) below.

551 2000 (1) SA 661 (CC), 1999 (12) BCLR 1360 (CC), [1999] ZACC 13 ('*Executive Council 1999*').

regulating their internal arrangements.⁵⁵² Interpreting FC s 160(6), the Court compared it to FC s 57:

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It is clear that [FC s 57] confers a power upon the National Assembly to regulate its internal proceedings, business and working committees. However, that power must be read in the context of the other provisions of the Constitution regulating the National Assembly, such as the regulation of the election and removal of the Speaker and Deputy-Speaker, the regulation of the voting procedures and quorums in the National Assembly and the regulation of public access to the National Assembly. In addition, it should be noted that in the case of the national legislature, the election, appointment and functioning of what is, in effect, its executive committee, the President and Cabinet, is fully regulated by sections 83 to 102. Thorough constitutional regulation of provincial executives is similarly to be found in sections 125 to 141. These provisions make it plain that the constitutional power of legislatures to regulate the internal proceedings of committees is a narrow power, not a broad one, and is related not to the executive committees of these legislatures, but only to other committees entrusted with specific tasks or portfolios. The power also does not relate to a power to regulate the main structural components of the legislature, which are fully regulated by the Constitution, but only to those working committees which either chamber of the legislature may decide to establish, and also disestablish, from time to time.⁵⁵³

This is fair enough. The power to make rules certainly does not extend to altering the constitutional requirements for quorums or votes, nor to controlling the President and the Cabinet. But, the last sentence is too strongly stated; the rulemaking power is not limited 'only to those working committees which either chamber of the legislature may decide to establish'. While Parliament may not alter the 'main structural components of the legislature', it may (and must) fill in the details that the broad language of the Constitution leaves open.

A quick look at the Joint Rules or the rules of either house demonstrates this. While much of the rules are devoted to non-legislative motions and the composition and functioning of committees — matters the Constitution leaves unregulated — they also deal in great depth with the intricacies of parliamentary debate and the legislative process.⁵⁵⁴ And, as we explained earlier, FC s 45 explicitly recognises that the Joint Rules can 'determine procedures to facilitate the legislative process' and set time limits. While this power is not explicitly assigned to the NA and the NCOP when they act separately, it is necessary for them to function. We provide a few examples of rules which have nothing to do with committees but which affect the legislative process. Some of them are obviously permissible, while others could arguably be said to exceed the legislature's authority.

1. The power to introduce Bills

552 FC s 160(6) reads: 'A Municipal Council may make by-laws which prescribe rules and orders for-

(a) its internal arrangements;

(b) its business and proceedings; and

(c) the establishment, composition, procedures, powers and functions of its committees

553 *Executive Council 1999* (supra) at para 100

554 Chapter 13 of the NA Rules; Chapter 10 of the NCOP Rules; and Chapter 4 of the Joint Rules

The Constitution affords all Ministers, Deputy Ministers, Members of the NA and committees of the NA the power to introduce legislation in the National Assembly.⁵⁵⁵ Yet business in the Assembly would likely come to a screeching halt if every one of the 400 members could demand a full consideration of every one of their pet legislative projects. The power could easily be abused to tie up the Assembly with hopeless proposals to prevent it from passing legislation that a minority opposed. There must be some method to filter the proposals so that the

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Assembly spends its limited time on feasible legislation. The NA Rules provide a careful filter to achieve just that.⁵⁵⁶ It could be argued that sifting proposals in this way limits the constitutional right of members to propose legislation. Or, the mechanism could be defended as making the right a workable reality.

2. The Joint Tagging Mechanism

Earlier,⁵⁵⁷ we discussed the Joint Tagging Mechanism — the method by which Parliament determines what process to follow in passing a Bill. The Constitution does not require such a process, yet it would be impossible for Parliament to function without some way to decide how to classify Bills.

3. Certification of constitutionality

NA rule 243(1A) requires that Bills introduced by the executive are certified by the Chief State Law Adviser as complying with the Constitution and being 'properly drafted in the form and style which conforms to legislative practice'. While the legislation may be proceeded with even if the Law Adviser does not certify the legislation, the Bill cannot proceed until the Law Adviser expresses her opinion. This extra step is not to be found in the Constitution. Does rule 243(1A) create an extra-constitutional hurdle for the passage of legislation? Or is the NA merely regulating its internal proceedings?

4. Amendments to constitutional amendments

Earlier,⁵⁵⁸ we discussed the Constitutional Court's holding in *Merafong*⁵⁵⁹ that the Constitution does not permit amendments to constitutional amendments in the NCOP. We explained there why that conclusion is inarguably wrong. Without rehashing that argument, we want to consider the interesting abstract question that

555 FC s 73(2).

556 NA rules 234-237 (The Rules require the member to submit a memorandum to the Speaker. The memorandum is tabled in the Assembly and referred to the Committee on Private Members' Legislative Proposals and Special Petitions. The Committee considers the proposal and makes a recommendation to the Assembly on whether it should be considered. The recommendation and the original memorandum are tabled in the Assembly, which votes on whether to consider the proposal. If it votes in favour, the member may prepare a draft Bill which is then referred to the JTM to be tagged, and the legislative process begins.)

557 § 17.6(b) above

558 § 17.3(a) above.

559 *Merafong Demarcation Forum & Others v President of the Republic of South Africa & Others* 2008 (5) SA 171 (CC), 2008 (10) BCLR 968 (CC), [2008] ZACC 10 ('Merafong').

situation raises. Unlike FC ss 75 and 76, s 74 makes no provision for what happens if the NA and the NCOP pass different versions of a constitutional amendment. Does Parliament have the power to create a procedure to deal with that eventuality? The *Merafong* Court did not address this question; it denied the NCOP power to propose amendments without acknowledging the fact that Parliament — in its Joint Rules — had in fact created a procedure for it to do so. It could be asserted that the absence of a mediation process in s 74 implies that mediation should not be permitted for constitutional amendments. On this view, Parliament's attempt to establish a procedure is unconstitutional. But there is no

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explicit constitutional prohibition on creating a mediation process for s 74 Bills, no constitutionally prescribed alternative for solving conflicts between the NA and the NCOP, and no principled reason to prevent the NCOP from proposing amendments. This view holds that denying Parliament this power merely promotes inefficiency in the legislative process by forcing Bills that could be passed through mediation to fail and begin the legislative process afresh.

5. Mixed s 75/76 Bills

As we discussed earlier,⁵⁶⁰ the Joint Rules make provision for mixed s 75/76 Bills to avoid the possibility of a tagging mistake. These provisions have (wisely) not been implemented because of doubts about their constitutionality. While these might improve the efficiency of the legislative process — by removing the need to split Bills and the possibility of good faith tagging errors — they do not fit the process devised by the Constitution for passing legislation.

Hopefully, these examples demonstrate both that Parliament must have significant power to make rules concerning the legislative process, and that it will sometimes be difficult to tell whether they have moved from making the constitutional process work, to re-writing that process. In our view, the best approach would be twofold. First, a court would ask whether the rule performs a function that is necessary for the law-making process to work. Second, if it is, then the rule will be valid, unless it imposes an unreasonably arduous additional obstacle to passing the legislation. If the rule is not necessary for the law-making process, it will be invalid unless it imposes a negligible obstacle to passing a law. While that is by no means a bright line, it is the beginning of a useful standard.

In addition to limiting Parliament to rules that do not add unnecessary requirements to passing a law, the Legislature must adopt rules that are rationally related to their function. This requirement is best illustrated by the dictum of a US Supreme Court case. In *US v Ballin*, the Supreme Court was confronted with a disagreement about whether a law had in fact obtained the required majority of votes.⁵⁶¹ The parties disputed the method the House of Representatives used to count votes. 'The constitution', the Court noted, 'has prescribed no method of making this determination, and it is therefore within the competency of the house to prescribe any method which shall be reasonably certain to ascertain the fact.'⁵⁶² It continued:

560 § 17.6(b)(iii) above.

561 144 US 1 (1892).

562 *Ibid* at 6.

[The House] may prescribe answer to roll-call as the only method of determination; or require the passage of members between tellers, and their count, as the sole test; or the count of the speaker or the clerk, and an announcement from the desk of the names of those who are present. Any one of these methods, it must be conceded, is reasonably certain of ascertaining the fact; and as there is no constitutional method prescribed, and no constitutional inhibition of any of those, and no violation of fundamental rights in any, it

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follows that the house may adopt either or all, or it may provide for a combination of any two of the methods.⁵⁶³

This is really a re-iteration of the standard approach our courts have taken to rationality — as long as the means is related to the end, courts will not ask if there was a better way to achieve the end. That principle will undoubtedly apply to any rules Parliament makes.

(ii) The consequences of non-compliance with the rules

What happens if the NA or the NCOP breaks one of its own rules? There is, again, no simple answer. First, we need to distinguish between three situations: (a) the rule only affects MPs; (b) the rule affects third parties; and (c) the rule affects the legislative process. For each of these situations, a court is likely to take a different approach both to whether the rule has been violated, and to the consequences of violation.

When the rule only concerns MPs — such as the suspension of MP De Lille — courts are likely to defer to Parliament's interpretation of its rules. If the rule affects third parties — such as a rule governing the testimony of witnesses in committee — courts will rightly require stricter adherence to the rules. A person who testifies before Parliament is entitled to have that body obey its own rules. If it fails to do so, a court will set aside any decision that negatively affects the third party.

The most difficult category consists of rules that deal with the legislative process. Where a rule is relatively unimportant and non-compliance with it does not affect the constitutional manner-and-form requirements or make the passage and debate of the Bill undemocratic, courts should probably let it go. It does not serve anybody if every minor good faith mistake in interpreting the rules could result in the invalidity of legislation — and there is no constitutional reason to take that path. However, where the rules mirror or give effect to a constitutional requirement, the position may be different. For example, where there is no electronic voting mechanism, the NA Rules have a complex, multi-step process to count votes. If this process is not followed, and there is some debate about whether the required number of votes was cast, it could be argued that the legislation should be set aside. The real reason for setting the legislation aside is not that it does not comply with the rules, but that there is doubt about whether it complies with the Constitution.

In addition, wherever Parliament or one of its actors acts in bad faith or irrationally in interpreting or applying rules, a court will be able to set it aside on the basis of the rule of law doctrine.

(c) Parliamentary privilege

563 144 US 1 (1892).

FC s 58 provides that cabinet members and members of the National Assembly have freedom of speech in the Assembly, subject to its rules and orders, and may not be held criminally or civilly liable for any statements that they make in

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the Assembly or anything arising out of such statements. FC s 71 contains an equivalent provision for the NCOP. The Constitutional Court has held that the purpose of such protections is to 'encourage vigorous and open debate in the process of decision-making. This is fundamental to democracy.'⁵⁶⁴ In a later judgment, Mokgoro J wrote:

Immunising the conduct of members from criminal and civil liability during council deliberations is a bulwark of democracy. It promotes freedom of speech and expression. It encourages democracy and full and effective deliberation. It removes the fear of repercussion for what is said. This advances effective democratic government.⁵⁶⁵

The importance of the privilege was further confirmed in *Speaker of the National Assembly & Another v De Lille*. The Supreme Court of Appeal held in *De Lille* that the freedom of speech conferred by FC s 58(1) was a 'crucial guarantee' and that the remainder of FC s 58 should not be interpreted in a way that would detract from that guarantee.⁵⁶⁶

To understand the scope of this privilege, it is useful to ask four questions. First, in which fora does the privilege apply? Second, to whom does it apply? Third, is there any speech that it does not protect? Fourth, can a member be subjected to internal sanctions for speech?

The geographical scope of the privilege has twice been addressed by the Constitutional Court in the context of s 28(1) of the Local Government: Municipal Structures Act.⁵⁶⁷ Since s 28(1) virtually mirrors FC ss 58(1) and 71(1) its interpretation of this section applies with equal force to privilege in the NA and NCOP. In *Swartboo* the Court held that:

The words 'said in', 'produced before' and 'submitted to' the council taken together are wide enough to cover all the conduct in the council that is integral to deliberations at a full council meeting and to the legitimate business of that meeting.⁵⁶⁸

564 *Swartboo v Brink* 2006 (1) SA 203 (CC), 2003 (5) BCLR 502 (CC), [2003] ZACC 25 ('*Swartboo*') at para 20.

565 *Dikoko v Mokhatla* 2006 (6) SA 235 (CC), 2007 (1) BCLR 1 (CC), [2006] ZACC 10 ('*Dikoko*') at para 39.

566 *De Lille* (supra) at para 20.

567 Act 117 of 1998.

568 *Swartboo* (supra) at para 12. The Court also commented that the 'function or purpose of a committee might well be relevant to the question whether a municipal councillor is exempted from liability for conduct which amounts to participation in the affairs of the committee of a municipal council in a particular case'. Ibid at para 17. The Court found it unnecessary to resolve this issue in *Swartboo* because the conduct at issue took place during the full council meeting. However, the issue is equally relevant to the question of privilege in the committees of the NA and NCOP.

Swartbooi also holds that the privilege will apply to all 'legitimate business' of the NA and NCOP⁵⁶⁹ and will apply even to resolutions that are subsequently set aside due to unlawfulness or unconstitutionality.⁵⁷⁰

Dikoko v Mokhatla provided a test of the reach of the privilege. Mr Dikoko, a mayor of a municipality in the North West, was called before a provincial legislative committee to explain his excessive cell phone bill. At the meeting, he made

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defamatory remarks about Mr Mokhatla, the CEO of the municipality. Mokhatla sued Dikoko for defamation and the latter claimed privilege. Mokgoro J initially suggested that the case would raise the difficult issue of whether the privilege covers the discussion of legitimate legislative business outside of the formal parliamentary setting. Ultimately, she left the question undecided, as Dikoko's remarks could not be considered legitimate council business, no matter where they occurred.⁵⁷¹

Although our courts have thus far avoided the issue, it is clearly a difficult one. We briefly discuss some cases from Canada and New Zealand to demonstrate the difficulties that can arise. In *Stopforth v Goyer* the defendant — a minister — made comments as part of his testimony before a parliamentary committee that defamed the plaintiff.⁵⁷² He then repeated those allegations to reporters on the steps of the legislature. The Ontario High Court held that the later statement was not covered by parliamentary privilege. A similar situation in New Zealand had a similar result. In *Prebble v Television New Zealand Ltd*, the Privy Council held that repeating a statement made in Parliament to reporters was an 'effective repetition' and constituted a fresh act of defamation that was not covered by privilege.⁵⁷³ The New Zealand Court of Appeal has taken the issue even further: if an MP merely refuses to retreat from defamatory remarks made in Parliament, he can be held liable for defamation.⁵⁷⁴ This issue has not arisen in South Africa yet, but it seems that it could threaten the purpose of parliamentary privilege if MPs were unable to repeat or defend their remarks outside of Parliament. An MP would be unable to discuss a statement made in Parliament as part of an ongoing and public debate. As the Constitutional Court has noted, the purpose of the privilege is to promote free debate.

The second question is to whom the privilege applies. FC ss 58 and 71 are fairly explicit: Cabinet members, Deputy Ministers and members of the NA and NCOP. It does not apply to people outside this list testifying before parliamentary

569 *Swartbooi* (supra) at para 18.

570 *Ibid* at para 19.

571 *Dikoko* (supra) at para 40.

572 87 D.L.R. (3d) 373.

573 [1994] 3 NZLR 1 (PC).

574 *Jennings v Buchanan* [2002] 3 NZLR 145.

committees. In *Dikoko* the Constitutional Court made it quite clear that these words could not be read to include anybody not explicitly listed.⁵⁷⁵

Third, is there any speech that the privilege does not cover? In *Swartbooï*, the Court acknowledged the possibility that there could be conduct 'that is so at odds with the values mandated by our Constitution that ... the Constitution ... could [not] conceivably have contemplated its protection' but found it unnecessary to decide the point.⁵⁷⁶ In doing so, the Court raised the questions whether a council member who admitted during council proceedings that they had committed a serious criminal offence would be protected from criminal proceedings and whether councillors could attract personal liability by utilising the council's processes for a party political or other ulterior purpose. While the Court was correct to leave open the possibility that there may be some situation in which privilege is not

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protected, it must be emphasised that this must only be in highly exceptional circumstances if the protection is not to be silently eroded through uncertainty amongst MPs over whether they are protected.

Finally, while FC ss 58 and 71 protect MPs from civil and criminal liability, they do not exclude the possibility of punishment through Parliament's own rules — FC ss 58(1)(a) and 70(1)(a) make the exercise of freedom of speech subject to the house's rules and orders. Whether Parliament had the power to suspend a member for what she said in parliamentary proceedings was the issue in *De Lille*. De Lille was a member of the NA who made a statement in the NA suggesting that certain members of the African National Congress had been informers for the pre-1994 apartheid government. The African National Congress used its parliamentary majority to pass a resolution of the NA suspending de Lille as a punishment for her statement.

The Supreme Court of Appeal held that the NA could legitimately exclude members who were 'disrupting or obstructing its proceedings or impairing unreasonably its ability to conduct its business in an orderly or regular manner acceptable in a democratic society.'⁵⁷⁷ This was inherent in its power to regulate its own proceedings. However, while it was necessary for Parliament to be able to suspend members who were disrupting debate, Parliament did not need the power to suspend a member after the infraction as punishment.⁵⁷⁸ The Court concluded that the suspension imposed on de Lille was not authorized by the Constitution itself nor by any relevant legislation or the rules of the Assembly.⁵⁷⁹ The resolution was accordingly held to be void.

This strict reading of FC s 58 is correct. Freedom of speech in Parliament is essential to the political process. The proper functioning of representative democracy depends on MPs having the freedom to speak openly in Parliament. Any issue that is placed beyond the protection of freedom of speech in Parliament is an

575 *Dikoko* (supra) at para 45.

576 *Ibid* at para 22.

577 *De Lille* (supra) at para 16.

578 *Ibid* at para 17, citing *Kielly v Clarkson* [1842] EngR 593; [1842] 13 ER 225 (PC).

issue that cannot be addressed by the political process. Moreover, if MPs do not know what they can or cannot say in Parliament without exposing themselves to internal punishment, they will incline towards self-censorship. Such a sword of Damocles would undermine deliberative democracy. In order to avoid these consequences, exceptions to freedom of speech in Parliament must be confined to a minimum and must be clearly defined. FC s 58(1)(a) and 71(1)(a) address these concerns by requiring all such limitations to be codified by the NA and the NCOP in rules which themselves have to be made with due regard to representative and participatory democracy, accountability and transparency.

In terms of FC ss 58(2) and 71(2), national legislation may prescribe additional privileges and immunities of the Assembly, the NCOP, Cabinet members,

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members of the Assembly and delegates to the NCOP, beyond those provided by FC ss 58(1) and 71(1). The Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act has now fulfilled this role, but has only minimally extended the privileges and immunities already conferred by the Final Constitution.⁵⁸⁰

The Act does, however, specifically permit the suspension of a member as punishment.⁵⁸¹ This solves the authorization problem identified by the Supreme Court of Appeal in *De Lille*. It could still be argued that ex post facto punishment violates FC s 58(1) and the right to freedom of expression. This was the conclusion of the High Court in *De Lille*. However, the challenge would have to take the form of a constitutional challenge to the Act. As discussed above, a court reviewing the Act is likely to give the legislature a significant degree of deference as it concerns the internal functioning of Parliament.

17.8 Political Parties

Political parties are integral to the legislative process. They are, ultimately, the bodies that, through their influence over both Parliament and the executive drive, direct and determine the legislative agenda and the outcomes of the legislative process. The role of political parties is particularly intense when one party has a clear majority in both houses.⁵⁸² The line between party and government is often

579 *De Lille* (supra) at para 30. See also *De Lille & Another v Speaker of the National Assembly* 1998 (3) SA 430 (C), 1998 (7) BCLR 929 (C) ('*De Lille HC*') at para 35 (Hlophe J reached the same conclusion as the Supreme Court of Appeal on a similar, but somewhat broader basis. He held that the s 58(1) guarantee was not subject to general limitation under s 36 of the Constitution, but could be limited only in terms of the rules and orders of the Assembly. Because the suspension imposed on de Lille was not authorized by the rules of the Assembly, the resolution was held to be an unconstitutional violation of her freedom of speech in the Assembly.)

580 Section 6 of the Act extends the existing privileges and immunities to joint sittings of the two houses.

581 Powers Act ss 12 and 13.

582 For a critical discussion of the role of a dominant ANC in South Africa and its relationship with the Constitutional Court, see S Choudhry "'He Had a Mandate"; The South African Constitutional Court and the African National Congress in a Dominant Party Democracy' (2009) 2 *Constitutional Court Review* 1.

blurred and Parliament loses some of its autonomy and may be perceived as a mere implementing agent of the ruling party's policies.

Yet how the law should regulate political parties is a very difficult question. Political parties are the quintessential voluntary association. There is not only a general constitutional right to association,⁵⁸³ but also a specific right to form a political party⁵⁸⁴ and participate in the activities of a political party.⁵⁸⁵ State interference in the decisions parties take, or the way they are structured would risk violating these elemental political rights.

Yet, at the same time, political parties take decisions that are decidedly public in character. They effectively determine the membership of the legislature by writing party lists for elections, controlling their own membership and nominating delegates to the NCOP. They often initiate policy, and have enormous power over the executive and the legislature concerning the implementation of policy. It would be naïve to pretend that political parties are just another voluntary association, like a

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chess club, a stokvel or a neighbourhood watch organisation. Political parties are different and should be treated differently, but where exactly do we draw the line?

Are they private entities like any other voluntary association, unbound by the strictures that regulate the state? Or are they elements of our constitutional system of government that bear the same constitutional responsibilities and limitations as other organs of state? The answer falls somewhere between these two extremes. In this section we discuss the general role and status of political parties. We then look at how the Constitutional Court has dealt with their role in the legislative process.

(a) Public or Private

There are several decisions that consider whether political parties are public or private bodies. Most of them arise in the context of the right to administrative justice, which is addressed elsewhere in this book.⁵⁸⁶ No coherent position has yet emerged as there is significant disagreement at High Court level.

First, in *Bushbuck Ridge Border Committee*, a local association attempted to force the ANC (and the governments it controlled) to honour a promise made prior to the 1994 elections to move the area where they lived from the Northern Province (now Limpopo) to Mpumalanga.⁵⁸⁷ The ANC had attempted to amend the Interim

583 FC s 18(1). See S Woolman 'Application' in S Woolman & Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 31.

584 FC s 19(1)(a).

585 FC s 19(1)(b). For a discussion of FC s 19(1), see J Brickhill & R Babiuch 'Political Rights' in S Woolman, Bishop & Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) §45.8.

586 J Klaaren & G Penfold 'Just Administrative Action' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 63.

587 *Bushbuck Ridge Border Committee & Another v Government of the Northern Province & Others* 1999 (2) BCLR 193 (T).

Constitution to that end, but failed to secure the required votes in the NA. The applicants argued that the ANC's failure to fulfil its promise violated their right to just administrative action. Kirk-Cohen J easily rejected the claim directed at the ANC: '[I]t is a political party which did not perform any administrative act, nor could it do so. It merely made promises, as did all concerned, which promises were of a political nature.'⁵⁸⁸

In *Marais v Democratic Alliance* the court considered whether a decision to strip the mayor of Cape Town of his membership of a political party — and thereby remove him from office — constituted administrative action.⁵⁸⁹ Van Zyl J concluded that the decision was a purely political one that, despite the public interest in the outcome, could not be described as administrative action. However, the court nonetheless set the party's decision aside for failing to comply with the rules of natural justice.⁵⁹⁰

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Third, in *Van Zyl v New National Party & Others*⁵⁹¹ — a case that reflects naked political maneuvering⁵⁹² — the High Court held that the decision of a political party to recall a provincial delegate to the NCOP was administrative action under the Promotion of Administrative Justice Act ('PAJA').⁵⁹³ Van Reenen J concluded that PAJA applied to all juristic persons — including political parties — who performed administrative acts as defined in PAJA. The main question was whether the decision to recall Van Zyl was 'public'. The Judge reasoned that the decision to recall 'has an influence on how the NCOP; the delegations of the respective provinces; and the joint committees on which delegates may serve, are constituted and may affect the manner in which those bodies perform their functions and duties, and that in turn may impact upon the interests of the community on provincial and national levels. Accordingly the exercising of that authority has a strong public component.'⁵⁹⁴

588 Ibid.

589 2002 (2) BCLR 171 (C).

590 This decision applied the common law standard of administrative review and so is not directly applicable under the new, constitutionalised system of administrative law. However, the decision may still be used to interpret the meaning of administrative action under PAJA.

591 2003 (10) BCLR 1167 (C) ('*Van Zyl*').

592 Van Zyl — a member of the Western Cape provincial legislature — was subject to party disciplinary proceedings for proposing a motion of thanks to a disgraced former Premier. While those proceedings were ongoing, the Party nominated her as a delegate to the NCOP. In order to accept the post, she resigned her membership of the Provincial Legislature. Immediately following her appointment to the NCOP, the Provincial Legislature (dominated by the Party's members) passed a vote of no confidence in her ability to represent the province in the NCOP. The Party then resolved to recall her from the NCOP. The offer of the NCOP position was simply an elaborate political ploy to strip Van Zyl of her political influence without concluding the internal disciplinary process.

593 Act 3 of 2000.

594 *Van Zyl* (supra) at para 76.

While *Marais* and *Van Zyl* support the proposition that that decisions of political parties that impact on who holds public office are 'public', the disclosure of who funds political parties is not, according to *Institute for Democracy in South Africa & Others v African National Congress & Others*, a public issue.⁵⁹⁵ IDASA — an NGO working in support of good government — wanted to use the Promotion of Access to Information Act ('PAIA')⁵⁹⁶ to force the four main political parties to disclose records of the donations they had received. One of the questions the High Court had to answer to decide the claim was whether political parties were public or private bodies in terms of PAIA.⁵⁹⁷ The Act defined public bodies as including any 'functionary or institution when — (i) exercising a power or performing a duty in terms of the Constitution or a provincial constitution; or (ii) exercising a public power or performing a public function in terms of any legislation.' The important word here, as Griesel J noted, is 'when'. PAIA later makes explicit⁵⁹⁸ that an institution can be public with respect to certain functions, but private regarding other actions. The *IDASA* Court concluded that, with respect to soliciting and receiving donations, political parties were acting entirely as private, voluntary associations.⁵⁹⁹

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'Such activities, insofar as they relate to the *private* funding of political parties, are not regulated by legislation. The respondents are, accordingly, entirely at liberty to generate an income from any lawful means, including donations, soliciting contributions from members, the sale of merchandise, the realisation of investments, and the like.'⁶⁰⁰

IDASA nicely demonstrates the current position: some activities of political parties are 'public', others are not. This is likely to be the case whether the challenge is based on PAJA, PAIA, other legislation, or the Constitution. Political parties occupy a strange hybrid position between a private voluntary association and organ of state. The law needs to recognise both faces — public and private. The courts have yet to develop a full theory identifying which powers or functions are public and which are private. And we do not attempt to do so here. It is an issue that is likely to be decided, to indulge in cliché, 'one case at a time'.

(b) The Role of Political Parties in the Legislative Process

While the previous section considered the general question of the nature of political parties and how the law regulates their actions, this section looks at the relationship

595 2005 (5) SA 39 (C), [2005] 3 All SA 45 (C), [2005] ZAWCHC 30 ('*IDASA*'). For a discussion of the case, see S Bosch '*IDASA v ANC — An Opportunity Lost for Truly Promoting Access to Information*' (2006) 123 *SALJ* 615.

596 Act 2 of 2000.

597 This was an important distinction because public bodies have a wider duty of disclosure than private bodies. Private bodies need only disclose information that is 'required for the 'exercise or protection of any rights'. PAIA s 50(1)(a).

598 PAIA s 8(1).

599 *IDASA* (*supra*) at paras 30-32.

600 *IDASA* (*supra*) at para 30.

between parties and the legislature. Some of the most contentious political struggles in recent years have raised the complicated relationship between the ANC as a political party, the ANC-led government, and the political structures that mediate and dictate the actions and policies of both the party and the state. The Court has uniformly declined to police the boundary between party and legislature.

When the Constitutional Court considered the challenge to floor-crossing legislation in *United Democratic Movement*,⁶⁰¹ the applicants argued that the legislation was irrational because its purpose was to promote the interests of the ANC and the New National Party. The Court was not impressed. In its view, the argument improperly 'equate[d] purpose with motive.'⁶⁰² Courts, it held, should not be 'concerned with the motives of the members of the legislature who vote in favour of particular legislation'.⁶⁰³ In hewing to a clear separation between law and politics, the Court defined its role as confined to determining whether the legislation itself is constitutional.

In *Glenister I* the Court rejected an argument that it should intervene to prevent Parliament from considering a Bill on the basis that the Bill was introduced by Cabinet on the instruction of the ruling party.⁶⁰⁴ The applicant contended that the purpose of abolishing the Directorate of Special Operations (better known as 'the Scorpions') was its success in prosecuting corruption within the ruling party. This allegation was not enough to move the Court to action. '[T]here is nothing wrong,'

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Langa CJ wrote, 'in our multi-party democracy, with Cabinet seeking to give effect to the policy of the ruling party.'⁶⁰⁵

A similar issue arose in *Merafong*.⁶⁰⁶ The challengers alleged that the facilitation of participation by the Gauteng Provincial Legislature was a charade because the issue invoked in the proposed legislation had already been decided by the ANC National Executive Committee ('NEC'). The NEC had allegedly instructed its members in Parliament and the provincial legislatures to vote in favour of the proposed change. The Court took a slightly different approach.

The Court did not reject this submission outright. Van der Westhuizen J held, first, that the community had failed to prove that the members present at the hearings

601 *United Democratic Movement v President of the Republic of South Africa & Others (African Christian Democratic Party & Others Intervening ; Institute for Democracy in South Africa & Another as Amici Curiae) (No 2)* 2003 (1) SA 495 (CC), 2002 (11) BCLR 1179 (CC), [2002] ZACC 21 ('UDM').

602 *UDM* (supra) at para 56.

603 *Ibid.*

604 *Glenister v President of the Republic of South Africa & Others* 2009 (1) SA 287 (CC), 2009 (2) BCLR 136 (CC), [2008] ZACC 19 ('*Glenister*').

605 *Glenister I* (supra) at para 53. We must note one caveat about this holding: It was based on the very high hurdle for intervention before a Bill becomes an act.

606 *Merafong Demarcation Forum & Others v President of the Republic of South Africa & Others* 2008 (5) SA 171 (CC), 2008 (10) BCLR 968 (CC), [2008] ZACC 10, ('*Merafong*').

were not open to their concerns. He also held that public participation does not mean that 'the views expressed by the public are binding on the legislature if they are in direct conflict with the policies of Government.'⁶⁰⁷ However, finding that the public's views are not binding 'is not the same as cynically stating that the legislature is not required to keep an open mind when engaging in a process of that kind. Public involvement cannot be meaningful in the absence of a willingness to consider all views expressed by the public.'⁶⁰⁸ The *Merafong* Court's holding implies that legislators have a duty to be willing to consider views opposed to the views of the party they represent. Of course, this duty is extremely difficult, if not impossible, to enforce.⁶⁰⁹ However it does suggest that the Court now possesses a more nuanced vision the relationship between parties and Parliament.

One of the Court's more recent direct examination of the ANC's influence on Parliament — *Poverty Alleviation Network*⁶¹⁰ — also concerned provincial boundary legislation, and seems to close down some of the space left open in *Merafong* (although in a different doctrinal context). As discussed earlier,⁶¹¹ Matatiele Municipality had been moved from KwaZulu-Natal to the Eastern Cape. The Court found that the KwaZulu-Natal provincial legislature had not met its constitutional obligation to facilitate public involvement and struck the law down. The legislature — in line with the ANC policy on the matter — duly passed the legislation again,⁶¹² this time following the correct procedure. The people of Matatiele again took their case to the Constitutional Court. They argued that the law was irrational because the legislators simply voted as they were instructed by the ANC. Rehashing the Court's reasoning in *UDM and Merafong*, Nkabinde J complained that the 'argument requires the Court to go behind the rationally enacted constitutional

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amendment and investigate the motives of Parliament and the ruling party. This the Court cannot do.'⁶¹³ She continued:

The Court cannot concern itself with the individual motives of legislators. There is good reason for this: if the Court preoccupies itself with what precedes the passing of the legislation (the motive), to the exclusion of its actual purpose, it would fail to focus on the proper object of the enquiry, which is the rationality of the legislation and not necessarily the motives of those who enacted it.⁶¹⁴

607 Ibid at para 50.

608 Ibid at para 51.

609 In the absence of some sort of 'smoking gun', it will be impossible to prove that an MP was not open to convincing as she will always be able to allege that she simply weighed the arguments and came down on the side of government policy.

610 *Poverty Alleviation Network & Others v President of the Republic of South Africa & Others*, 2010 (6) BCLR 520 (CC), [2010] ZACC 5 ('*Poverty Alleviation Network*').

611 See §17.6(a)(ii)(cc)(4) above.

612 Thirteenth Constitutional Amendment, 2007.

613 *Poverty Alleviation Network* (supra) at para 73.

Together, *UDM*, *Glenister I*, *Merafong* and *Poverty Alleviation Network* paint a picture of a Court unwilling to ensure that the legislatures retain some autonomy from the ruling party's internal decision-making bodies. While it would probably prefer parties to afford legislators some leeway, it will not prevent a party from forcing its members in the country's legislative bodies from adhering to party discipline.

Sujit Choudhry has recently argued that these cases 'reflect[] the Court's inadequate understanding of the concept of a dominant party democracy, its pathologies, the pressure it puts on what is otherwise a formally liberal democratic system because of the lack of alternation of power between political parties, and how this pressure is generating constitutional challenges.'⁶¹⁵ He has suggested an alternative set of doctrines that would afford the Court a central role in regulating the relationship between party and state.

South Africa, Choudhry argues, is a dominant party democracy — a democracy where one party retains power for a significant period of time. 'Dominant party democracies', he argues, 'display a characteristic set of pathologies:'

- (a) the use of public resources by dominant political parties as political [resources] to distort electoral competition;
- (b) deliberate attempts by dominant parties to change the rules of electoral competition to fragment opposition parties and diminish their ability to offer a credible alternative;
- (c) the erosion of federalism to undermine the ability of opposition parties to form governments at the sub-national level and deploy the political resources provided by incumbency to enhance their competitiveness at the national level;
- (d) the subordination of the parliamentary wing of a dominant political party to its non-parliamentary wing, thereby shifting politics into the party and out of the legislature, diminishing the central role of the legislature in national political life.⁶¹⁶

All of these practices are present — to varying degrees — in South Africa.

Choudhry argues that the Constitutional Court should play a strong role in trying to avoid the dangers of dominant party democracy. He suggests five doctrines that the Court could employ to achieve that end. First: 'anti-domination'. This doctrine would outlaw 'any exercise of public power that has as its principal goal the preservation, enhancement or entrenchment of the dominant status of a dominant political party.'⁶¹⁷ *UDM* is an example of this phenomenon because floor-crossing

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was designed — at least in part⁶¹⁸ — to increase the ANC's majorities in the national and provincial legislatures. Although the Court was rightly hesitant to examine

614 Ibid.

615 S Choudhry "'He Had a Mandate"; The South African Constitutional Court and the African National Congress in a Dominant Party Democracy' (2009) 2 *Constitutional Court Review* 1.

616 Choudhry (supra) at 32.

617 Ibid at 34.

legislators' motives in all cases, Choudhry's anti-domination doctrine is limited to laws which are motivated by a desire to entrench the power of the dominant party.

Second, Choudhry argues that courts should not permit the dominant party to capture independent institutions. In a dominant party democracy, independent institutions prevent abuse of power by the ruling party by taking decisions that would otherwise be taken by the state. The role of courts is to 'focus their efforts on strengthening and buttressing the institutional structures that check partisan abuse in dominant party democracies, as opposed to checking those individual abuses themselves.'⁶¹⁹

Third, the non-usurpation doctrine aims to prevent elected representatives from having all of their actions determined by unelected structures and members of the party. *Merafong* and *Poverty Alleviation Network* are, on Choudhry's telling, examples of this unwelcome phenomenon. 'The real problem', he contends, 'is not abdication; it is the seizure of public power. The purpose of the [non-usurpation] doctrine is to protect public officials who are democratically elected, and through them, the democratic process, from unelected party officials who lack democratic legitimacy and attempt to usurp and wield public power.'⁶²⁰ The Constitutional Court should, Choudhry argues, have relied on this doctrine — rather than public participation or rationality — to invalidate the ANC's attempt to instruct legislators how to vote on the boundary amendments. While enthusiastic about this doctrine in theory, Choudhry notes that the evidentiary difficulties of determining who took a decision will cause courts to under-enforce the doctrine.⁶²¹

Finally, Choudhry takes on cadre deployment. In his view, the ultimate evil of the ANC's dominance is the deployment and removal at whim of its members from legislative and executive posts. The ANC's power to dictate to MPs and MPLs how to vote ultimately 'depends on the threat of deployment, and redeployment, to be effective. If political office-holders do not toe the party line, they can be removed by the ANC NEC, and replaced with cadres who will be compliant. Thus, dictation presupposes deployment.'⁶²² Choudhry's opposition to cadre deployment takes two forms: anti-seizure and anti-centralisation. Drawing on decisions of the German Constitutional Court,⁶²³ he argues that cadre deployment 'directly rob[s] voters of their power', because '[i]nstead of voters electing MPs through their inclusion

618 The main opposition party, the Democratic Alliance, also supported the legislation as it hoped to gain seats as a result.

619 Choudhry (supra) at 52.

620 Ibid at 67.

621 Choudhry (supra) at 70 ('The relationship between the parliamentary and non-parliamentary wings of political parties in fact lies on a continuum, between the poles of complete independence and subservience. There will be numerous situations in which the interplay between both wings of the party will defy easy categorisation. The evidence will be ambiguous. Moreover, the precise location of ultimate decision-making power may vary by issue. ... Indeed, judicial self-doubt regarding the dangers of over-enforcement — ie to label a public decision as occurring under dictation, when in fact, it did not — may prompt courts to systematically under-enforce the doctrine of nonusurpation.')

622 Ibid at 70.

623 Ibid at 72 citing DP Currie *The Constitution of the Federal Republic of Germany* (1995) 106-7.

in a list, MPs can be removed and appointed by the ANC NEC.⁶²⁴ The anti-seizure doctrine would find the ANC's statutory power to deploy MPs unconstitutional. The anti-centralisation doctrine applies the anti-seizure doctrine to the provinces. The anti-centralisation doctrine recognises that the Constitution's commitment to 'co-operative government' between distinct spheres or levels of government is undermined by the concentration of power that should be held by the majorities of provincial legislatures in a single, unelected, national body: the ANC NEC.⁶²⁵

Choudhry offers a coherent and comprehensive alternative to the Court's current evasion of the problem of continued ANC dominance of the political scene. We remain agnostic about whether his approach is, all-things-considered, to be preferred. While attractive, it has significant weaknesses. First, were the Court to enforce these doctrines in the manner that Choudhry suggests, it would place itself on a direct collision course with the ANC. That may put the Court's very existence at risk. Second, all Choudhry's doctrines rely on clear evidence of who took a decision or why the decision was taken. That will often be impossible to determine with any certainty. A court — while generally sympathetic to Choudhry's concerns — may feel unable to assume that the ANC or the legislature has acted with a nefarious motive unless there is unquestionable proof. Third, Choudhry's approach means that practices that are permissible in a competitive political environment become threats to democracy when one party controls all the levers of power. There are sound interpretative reasons to believe that the Constitution should remain constant no matter what the current balance of political power might be.

Finally, several of Choudhry's doctrines — particularly the anti-domination doctrine — could themselves be seen as anti-democratic. When an overwhelming majority of the population places their votes and their faith in a party, does it really promote democracy for an unelected judiciary to put obstacles in its way? Our objection does not simply re-hash the counter-majoritarian chestnut. Choudhry's thesis is not merely that courts should apply the law and if that thwarts the ruling party, so be it. His thesis is that the courts should actively interpret the law so as to try and curb the power of a dominant party: The stronger the democratic mandate, the more courts are justified in hindering it. Can Choudhry's suspicion of centralised control really be reconciled with our proportional representation, list-based electoral system where voters vote for the party — with all its policies, structures and leadership — rather than individual candidates?⁶²⁶ While we take no stand, that is a possible troublesome implication.

Despite our skepticism regarding both the practical utility and the substantive virtue of the Choudhry doctrine, in 2011 the Court indicated that it might be willing at least to start down that path. In *Glenister II*, a narrow majority of the Constitutional Court held that the Constitution imposed a duty on the legislature

624 Choudhry (supra) at 73 (Moreover: 'The ANC NEC can remove a President, regardless of whether she has lost the confidence of the National Assembly. The ANC NEC can likewise remove a member of the cabinet, regardless of whether she has been dismissed by the President, or whether the National Assembly has passed a motion of no-confidence in the cabinet.' Ibid.)

625 Ibid at 76.

626 We thank Jason Brickhill for alerting us to this problem.

to enact an independent corruption-fighting body.⁶²⁷ The decision needs to be understood against the political background that led to the challenge. The original anti-corruption body — the Scorpions — was housed in the National Prosecuting Authority. It investigated several high-ranking ANC officials, including Jacob Zuma. It was accused — not without possible justification — of being used as a political weapon by one faction against another within the ANC. When Zuma won the ANC presidency from Thabo Mbeki at the 2007 ANC Polokwane Conference, one of the primary resolutions of the ruling party was to abolish the Scorpions. They were ultimately replaced with a new body called 'the Hawks'. The Hawks, unlike the Scorpions were located in the South African Police Service.⁶²⁸ Hugh Glenister — a concerned businessman — challenged the legislation on various grounds.

While the Court rejected public participation⁶²⁹ and rationality challenges, the majority accepted the argument that the legislation violated the government's s 7(2) duty to respect, protect and promote the Bill of Rights. Moseneke DCJ and Cameron J held that s 7(2) requires the government to establish an independent unit to fight corruption. In their view, the Hawks were insufficiently independent. We discussed the wisdom of the Court's use of s 7(2) above.⁶³⁰ Here, we consider the details of the majority's views on the Hawks' independence.

There were two primary reasons why the *Glenister II* Court found the Hawks' structural guarantees of independence inadequate. First, the security of employment was insufficiently guarded. In sum: 'the lack of employment security, including the existence of renewable terms of office and of flexible grounds for dismissal that do not rest on objectively verifiable grounds like misconduct or ill-health, are incompatible with adequate independence. So too is the absence of statutorily secured remuneration levels. We have further found that the appointment of its members is not sufficiently shielded from political influence.'⁶³¹

Second, the Court's 'gravest disquiet' lay with the political oversight of the Hawks. The legislation empowered a Ministerial Committee to set policy guidelines for the Hawks. While it acknowledged that the Committee could issue perfectly innocent guidelines, it was also possible that the guidelines could 'specify categories of offences that it is not appropriate for the [Hawks] to investigate — or, conceivably, categories of political office-bearers whom the [Hawks] is prohibited from investigating.'⁶³² In the clearest suggestion that the history of corruption investigations of senior government officials was playing on their minds, Moseneke DCJ and Cameron J wrote:

627 *Glenister v President of the Republic of South Africa & Others* 2011 (3) SA 347 (CC), [2011] ZACC 6 ('*Glenister II*').

628 For more on the demise of the Scorpions and the rise of the Hawks, as well as *Glenister I* and *Glenister II*, see S Woolman 'Security Services' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, RS3, 2011) Chapter 23B.

629 § 17.6(a)(iii)(cc)(5) above.

630 § 17.5(f)(i) above.

631 *Glenister II* (supra) at para 249.

632 *Ibid* at para 230.

It cannot be disputed that those very political executives [on the Ministerial Committee] could themselves, were the circumstances to require, be the subject of anti-corruption investigations. They "oversee" an anti-corruption entity when of necessity they are themselves part of the operational field within which it is supposed to function.⁶³³

The majority could easily have said that they should presume that the power to issue guidelines would not be abused. The Court's heightened suspicion can best be explained by a fear that the political elite would exploit the power for its own ends. That makes the finding a classic example of Choudhry's 'anti-capture' and 'anti-domination' doctrines in action. *Glenister II* must encourage those who hope that the Court can be an effective tool to manage the ANC's continued political dominance nationally and the DA's control of the Western Cape.
