

From the Senate to the NCOP: A description of the Composition and Working of South Africa's Second Chamber

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Declaration

I, the undersigned, hereby declare that the work contained in this research assignment is my own original work and that I have not previously in its entirety or in part submitted it at any university for a degree.

ABSTRACT

The aim of this study is to provide a structural analysis of the second house of the South African Parliament - the National Council of Provinces (NCOP).

The study firstly focuses on the theoretical experience of second chambers in general. It then touches on a comparative study of second chambers of selected countries. The study then provides a description of the composition of the second house in South Africa, the committee system employed as well as the information flow. It also explores the concept of co-operative governance, the powers assigned to the NCOP by the Constitution and discusses the method of selecting delegates in detail. In addition the study focuses on the role that the NCOP is expected to play within the national legislative process.

This analysis is descriptive in nature and aims to serve as an educational tool for the South African public as well as in the international arena.

OPSOMMING

Die doel van hierdie studie is om 'n strukturele analise te maak van die tweede kamer van die Suid-Afrikaanse Parlement, die Nasionale Raad van Provinsies (NRVP).

Eerstens fokus die studie op die teoretiese ervaring van tweede kamers in geheel. Dit gaan dan verder om sekere vergelykings te tref tussen die tweede kamers van verkose lande. Die studie beskryf onder andere die samestelling van die tweede kamer in Suid-Afrika, hoe die komiteestelsel gebruik word, asook die vloei van informasie binne die NRVP. Die studie gaan ook verder om die konsep van saamwerkende regering en die konstitusionele magte van die instelling te bespreek asook die metode om afgevaardigdes te verkies tot die NRVP. Die studie fokus ook op die verwagte rol van die NRVP binne die nasionale wetgewende proses.

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Chapter 1

Introduction to Second Chambers and Problem Statement

1.1 Introduction

A bicameral system is defined as a legislature which has two chambers rather than one, providing checks and balances and lessening the risk of elective dictatorship (Comfort, 1993: 44). Whether a legislature will consist of one or two houses is generally determined by the constitution of that country. Historically, bicameralism was an established characteristic of most legislatures and reflected a class-conscious conviction that the representation of the people should be supplemented by the representation of some sort of aristocracy (Loewenberg, 1985: 121). This conviction was the basis of the distinction between the House of Commons and the House of Lords in Great Britain. This distinction is also of particular importance for South Africa because the parliament also consists of two legislative bodies.

Bicameralism, originated in the essential pre-democratic view that the representation of the nation required both an upper and lower house, in the class-conscious sense of “upper” and “lower”. It was, however, particularly well suited to federal systems of government, in which both the states and the people could claim the right to be represented in the national legislature (Comfort, 1993: 45). The application of bicameralism to the needs of a federal system was distinctly an American intervention, even if bicameralism itself was an older idea. In the South African case the need for a bicameral system is to ensure the participation of provincial and local government in the national legislative process as to protect the interest of these two spheres.

In the 1996 Constitution, South Africans chose to adopt a national Parliament composed of two legislative bodies – the National Assembly (NA) and the National Council of Provinces (NCOP). Together they are responsible for drafting, debating and passing the legislation that will govern the new South Africa. The success of the new democracy will depend greatly on how and how well, these two legislative bodies perform their assigned roles.

These roles are complementary, but not identical. The NA represents all South African voters, as individuals. Its membership is based on proportional representation. As the primary expression of the democratic will of the people it is, ultimately, the more powerful of the two chambers.

The NCOP has a somewhat more limited, but also critical role. It represents South African citizens not directly, in their role as individual citizens, but indirectly, in their role as residents of the provinces where they reside. Its role is to represent the provincial perspective within national Parliament. As such, it is a concrete expression of the commitment to “co-operative government” as set out in chapter three of the Constitution (Constitution of RSA, 1996). Co-operative government means that governing South Africa is to be seen as a partnership among the different spheres of government. This in turn requires that national legislation must be sensitive to provincial needs and concerns. It also means that provinces do not act alone or in isolation; rather they must be deeply integrated into the national legislative process. This seems to be the underlying rationale of the NCOP (Murray, 1998: 13). This rationale is reflected both in the powers assigned to the NCOP and the composition of its membership. Like the NA, its fundamental job is to debate and pass legislation, and to oversee the executive. But it does so from a distinctly provincial perspective. Hence the powers are much greater with respect to legislation which directly affect the provinces, and to constitutional amendments than they are in matters which do not affect the provinces.

The NCOP is a fairly new institution. This resulted in a serious lack of academic literature about this institution. Another contributing factor to this problem is the fact that this institution is a unique South African product without any precedent. This study wants to open up the mystery of the newly established second chamber of the South African Parliament. In this chapter the background to bicameralism, the purpose of second chambers, the role thereof as well as the history of the South African second chamber are discussed. The chapter also elaborates on the problem statement, purpose of the study and the research method employed in this study. Before one could however embark on a proper discussion of any second chamber the notion of bicameralism firstly needs to be addressed.

1.2 Background to bicameralism

Parliaments are frequently classified according to the number of chambers they possess. Those with a single chamber are termed unicameral and those with two chambers bicameral. Most countries which have recognisable legislatures have unicameral bodies (Shell, 1988: 1). In liberal democracies, most Parliaments are bicameral and the minority with one-chamber legislatures are, without exception, comparatively small in population. They include a number whose switch from bicameralism to unicameralism has been made in the post-war era, for example, New Zealand in 1950, Denmark in 1953, and Sweden in 1973, none of which have populations above 10 million (Shell, 1988: 3 also see Chaney, 1988: 1). One could therefore conclude and say that all large liberal democratic countries continue to have bicameral legislatures, but that elsewhere bicameralism remains by no means uncommon, especially in liberal democracies.

The underlying justifications for bicameralism have changed as prevailing ideas about legitimate forms of government have altered. In the pre-democratic period, parliamentary assemblies generally consisted of two chambers, because this reflected the view that some separate representation for aristocrats, “elders” or people with property, must be provided (Coghill, 1984: 14). As the acceptability of notions of distinct class-based representation diminished, so the language in which second chambers were justified tended to alter. Instead of recognising the desirability of providing distinct representation for aristocracy and property, the need for a body to provide some restraint upon directly elected popular chambers came to be emphasised (Shell, 1988: 12). Although some existing states function satisfactorily with a single chamber legislature, the presence of second chambers throughout the world is nevertheless significant (Strong, 1972: 199).

In modern times there are two kinds of arguments for a bicameral system. Firstly, there is the concern for a more stable balance between the executive and the legislature. This concern resulted in the restriction of the unbridled power of a single chamber recruited on a different basis¹. On the method of recruiting members for the second chamber, the following variations are normally employed: the representations

¹ E.g. Members of the NA in South Africa are recruited from the political parties national lists. Members from the NCOP are nominated by provincial legislatures to ensure the provincial link (Constitution of RSA S47 and S62, 1996).

of regional views in the form of regional governments, regional legislators, and regional electoral or particular minorities (ANC Head Quarters, 1995: 25).

Secondly, as a method of ensuring that the parliamentary machinery runs more effectively and smoothly, the second house then play the so-called “revising role” to maintain a careful check on the sometimes hasty decisions of a first chamber (Hirsch and Hanoch, 1979: 35). The second chamber of the South African Parliament combines its functions with the role of facilitating intergovernmental co-operation, as is the case in Germany and Austria (South African Parliament, 1996: 35).

1.3 Purpose of a second chamber

Ranney (1975: 358) argues that, historically, there are two arguments for the existence of a second chamber. Firstly, democracies in federal states regard it necessary for their sub-national units (states/provinces) to have equal representation in the national legislature and, secondly, both unitary and federal states feel the need to provide for internal control in respect of legislative action (See Levmore, 1992: 45).

Regarding the first argument for existence, Strong notes that such an institution can give priority to the will of each of the units in a federation as against the interests of the federation as a whole (Strong, 1972: 178). Wheare believes that members of second chambers can represent interests and views that could be ignored or subordinated, particularly in respect of rural versus urban interests (Wheare, 1963: 213). In this regard, states that are less populated, for example, have equal representation in a second chamber. According to a report by the South African Law Commission on Constitutional Models a single chamber system cannot accommodate heterogeneous interests and could therefore lead in practice to majority domination (South African Law Commission, 1991: 828).² Riggs, on the other hand, believes that there can be single chamber legislatures in which minority rights can be well protected, if there is unlimited debating or if a diversity of interests are present (Riggs in Kornberg, 1973: 53).

² This was exactly the two points of concern during the negotiations in South Africa (1991-1993) regarding the establishment of a second house. South Africa is a country that is deeply divided along racial lines. It was felt that a second house would not only allow for the refining of legislation but that it would ensure that issues like views and interests of minorities that easily could get lost in a one chamber system would be adhered to in a two-chamber system. This view was shared amongst some ANC members (Interview: Mr N. Ackerman National Party negotiator during constitution – making process and presently a NCOP delegate for the Western Cape, 8 June 2000).

The ability of second chambers to protect other interests, specifically minority interests, in heterogeneous societies has to be qualified. Although it is possible, in principle, to protect the interests of minorities through the operation of two chambers (of which the legislative assembly in Belgium is an example in respect of language interests), it is a prerequisite, according to De Villiers (1994: 129), that there be a general consensus between different political groups in a society on the question of whether minorities are entitled in principle, to protection. A culture of tolerance regarding the recognition and protection of minorities therefore has to exist. If such a culture does not exist and if the rest of the population is unwilling to do so, a constitution will not be able to protect a particular minority.

The South African Law Commission Report on Constitutional Models further identifies two principles that have to be considered in determining the role and function of a second chamber, firstly the democratic principle that all citizens are equal, and that a deviation from majority rule therefore amounts to a deviation from this principle (South African Law Commission, 1991: 831). The second principle is that there should be a justified need for the protection of certain interests, such as minorities. The role and function of a second chamber is therefore determined by finding a balance between these two principles, with consideration of the points of view and values prevalent in a society. In the South African context, this would mean that the protection of specific interests in a second chamber would have to take place with consideration and favouring of certain groups. South Africa is a country composed of various cultural groups and to make one group's values prevalent in society would imply a certain degree of cultural domination.

In terms of the second argument for the existence of a second chamber and which relates to internal control in respect of legislative action, Strong shows that this prevents incorrect or flawed legislation in respect of the Constitution and other legislation from being passed by a single chamber (Strong, 1972: 178). It also means that the first chamber does not have unchecked power that could threaten the freedom of individuals and minorities. Wheare argues in this regard that the value of a second chamber lies in the fact that it provides a second opinion (Wheare, 1963: 211). The value of even simply delaying a matter lies in providing an opportunity for mustering support for a particular matter, which could result in the government or first chamber

having to make amendments or to reconsider the matter. If this does not succeed, sufficient time has nonetheless passed to draw the attention of the public to the matter.

1.4 The role of second chambers

It has long been recognised that checks and balances are necessary in a system of government to ensure that individual power is not abused. A parliament to which the executive is responsible for its actions is one such check (Dayer, 1959: 100-145). Parliament is the law-making assembly where the opinions, interests and beliefs of the people are represented. It is the foundation upon which modern democracy is built and it is thus the role of Parliament to ensure that the government is answerable to the governed (Hirsch and Hanoch, 1979: 72-97).

Normally a second house will fulfil its role as a check on government by scrutinising bills, delegated legislation, government administration and government policy, but generally restraints are imposed on the second chamber with regard to money bills. Normally these bills cannot be introduced in the second chamber and the second house will only have a short substantial veto on such bills (Hirsch and Hanoch, 1979: 72-97). Where there is a separation of powers, the second chamber has usually been given equal powers with the first chamber. There is usually provision for differences between the two houses to be resolved by a mediation committee, but for breaking deadlocks a number of different arrangements have been employed. In Germany, bills relating to matters within exclusive federal jurisdiction and in Malaysia for most bills, the second chamber has only a substantial veto (Hirsch and Hanoch, 1979: 72-116, also see Watts, 1994: 16). Historically, the South African second chamber was always characterised by having restrictive powers. Following is a detailed discussion of the history of the second chamber of South Africa, illustrating the various powers it had during its existence over the years.

1.5 The history of the South African second chamber

The Republic of South Africa was a colony of Great Britain. The sovereign legislature was therefore modelled on the Westminster Parliament. The South Africa Act of 1909 provided for a bicameral legislature, which established the Union of South Africa on 31 May 1910 (Cloete, 1996: 14). This Act provided for the Parliament of the Union of South Africa to consist of two houses, namely the Senate and the House of Assembly.

The House of Assembly was the dominant house and consisted of directly elected representatives, but all legislation had to be passed by both houses and all money bills had to be initiated in the House of Assembly. The members of the Cabinet were also members of the House of Assembly. The bicameral system introduced on 31 May 1910 remained in force until 3 September 1984 (National Democratic Institute (NDI), 1996: 27).

The tricameral system created by the Republic of South Africa Constitution Act, 1983 (Act 110 of 1983), which came into force on 3 September 1983, did not provide for an upper or a lower house. The three houses were all, indeed, lower houses with equal powers. The House of Assembly, consisting of a hundred and seventy eight members, represented the interest of the white citizens and had legislative powers regarding their affairs. The House of Representatives consisted of eighty-five members and represented the coloured citizens. They also only had legislative powers regarding their own affairs. The House of Delegates represented the Indian interest. This house consisted of forty-five members and had legislative powers only regarding Indian affairs (Cloete, 1993: 26).

After the first democratic election in 1994, the Senate was re-introduced. Only a few months after the reintroduction of a Senate in the Republic of South Africa, after an absence of 14 years, a renewed debate on the nature and role of such an institution was under way (Basson, 1995: 14). On 14 September 1994 (during the debate on the President's budget vote in the Senate) President Nelson Mandela said the following regarding the future role and function of the Senate:

“ I do not for a single moment doubt the need for a Senate, with the two broad objectives as currently defined. Firstly, the Senate is meant to represent the interests of the provinces in the central Parliament. Secondly, it embodies the unity of South Africa and its people. The very existence of the Senate expresses the interdependence of the provinces. Related to this is the role of the Senate in the constitution-making process, its right, and indeed, obligation, to initiate national legislation and to play a crucial role in the composition of judicial bodies in general and the Constitutional Court in particular. The Senate, therefore, symbolises the fact that South Africa is more than just a mere collection of provinces. Members of this House have a

responsibility to provinces other than their own and indeed to the nation as a whole” (Senate Hansard, 1994: 1012, also see *Sowetan* 19 June 1994).

All of the newly established provinces soon argued that this institution does not allow for the adequate representation of their interests. One explanation for their discontent lay in the lack of a clear link between the provinces and the senate (Humphries and Meierhenrich, 1996: 30). The senators were appointed by the political parties on a basis of proportional representation and not by the provincial government.³

In the bicameral system that then existed, the second house was known as the Senate. The Senate consisted of ten permanent senators selected according to the political strength of a party in a province (Humphries and Meierhenrich, 1996: 25). Certain problems were experienced by the operations of the Senate. Firstly, the Senate did not deal with matters differently than in the NA. It simply became a duplication of the NA (Basson, 1995: 15 also see Constitutional Assembly, 1996: 37). Secondly, the Senate failed to represent the provinces, because there was no official communication between the provinces and the senators and the Interim Constitution also did not provide for this. The senators were not accountable to the Provincial Legislatures. There was no official link between the provinces and senators. With the introduction of the final Constitution, however, the Senate was abolished and a new structure, namely the NCOP was introduced to represent the provinces more meaningfully (Murray, 1998: 10, also see Mpumalanga Legislature Hansard, 1996: 7).

The negotiations on the new upper house in the Constitutional Assembly were characterised by lack of agreement between the federalists (Inkatha Freedom Party (IFP) & New National Party (NNP)) and the centralists (African National Congress (ANC) with regards to the power of provinces within the new structure (Humphries and Meierhenrich, 1996: 45 also see *Beeld* 2 July 1996). The reasons for the disputes derive from opposing visions of whether South Africa should become a unitary state with federal characteristics or a federalist-type state within a single country. This philosophical debate pits the ANC and Pan Africanist Congress (PAC), which favour

³ This resulted in the lack of a link between senators and Provincial Legislatures. Senators also were not accountable to Provincial Legislatures. Interview: Ackerman, 8 June 2000.

the unitary option, against the IFP, NP and the DP (*The Star* 14 June 1996 also see ANC Parliamentary Research Department, 1996: 23).

During a multi-party bosberaad at Arniston in 1996 all the parties, except the IFP, committed themselves to the defence of direct representation of provincial interests at the national legislative level (*Argus* 14 May 1996). The ANC-constitutional planners had put forward a model in which provinces can legislate their own constitutions and pass legislation within areas of provincial interests. It was argued that the notion of the ANC's idea of a council to represent provincial interests in place of the senate was the basis of the compromise to resolve the South African constitution-making impasse (*Argus* 14 May 1996).

Negotiations on the new upper house in the Constitutional Assembly were preoccupied with the German Bundesrat, which many saw as a desirable model for South Africa. Senior members of the Constitutional Assembly, in fact, visited Germany in early 1996 to gain insights into the working of the German federal system (Humphries and Meierhenrich, 1996: 27). The NCOP is however quite distinct from the German Bundesrat with respect to the recruitment of members as well as the functioning of the institution (Department of Constitutional Affairs, 1997: 37).

During the negotiations around the transformation of South Africa, the tendency of a more decentralised government were incorporated to accommodate parties such as the IFP and the NP who had an interest to protect their federalist position against the centralist approach of the ANC. The product of these negotiations was a political compromise that resulted in the creation of provinces and the development of the concept of co-operative governance (Humphries and Meierhenrich, 1996: 35). One could conclude that the NCOP came about as a political compromise based on the original proposal of the ANC of a council of provinces. This compromise was based on the idea to establish a council of provinces while accommodating the more federal characteristics⁴ supported by the other parties such as the NP and IFP. Hence, the South African state is characterised as a unitary state with certain federal tendencies (Murray, 1998: 1).

⁴ E.g. Provinces can have their own Constitutions as long as it is in line with the country's Constitution (Constitutional Assembly, 1996:14).

South Africa has a long history with second chambers. The creation of the NCOP once again confirmed the country's belief in the necessity of a second chamber in the democratic process. The previous discussion illustrates that the South African second chambers were adapted to serve the political needs of the country during specific times. In conclusion the NCOP was created to allow provinces to be represented in the national legislative process.

1.6 Problem statement and purpose of the study

In 1996 the NCOP replaced the Second House of the South African Parliament, the Senate. The fact that it was established in 1996 only two years after the 1994 election, resulted in a serious lack of information regarding its functioning. Its newness has led to a serious lack of academic literature on it as an institution, which places a definite and urgent obligation on scholars to explore and analyse the workings of the NCOP.

The purpose of the study is to describe the composition, functions and powers of the NCOP as well as to describe the role that this institution plays in the national legislative process. This is a descriptive study of the composition and working of the South African second chamber. My aim with this study is to shed some light on the workings of the NCOP not only for international interest and academic purposes, but also to make a contribution to the general knowledge about the NCOP. I believe that this study will contribute towards enhancing the political education of one of the world's youngest democracies - South Africa.

This study does, however, not explore the political discussions with regard to the establishment of the NCOP in detail, because this topic calls for a study on its own. The complexity of the negotiations requires an in depth analysis of the documentation available as well as conducting various interviews. A different research method should therefore be employed to discuss the political nuances of the negotiations regarding the NCOP.

1.7 Research method employed

To analyse and capture the workings of the second house of the South African Parliament, a qualitative research project was undertaken. The nature of this study required the techniques and methods of qualitative research. Qualitative research has a

long and distinguished history in the human disciplines. It is a field of inquiry in its own right which cuts across disciplines, fields and subject matter. A complex interconnected family of terms, concepts and assumptions surround the term qualitative research. These include the traditions associated with positivism, post-structuralism and the many qualitative research perspectives or methods connected to cultural and interpretative studies (Bless 1995: 12).

One of the strengths of qualitative research is that data is collected in close proximity to a specific situation. The emphasis is on a specific case, a focused and “bounded phenomenon embedded in its own context” (Bless, 1995: 13). Another feature of qualitative data is their richness and holism and its strong potential for revealing complexity. According to Bless (1995: 11): “Such data provide thick descriptions that are vividly nested in a real context, and have a ring of truth that has strong impact on the reader”. Furthermore, the fact that such data is typically collected over a sustained period makes it useful for studying any process, and the inherent flexibility of qualitative studies gives further confidence that we have really understood what has been going on. Qualitative research often has been advocated as the best strategy for discovery and exploring a new area (Nel, Singh & Venter, 1985: 34).

The data to be used for this qualitative analysis is of a secondary nature. The data was gathered from parliamentary and departmental reports and relevant literature like news reports and newspaper clippings. These reports and other relevant literature were studied and analysed to provide the reader with an in depth discussion of the workings of the NCOP. Interviews were conducted and role-playing offices were also consulted.

1.8 Conclusion

This chapter attempted to introduce the study and strived to illustrate to the reader what to expect in the following chapters. In chapter two the transition from the Senate to the NCOP is discussed. A theoretical background to second chambers in general is also provided in this chapter. Chapter three gives a full description of the structure, committee system, method of selecting delegates and the information flow in the NCOP. The fourth and concluding chapter focuses on challenges facing this

institution and provides a list of possible recommendations for the institution to consider.

Chapter 2

From Senate to NCOP

2.1 Introduction

This chapter firstly gives an historical overview of the South African Senate (1994-1996) and how it related to other second chambers regarding specific characteristics. Secondly, it gives an evaluation of the Senate to highlight the shortcomings that led to its abolishment and the establishment of the NCOP.

South Africa's Government of National Unity (GNU) was a constitutionally defined multi-party government. The GNU came into existence after South Africa's first democratic elections, in April 1994. There were seven parties represented in the South African Parliament. See table 1 for an illustration.

Table 1: Distribution of Party Seats in the '94 Parliament

African National Congress = 252
National Party = 82
Inkatha Freedom Party = 43
Freedom Front = 9
Democratic Party = 7
Pan Africanist Congress = 5
African Christian Democratic Party = 2

(Public Education Department of Parliament, 1997: 2).

The GNU was established in terms of South Africa's Interim Constitution. This defined political structures at almost every level for a period of five years. The two largest parties or any party that received more than 20 % of the vote were entitled to nominate a person to one of the vice-presidency posts. The cabinet of 27 seats included members from all parties that received more than 10% of the vote, in proportion to each party's support. The dispensation defined in the Interim Constitution was meant to continue until the next elections scheduled for April 1999,

but at the end of June 1996 the NP withdrew from the GNU⁵ (Public Education Department of Parliament, 1997: 3). The Constitutional Assembly (combined sittings of the NA and the former Senate) adopted a final constitution on May 1996. The new constitution was signed into law on 10 December 1996 (Public Education Department of Parliament, 1997: 3 also see South African Parliamentary Announcements and Tablings (ATC), 1997).

The legislative authority in South Africa after the elections in 1994 consisted of two chambers, namely the NA and the Senate. The NA consisted of four hundred members elected through the system of proportional representation. The Senate was comprised of ninety senators (ten senators per province) who were nominated by the parties represented in the provincial legislature on a proportional basis. No residential qualification was, however, set in respect of a particular province at the time of or following the nomination of a senator.⁶ The qualification for nomination as a senator was the same as that for members of the NA (Department of Constitutional Affairs, 1994: 5).

The term of office of senators was also the same for the NA and therefore related to elections that had to be held every five years (Constitution RSA Sections 40, 48 and 50, 1993). Since senators were nominated by political parties and not elected directly by the electorate, party loyalty and discipline played an important part in the decision making process in the Senate. According to Section 51 of the Constitution a senator has to resign if he or she ceases to be a member of the party that nominated him or her (Constitution RSA, 1993).

In terms of the powers of the Senate, Ordinary Bills may have been submitted in either the NA or the Senate, and adoption has to be approved by both chambers of Parliament. Bills related to revenue, the appropriation of funds or taxation was submitted only in the NA (Constitution RSA, 1993).

⁵ The NP withdrew from the GNU a day after the passage of the new constitution. The reasons according to the then secretary – general of the NP, Roelf Meyer were because the strains within government and within the NP became unendurable (*Financial Mail* May 17, 1996). Meyer admitted that after 46 years of draconian rule the “NP simply didn’t know how to fulfil the role of an opposition party” (Script of Current Affairs, SABC 3 TV programme: 10 May 1996).

⁶ Mr Moorcraft, resident in the Eastern Cape, was nominated by the Democratic Party as senator for the Province of KwaZulu/Natal (Department of Constitutional Affairs, 1994:6).

Furthermore, these Bills, if rejected or amended by the Senate, were referred back to the NA, which then had the right to approve the Bill with or without the amendment. The Constitution could be amended only if approved by a two-thirds majority of a Joint Sitting of the NA and the Senate - excluding the constitutional principles (Constitution RSA, 1993). Bills that affected the boundaries of provinces or the exercise or performance of their powers and functions needed the approval of the Senate. Bills that amended the Constitution in respect of the boundaries of a particular province or the exercise or performance or functions, could only have been approved if a two-thirds majority of senators of a province or provinces voted in favour of it (Constitution RSA, 1993). In this respect the powers of the Senate could, to a certain extent, be regarded as a veto although it is not described as a veto in the Constitution. In this case there was a strong provincial link in terms of the powers of senators (South African Parliamentary Library, 1996: 16).

In the event of a dispute between the two chambers of Parliament over a draft Bill, the matter was referred to a joint committee consisting of members of both chambers. A Joint Sitting of the NA and the Senate was then held to consider the draft Bill and the joint committee's recommendations. Only an ordinary majority was required to approve the draft legislation (Constitution RSA, 1993). Since the NA had four hundred members and the Senate only ninety, the NA was in a good position to see that such a Bill is passed.

In respect of legislation that does not affect regional interests, the Senate did not have strong powers; hence the Senate could not easily block a Bill approved by the NA. According to Watts (1994: 139), the Senate has also been given a specific role together with the NA in a number of areas for example, in the appointment and removal of the Public Protector and the Auditor –General and the establishment of the Commissions on Gender Equality and on Restitution of Land Rights (Constitution RSA, 1993).

In contrast to the members of the NA, parties represented in the provincial legislature nominated senators on a proportional basis. Party lists were therefore not used. The Senate's political composition was proportionate to the representation of political parties at provincial level (in the provincial legislature). Furthermore, as mentioned

earlier, there were no qualifications as to residence. It could therefore happen that people who were not successful in elections for the NA could be nominated as senators (Watts, 1994: 241).

Compared to the party representation of the NA, certain parties were in a weaker position in the Senate. The ANC for example succeeded in obtaining a two-thirds majority in the Senate as opposed to its 62% support in the NA, whereas the NP's support in the Senate was 18%, compared to its 20% support at national level (Watts, 1994: 236).

The position of the other parties was as follows:

Inkatha Freedom Party (IFP)	National 10%	Senate 5%
Freedom Front (FF)	National 2%	Senate 5%
Democratic Party (DP)	National 1%	Senate 3%

With the exception of the FF and the DP, other smaller parties such as the PAC and the African Christian Democratic Party (ACDP) were worse off in the Senate than in the NA in terms of seats. In the case of the FF and the DP, the second ballot was probably responsible for this trend (Coetzee, 1996: 24). The electoral system used is important to second chambers, because it determine the party representation in this house, as illustrated above.

Before one can understand the workings of the NCOP or any second chamber it is important to understand the general characteristics of second chambers. The different application of each characteristic has an impact on how the chamber is ultimately defined. In the following section it is attempted to outline the most general characteristics and their variations.

2.2 Background to the functioning of second chambers

The nature, role, composition and functioning of second chambers are determined by both the constitutional system and the community they are intended to serve (Constitutional Development Services (CDS) Internal document no. 2.24, 1995: 14). Although there are several variables that could have an effect on the nature of second chambers, certain characteristics or principles can nevertheless be identified when

comparing them. Such a comparison offers the opportunity to analyse and evaluate a particular second chamber on the basis of principles. In this regard Strong points out that it is essential for an analysis of second chambers to reflect the true nature of the chamber in respect of matters such as the manner of appointment, powers and dealing with disputes (Strong, 1972: 178).

In the analysis of second chambers in other states, the following characteristics were identified. These characteristics are important because it ultimately determines the type of second chamber that one finds in a particular country.

2.2.1 Manner of appointment/composition⁷

According to a study by the President's Council, the trend throughout the world is for one chamber to consist of representatives of the society as a whole, elected by universal franchise (President's Council, 1990: 60). Using a form of proportional representation as a basis for election, this chamber will reflect the national support for each party. The second chamber is generally structured in such a way that it is representative of geographic units such as regions (in a unitary state) or member states (in federation), ethnic groups, other interest groups such as environmentalists, traditional leaders (tribal leaders) or senior members of the community elected on the grounds of their expertise or experience in particular fields (Loewenberg, 1985: 216 also see Longley, 1989: 25). With regards to the manner of appointment of members of second chambers, Strong (1972: 179) shows that the nomination of senators usually derives from heredity, nominations, elected members or party elected members. It is however clear from the analysis of second chambers in a number of states that a combination of these factors can also occur. Here follows an overview of how members are appointed and brief examples thereof.

2.2.1.1 Heredity

The British House of Lords, in whom some members hold hereditary seats, dates back to the thirteenth century when an assembly of the nobility advised the king. The Lord Temporal use to consist of members who are lords and ladies through heredity (about seven hundred and eighty), members of the nobility appointed as barons or baronesses

⁷ The manner in which delegates to the NCOP is appointed would be discussed in chapter three.

in terms of the Life Peerage Act 1958 and the Lords of Appeal in Ordinary (eleven highly jurists) who become life peers in terms of legislation (CDS Internal Document no.1: 4, 1995: 34). This however changes at the end of the 1998-99 parliamentary session. In accordance to section one of the House of Lords Act, six hundred and fifty hereditary peers ceased to be members of the House while, under section two, ninety hereditary peers remained members for their lifetime or until a subsequent act provides otherwise (House of Lords 1999: 1). In Belgium a different pattern emerges where the sons of the king or princes of that branch of the royal family that may become heirs to the throne, among others, qualify as members of the Senate (Department of Constitutional Affairs, 1994: 14).

2.2.1.2 Nominations

In Canada senators are nominated by the governor-general and in Malaysia nominees make up a proportion of the senate. In Britain, part of the House of Lords is constituted from certain archbishops and a number of senior bishops of the Church of England who serve for as long as they retain their posts. This has changed recently. (See discussion in 2.2.1.1.) Over and above other means of representation, elected representatives nominate further twenty-five members of the Belgian Senate. The Indian upper chamber includes twelve members who are nominated by the President (*The Parliamentarian* July 1990: 12 also see *The Parliamentarian* July 1993: 34 and October 1993: 26).

2.2.1.3 Elected members

Strong points out that if a second chamber is removed from popular control, it loses vitality (Strong, 1972: 102). Voters in the respective federated states of Australia and the USA elect senators by a direct ballot. Although the various cantons in Switzerland make their own decisions on the appointment of members, the election of senators for the State Assembly generally takes place by means of a direct ballot.

2.2.1.4 Party elected members

This category refers to cases where governments of federated states nominate senators directly, as in the case of the Bundesrat in Germany. In other cases legislatures of states or provinces, who are directly elected by the electorate, can in turn nominate/elect senators, as in Malaysia, Belgium and India. According to the

Namibian constitution, each regional council elects two members (CDS internal document no.1: 4, 1995: 24).

2.2.1.5 Combination of nomination, direct election and partial election

As set out above, there are various combinations by which members of second chambers are appointed. In this regard Belgium is a good example of where the Senate is made up of four categories of people - directly elected, partly elected, nominated and heredity (Seminar on Federal Relations, 1996: 190). The Indian upper House and the Malaysian second chamber are constituted through nomination and the elected members of the legislative assemblies of each state elect further members.

2.2.2 Term of office

As regards to the term of office of senators, three types of terms can be distinguished. Here are the types;

- i) The term of office of members of the upper and lower chamber differs for example in the USA, Namibia, Australia and Germany.

In this regard the term of office of senators could be a fixed term of six years in Namibia and Australia for example, or senators can be elected for a term of six years staggered over two year periods as is the case in USA. In Australia, senators change every six years except in the case of the arrangement that half of the senators initially serve for only three years (Department of Constitutional Affairs, 1994: 34).

- ii) The term of office of senators coincides or occurs with that of members of the Lower House for example in RSA and Malaysia.

- iii) Senators in Canada appointed when the constitution first came into effect in 1867 retain their positions for life, but those appointed thereafter remain until the age of seventy-five (Schaffer, 1990: 24).

Wheare argues that a longer term of office and partial renewal at times means that the members of second chambers are more “conservative” in the sense that they are not quite up to date on the latest developments. He also hold the view that a longer term of office could give second chambers a greater degree of independence from their party leaders, which is the case with members of first chambers (Wheare, 1963: 212). It appears that the term of office of members of the first and second chambers differ

from each other in most states. If the point of departure is that a second chamber is not merely a duplication of the first chamber, it is desirable that the term of office of members of the two chambers should differ and also result in other interests being represented in the second chamber. Where, in addition, terms of office are staggered as in the case of the USA, the composition of the Senate cannot only change, but stability and continuity are also retained. The nomination of senators up to the age of seventy-five years, in Canada (initially for life), contributes to them not really being regarded as representatives of the people, rather as a reward for faithful service to the respective parties. The result is that the Senate does not form a real check or balance (Department of Constitutional Affairs, 1994: 36).

2.2.3 Qualifications and nature of the members

In some states senators have to meet certain qualifications. In states such as the USA, Nigeria (prior to the suspension of the 1979 constitution) and Malaysia senators have to be at least thirty years old, while residence qualifications are also set in states such as the USA and Canada. In the case of Belgium senators have to be at least forty years old. Other qualifications that are set include financial independence e.g. Belgium and expertise in certain fields e.g. India and proof of exceptional service as in the case of Malaysia. In states Namibia, Australia and Switzerland, no additional qualifications to those applicable in the first chamber are set (Rosenthal, 1996: 27).

2.6 Interest groups or institutions that are represented

The principle of representation in a second chamber is closely related to the manner of appointment. Due to the historic link between the population and royalty in Britain, the House of Lords could to some extent be regarded as representative of the general population, although the population has no direct say in the composition of the House of Lords (*The Parliamentarian* October 1972: 23, also see *The Parliamentarian* October 1982: 34).

Where senators are nominated, as is the case in Canada, Malaysia and Britain, there is, of course a danger that senators could become mere lackeys of the government of the day and not necessarily be a mouthpiece for the population. In cases such as Australia, the USA, Switzerland and partly Belgium, where voters are directly responsible for the election of members of the second chamber, senators are directly

responsible to the voters and not to the states as such. Where governments of federated states nominate senators directly, as is the case in the Bundesrat in Germany, and where legislatures of states or provinces (elected directly by voters) are nominated, as is in the case in South Africa and partly in Malaysia, Belgium, India and Namibia, the result could be that the interests of the governments or legislative assemblies are given precedence over those of the voters (*The Parliamentarian* October 1991: 51).

The Constitution of the Republic of South Africa of 1993 was silent on the interaction between the Senators and the provinces. Although the parties represented in the respective provincial legislatures nominated senators, they were not accountable to the provincial legislatures or provincial governments. Although the direct election of senators is probably the most democratic option, a combination of nominations, direct elections or partial elections could also be fairly representative, since specific interest groups, as in the case of Belgium, India and Malaysia would then be represented (Department of Constitutional Affairs, 1994: 25).

Although the objective of the of second chambers differs from that of first chambers, the ideal nevertheless seems to be to make office bearers of second chambers responsible directly to the voters of a state or to the various federated states. Although members nominated could provide valuable inputs, the danger is that they could become mere lackeys of the government of the day (Patterson and Wankle, 1972: 210). The legitimacy of a senate is, therefore, largely determined by the extent to which it reflects the will of the population or the respective federated states (*The Parliamentarian* July 1992: 34).

2.2.5 Powers

Wheare (1963: 201) believes that there is little sense in having two chambers in a parliament that are equally representative of the population and have the same powers, since this results in duplication. He makes the interesting statement that if a state is governed in terms of the cabinet system, the latter institution can be responsible to only one chamber – the popularly-elected chamber – which means that such a chamber must have greater powers than the other.

Based on observations on second chambers in member states of the Commonwealth, Wheare concludes that a system of government by cabinet in a federation results in a second chamber not being able to guarantee the effective protection of state's rights even if it has the same legislative powers as a first chamber, precisely because such a system of government is so strong that it will diminish the legislative powers of the second chamber (Wheare, 1963: 206). This means therefore, that a system of government by cabinet and a second chamber that has the same powers as the first chamber are irreconcilable. In general, states in which the two chambers are equal do not have a system of government by cabinet, such as the USA and Switzerland. The different ways in which the powers are handled will be briefly discussed in the following section.

2.2.5.1 Fully equal powers

An absolute requirement for chambers to have equal legislative powers is that both should be able to approve legislation before it comes into effect (CDS internal document no.1: 4, 1995: 36). Although initiation of legislation and the submission thereof in any chamber may also be interpreted as a degree of equality, its approval is the deciding requirement. Examples where chambers are equal in this regard are Belgium, the USA, Switzerland and Malaysia; here both chambers have to approve legislation before it can come into effect.

2.2.5.2 Equal powers with certain limitations

The most common occurrence is probably equal legislative powers between chambers, with the exception of dealing with financial legislation, as is the case in Nigeria and India. In these states there is equal power, but there is a possibility that the will of the first chambers will dominate when it comes to financial matters in that they are decided by vote in a joint sitting. In Australia procedures provide that the first chamber cannot approve legislation rejected or amended by the second chamber, although eventually, after a dissolution of the parliament and a repeat of such rejection the new parliament can approve it in a joint sitting which in effect amounts to an affirmation of the will of the first chamber. On certain matters that affect the interests of federated states the second chambers in Germany and South Africa have an absolute veto, but the chambers are nonetheless not equal since the will of the first

chamber can prevail in respect of other matters (Department of Constitutional Affairs, 1994: 35).

The above examples indicate that although both chambers can theoretically have relatively equal powers, their operation in practice amounts to the one chamber's opinion eventually prevailing, which in essence points to inequality of the chambers.

2.2.5.3 Unequal powers

The greater powers of one chamber as against the other can present itself in different ways. In some cases it is quite clear that the second chamber has lesser powers, while this is disguised in other cases, as described in section 2.2.5.2 above. The determining factor in this case, however, has to be whether mechanisms and techniques can be applied in such a manner that the view of the one chamber can (eventually) prevail over that of the other. The following possibilities exist in this regard:

- **Confirmation by first chamber**

A first chamber can have the power merely to confirm legislation approved by it but rejected by the second chamber in order for it to come into effect. In Namibia proposals by the second chamber to amend draft legislation (adopted by an ordinary majority) can be dealt with by the first chamber as it deems fit. In Germany an ordinary majority of the first chamber can invalidate rejection by the second chamber if the second chamber did not reject it by a two-thirds majority (ANC Head Quarters, 1995: 23).

- **Delaying veto**

The rejection or non-approval of a Bill by the second chamber can also serve to delay its disposal, as is the case in Britain where the House of Lords can delay Bills for a year excluding financial matters, which can be delayed for a shorter period and prevent it from being passed in one session of the parliament. In Canada the second chamber has a delaying veto of only one hundred and eighty days when it comes to constitutional amendments (Blondel, 1990: 240).

- **Increased majority**

In Namibia a rejection of a Bill with a two-thirds majority in the second chamber has to be overturned by a similar majority in the first chamber in order for it to come into effect. The same applies in Germany in respect of legislation that does not affect the interests of federated states (NDI, 1996: 34).

- **Joint sitting**

A joint sitting of the two chambers as a means of solving a dispute between them by a majority vote can cause the will of the first chamber to prevail, because first chambers have more members than second chambers. This procedure is followed in India when there is a dispute between the chambers over non-financial legislation. In Nigeria this method also applies to financial matters or if a joint committee of two chambers could not settle the dispute. In Australia a joint sitting of the two chambers can also approve draft legislation with an absolute majority after a complicated dispute resolution procedure has been followed, which includes the dissolution of parliament (Copeland and Patterson, 1994: 180).

2.2.5.4 Division of powers between chambers

The examples of the states mentioned, show that second chambers can sometimes have exclusive powers in respect of certain matters in that they can exercise a veto over such matters, as in the case of Germany in respect of the interests of provinces/federated states. In other cases it has been shown that the first chambers have the final power as regards financial matters. Second chambers also perform functions with regard to minority interests. With a view to reforming the Canadian Senate, it was for instance proposed that the language and cultural interests of French speaking residents should be protected and that, in order to achieve this goal, draft legislation has to be approved by a majority of senators as well as a majority of French speaking senators (Department of Constitutional Affairs, 1994: 48, also see Dlamini: 1991: 24).

The foregoing indicates that chambers in some states have fully equal powers e.g. Belgium, the USA, Switzerland and Malaysia, although second chambers, in by far the majority of states have lesser powers than first chambers. This inequality is often

disguised and becomes apparent in that first chambers can confirm decisions over which there are disputes in order for them to come into effect; second chambers can only delay decision-making; disputed legislation can be accepted by the first chamber with an increased majority and legislation can be passed by means of a joint sitting, which naturally favours the chamber with the most members (Kornberg: 1989: 60).

A division of powers between chambers can also occur where the second chamber, for example, has exclusive decision-making powers in respect of provinces or regions e.g. Germany or has the right to perform a protective function in respect of language and cultural interests as in Belgium, while first chambers can have the final decision-making power over financial matters (Parliamentary Research Unit: 1993: 34).

2.3 Disputes between chambers

Malherbe (1991: 189) points out that the authority and status of the two chambers in relation to one another determine the resolution of disputes between two chambers of a parliament. When chambers have the same legislative powers, the resolution of disputes will take place in a manner that does not favour one chamber over the other, while the resolution of disputes between unequal chambers will favour one or the other. Disputes between chambers can therefore not be dealt with independent of facets such as the aim of second chambers, the power and status of both chambers and the equality of one chamber in relation to another (Constitutional and Parliamentary Information, 1993: 27).

In the event of conflict between two chambers there are different approaches and/or techniques that can be followed to reduce or resolve such conflict. The following are brief descriptions of each of these techniques.

2.3.1 Confirmation by the “stronger” chamber

When one chamber has greater powers than the other, that chamber can overturn the rejection of a Bill by the other chamber through confirmation of its original approval. This procedure is followed in Namibia, Germany, India and Australia. In the case of India it applies only to financial legislation, where the Lower House can accept or reject amendments by the upper house in order for legislation to come into effect. In Namibia this confirmation can be obtained through an ordinary majority if the second

chamber rejected it with an ordinary majority. If it is rejected with two-thirds majority it has to be approved/confirmed with the same majority, in the NA in order for it to come into effect (Levmore, 1992: 60).

In Germany the Bundestag (first chamber) can, in respect of certain legislation, set aside an objection of the Bundesrat with an ordinary or a two-thirds majority, depending on whether a decision was taken with an ordinary or a two-thirds majority. In the case of Australia, the House of Representatives (first chamber) can also deal as it deems fit with requests by the Senate for amendments to or exclusions from legislation (Schaffer, 1990: 24).

2.3.2 Delaying

The technique of delaying Bills to show dissatisfaction or to create opportunity for reformulation or re-evaluation is illustrated by the procedures that can be followed by the House of Lords in Britain (President's Council, 1990: 61). If the latter institution rejects in two successive sessions an ordinary Bill adopted by the House of Commons it can be submitted to the head of state only when a year has passed since its approval by the lower house during the first and second sessions.

2.3.3 Joint committees

According to a President's Council report on decision-making and conflict resolution mechanisms the purpose of joint committees is to remove the debate from the highly politicised environment of parliament to a more informal atmosphere (President's Council, 1990: 61). Malherbe points out that in some parliaments the convention is to have all Bills considered by joint committees beforehand so that the committees serve to prevent disputes rather than solve them (Malherbe, 1991: 33).

In the states mentioned the mechanisms of joint committees for the resolution of disputes is applied in Nigeria, the USA and Germany. In Nigeria draft legislation dealing with the collection or spending of revenue is referred to a joint financial committee if there is a dispute between the two chambers (*The Parliamentarian* October 1982: 14).

In the USA a dispute between the two chambers is also referred to a joint committee, while in Germany an arbitration committee, made up of an equal number of members from each chamber and with strong representation from the “Länder”, deals with disputes. This committee is of a semi permanent nature, not subject to party discipline, only advisory in nature and has a high success rate (Jain, 1993: 218).

2.3.4 Joint sittings

In all of the parliaments studied, disputes are referred to a joint sitting of both chambers for approval with an ordinary two-thirds majority. In the event of disputes between the two chambers in Australia the parliament is dissolved and, if the new parliament in turn cannot reach consensus, a joint sitting of the two chambers is assembled where a majority can adopt the matter. In Canada the proposals for changes to the Senate determined that disputes between the two chambers have to be settled by means of a joint sitting and majority vote during such a sitting. In Switzerland there is also a possibility of joint sittings to deal with matters by means of an ordinary majority. If ordinary legislation, excluding legislation of financial nature in India is approved by only one chamber, the two chambers can have a joint sitting for approval by a majority (Department of Constitutional Affairs, 1994: 40 also see the South African Parliamentary Research Unit, 1993: 9). Levmore (1992: 40) mentioned, that the resolution of disputes by means of joint sittings favours the chamber with the most members, particularly when decision-making occurs by means of an ordinary majority.

2.3.5 Consultation between the chambers

In some parliaments where the two chambers are equal, as in Belgium, disputes over Bills are settled by amending them and sending them back and forth until consensus is reached (CDS internal document no.1, 1995: 12). If the chambers fail to reach agreement, the draft legislation expires. Apart from the fact that the Senate in Malaysia is limited as regards the initiation and amendment of legislation, the procedure followed between the chambers is the same as described above.

2.3.6 Referendum or Election

In Switzerland referendums on certain legislative matters can be enforced by means of petitions containing a certain number of signatures. In Australia, both chambers can

be dissolved and an election called if consensus cannot be reached on a Bill. Malherbe (1991: 210) believes that this provision is aimed at protecting the federated states as represented in the Australian senate, but at the same time at complying with the popular will.

2.3.7 Advisory bodies

An advisory body may also be used to remove a dispute from the direct political line of fire and propose solutions to the chambers as objectively as possible in calmer circumstances (CDS internal document no.1: 13, 1995: 23). Such an advisory body, which could be made up of members of both chambers, should consist of recognised experts e.g. in Belgium and India. The principle on which technical committees consisting of experts submitted reports to the Negotiating Council during the Multi-Party Negotiating Process (MPNP) in South Africa is an analogous example.

2.3.8 Decision- making body

In order for a body to have legitimacy to remove a dispute from the political arena for a decision, it should be constituted in a manner acceptable to both chambers. Nominations from one chamber can, for example, be submitted to the other chamber for approval to ensure mutual acceptability. The President's Council, which has performed such a function in South Africa, was controversial precisely because its composition favoured the majority party. If disputes arose as to whether a particular Bill was unconstitutional, provision could also be made for it to be referred to the Constitutional Court (President's Council, 1990: 61).

2.3.9 Differentiation between different types of draft legislation

The examples studied showed that different types of legislation could be dealt with in different ways. Examples where draft legislation of a financial nature is dealt with in a manner that reflects the dominance of the first chamber over the second are to be found in India, where the powers of the chambers are relatively equal, except for financial matters. Malherbe (1991: 211) believes that distinctions between different categories of Bills are useful where the chambers are constituted differently, and one chamber has a greater interest in some matters than others do.

In Germany a specific distinction is made between, for example, matters that affect the interests of the “Länder” and provinces and for which the approval of the second chamber is required. Different procedures can be followed to reduce or resolve conflict between chambers. This is mostly done in a manner that reflects which chamber has the greater powers. For example, the dominant of the two chambers can confirm an earlier decision after which it becomes law without the approval of the Senate, as is the case with financial matters in India. In some states such as Britain, Australia, Belgium and Namibia the second chamber can delay draft legislation to show dissatisfaction with it or to create an opportunity for reformulation and re-evaluation (Department of Constitutional Affairs, 1994: 18 also see Discussion Forum for South Africa, 1995: 14).

Joint committees, which are aimed at removing the debate from a politicised environment, can serve to prevent disputes over draft legislation, while they may also be used to resolve disputes between two chambers as in Nigeria, the USA and Germany. Consensus may be reached in such a committee or voting by secret ballot (to reduce party political influence) can increase the chances of reaching a decision. An ordinary or special majority as is the case in Australia, Switzerland and India can also refer disputes between the two chambers to a joint sitting for approval. Dispute resolution in this manner could favour the chamber with the most members, particularly if it is done by an ordinary majority decision (Department of Constitutional Affairs, 1994: 47 also see Constitutional and Parliamentary Information, 1993: 4).

Where the chambers are equal, for example in Belgium, bills that give rise to disputes are amended and sent to and from between the chambers until consensus is reached, otherwise they expire. Referendums or elections are dispute-resolution mechanisms that can be used in Switzerland and Australia respectively, while advisory bodies made up of experts and appointed by members of both chambers play a part in resolving disputes. Decisions can also be referred to a decision-making body e.g. the Arbitration Court in Belgium. Different dispute-resolution mechanisms can be applied for different types of Bills for example financial legislation where the stronger chamber can confirm it and legislation that affects the interests of provinces or federated states and that require the exclusive approval of the second chamber

(Department of Constitutional Affairs, 1994: 51). Just as there are different ways of resolving disputes, different mechanisms are employed to take decisions. In the following section various decision-making procedures will be discussed.

2.4 Decision-making in the second chamber

Decision-making procedures in second chambers are relevant because of the different interests represented in second chambers can be promoted or prejudiced by them. The following ways of decision-making exist in this regard.

2.4.1 Constituent majorities

When a majority of every region or province in a second chamber or a majority group representing a specific interest has to support draft legislation before it comes into effect, such an interest group has a veto with regard to certain specified matters. It could be an effective way of protecting such interests, but it could also delay/prevent decision-making, which in turn could lead to frustration if applied to too many matters (CDS internal document no 1:18, 1995: 14). Proposals for changes to the Canadian Senate also indicated that draft legislation that affects the French language or culture has to be approved by a majority of senators and amendments must also be made by a majority of French-speaking senators (Department of Constitutional Affairs, 1994: 37).

In Belgium, elected members of each chamber are divided into a French or Dutch-speaking group in respect of certain matters and the approval of such language groups is required for decision-making. If 17% of a language group is opposed to a motion, for example, it is referred to a Council of Ministers (executive authority) for a recommendation within thirty days, after which it is considered again (Constitutional and Parliamentary Information, 1993: 15).

2.4.2 Ordinary and increased majorities

Decision-making on all matters of an ordinary majority in a second chamber could be prejudicial to groups or individuals that are always on the losing side owing to representation of a particular interest. It is found that decisions on ordinary legislation can often be approved by means of a majority vote (as in Belgium and India), constitutional amendments by increased majorities (e.g. Belgium) and sensitive

matters by the constituent majorities, which leads to a majority requiring the approval of a minority or minorities to get a certain matter passed (Brenman & Hamlin, 1992: 14).

2.4.3 Differentiation between sensitive and other matters

It may be said that majority decision-making should apply to all but certain sensitive matters. With regard to the latter constituent majorities, increased majorities or even an appeal to a decision-making body or a constitutional court may be required (Department of Constitutional Affairs, 1994: 38). This limits the protection of specific interests to those matters that are really important to these groups. Examples of this are to be found in Germany in respect of the veto that senators from federated states have with regard to the interests of federated states.

2.4.4 Postponement of decision-making

In order to reach consensus in the second chamber it is advisable to apply the method of consultation before drafting legislation on sensitive issues (CDS internal document no 1:18, 1995: 34). Postponement of a decision if a minority or specific interest group objects to draft legislation with the view to the promotion of consensus by other means could prevent decisions from being made hastily, such as in Belgium where the objection of the representatives of a language group can be referred to the Council of Ministers to make a recommendation to the second chamber (Department of Constitutional Affairs, 1994: 52).

In the states examined it was found that constituent majorities in second chambers have to be obtained in respect of the following matters in particular: the interest of provinces or federated states in Germany, language interests in Belgium and language and cultural interests in proposals in the Canadian Senate. Ordinary majorities can be required in respect of ordinary matters (normal legislation), while increased and constituent majorities or even an appeal to court may be required in extreme cases in respect of important or sensitive matters. In this way the protection of specific interests is limited to matters that are vital to such groups, without continuously being a source of frustration to the majority. The postponement of decision-making of draft legislation about which there are fundamental defences in second chambers and the

use of more informal consensus seeking methods are further ways of accommodating as many interests as possible (ANC Parliamentary Research Unit 1996: 14).

The redundancy of the South African senate led to its abolishment in 1996. It is important to know why this institution was perceived a failure, because its failure is the premise on which the NCOP was built. This section outlined the fundamental characteristics of second chambers in general. It also highlighted the different variants that can exist in these regards. The following section will focus on how the South African senate was structured in relation to the general characteristics discussed earlier.

2.5 Evaluation of the Senate

In order to determine whether the existence of the South African Senate could have been justified, it was essential to determine whether this institution meets the objectives of second chambers as they are found in most democratic states. Firstly, the Senate has to be able to act as a watchdog over legislative action (reviewing role) and secondly, it has to be able to play a part in specific interests, for example, in protecting provinces in the national legislature (Interview: Palmer, 10 December 1999 also see discussion in section 2.2.4 and 2.2.5).

In view of the above it could be argued that the South African Senate could not play a proper reviewing role in respect of the first chamber (excluding provincial interests, in respect of which it has special powers) since the powers of the institution were restricted in this regard and its party political composition did not differ in essence from the NA. As regards the protection of specific interests, it could be argued that provincial interests, and the interests of smaller provinces in particular, did enjoy effective protection in the second chamber. A deficiency however existed with regard to the lack of accountability to, and formal interaction of senators with the provinces they represent (Cloete, 1995: 25).

With regard to the Constitution (1993) it was clear that the objective of the legislature was not to grant direct protection to minorities. Minorities did have indirect protection in so far as certain political parties were willing to safeguard their interests. This

protection might not have been particularly effective in view of the limited support enjoyed by the minority parties in comparison with the majority party in the Senate.

In the view of the Senate's evident shortcomings in respect of its legislative review function, accountability of the executive and the protection of specific interests, the question arose on how the institution could be changed, with due regard for existing societal values and viewpoints. The ANC wanted a unicameral system. They argued that provinces could be directly represented in the NA by electing half of this house's members from provincial lists⁸. The other parties agreed that Provinces should be directly represented in the NA. This did however not solve the problem of accountability⁹ and the specific link with provincial legislators that in fact led to the abandonment of the Senate. This, and also the fact that there was uncertainty amongst the ANC itself about the establishment of a second chamber or not brought about the establishment of the bicameral system that exists today¹⁰. Parties were united on the idea that it should address the shortcomings of the Senate as mentioned above.¹¹ The following possibilities/options for changing various aspects of the Senate was considered in this regard.

2.5.1 Composition

The method which seems the most feasible for obtaining a composition different from that of the first in the second chamber, without prejudicing the democratic principle, is to have different terms of office for the two chambers while retaining the five-year term of office for each chamber. For example, the election of provincial legislatures and the appointment of senators could be separated from the election of members of the NA. In practice this would mean that both elections would be held on the adoption of the final constitution, but that the next provincial/senate election would take place only three years later. The term of office of the members of the first chamber would then expire after five years as usual. In this way the Senate could, in due course, of time reflect a composition that differs from that of the first chamber. The same

⁸ The NA is still composed of 200 members selected on the national list and 200 members selected on provincial lists.

⁹ Senators were not accountable to provinces during the time of the Senate.

¹⁰ Interview: N. Ackerman, 8 June 2000

¹¹ Interview: N. Ackerman, 8 June 2000

naturally applies to the provincial legislatures (See discussions in sections 2.2.2 and 2.2.3.).

This principle is applied successfully in different countries, amongst others, the USA, Namibia, Australia and Germany (Department of Constitutional Affairs, 1994: 30). The practice of periodically replacing a proportion of the senators would not be feasible, since a different method of appointing senators, which is not without merit, is followed in South Africa. Criticism against this option was that in practice it would result in South Africa having an election every two to three years. Parties were unanimous that this system was too complicated and all parties rejected it (Interview: Ackerman, 8 June 2000).

A further method for having the composition of the second chamber different from that of the first is to nominate the representatives of the interest groups as discussed in section 2.2.4. This method is problematic since virtually insurmountable problems are created in determining which interests should or should not be given representation, apart from the fact that it is undemocratic and that the true sphere of such groups essentially lies outside the legislature (Department of Constitutional Affairs, 1994: 30). There were nevertheless early indications that traditional leaders could, through the proposed Chamber of Traditional Leaders, lay claim to representation in the Senate. The IFP was the only party that supported this idea (Interview: Ackerman, 8 June 2000).

As regards the possibility of amending the formula for determining the support of parties in the Senate, it should be noted that there were different interpretations of the operation of the formula for determining delegates as contained in Section 48 of the Constitution (1993). For example, it could be noted in this regard that the operation of the formula has resulted in practice in a party such as the FF, which has only 5.6% support in the Mpumalanga province, having a representative for that province in the Senate. A different interpretation of the Constitution would have it that in this case the FF is not entitled to a seat (Discussion Forum for South Africa, 1995: 23). To amend the formula, by which parties obtained proportional representation in the Senate by lowering the required support threshold, would mean that the majority party in each

province would have to give up some of its representation in the Senate if an equal number of representatives per province was to be maintained.

Although members of the second chamber should ideally be elected directly by the population, there are certain problems in this regard. Three different elections already have to be held, whether they are held for the three spheres of government in turn or are held at the same time it resulted in one more ballot paper. There was also the argument that there is not too much sense in having two chambers that represent the population in same way, especially since provincial interests are also represented in the NA; this could merely result in duplication. If senators were directly elected they represent the voters and not the provincial governments/legislatures, which could result in conflict over who actually represents the interests of a province (Cloete, 1995: 35).

2.5.2 Term of office

Options such as having members of the second chamber serve for a longer term of office than the first chamber and having a proportion of the members step down at a certain time were not recommended, despite the advantages that they hold (such as providing continuity and dignity to such an institution without removing it from popular control). The reason is that the way in which South African senators are appointed by the provincial legislatures had merit; the appointment of senators and their terms of office ought to coincide with the election and terms of office of members of provincial governments (Discussion Forum for South Africa, 1995: 10).

2.5.3 Qualifications and nature of members

Since senators represented provincial interests, it was advisable to set the requirement that they should be residents of the provinces that they represent. No residential qualification was set with senators. See discussion in 2.2.2. This qualification would further extend the unique composition of the Senate and the central party structure would not be able to nominate a person who is not a resident to represent a province (Department of Constitutional Affairs, 1994: 30 also see Discussion Forum for South Africa, 1995: 12). Providing that a person has to be resident in a particular province for at least two years before he/she may be nominated could even have extended the residential qualification set for senators.

2.5.4 Interest groups or institutions that are represented

Although the South African Senate was composed of a number of senators from each province and nominated by the parties represented in the respective provincial legislature, the Constitution was silent on the interaction between the Senate and the provinces. The Senators were therefore not accountable to the provincial governments or the provincial legislatures. Furthermore, dual membership of the Senate and a provincial legislature was expressly prohibited. This contrasts, for example, with Germany where such dual membership is required and Switzerland where it is permitted (Watts, 1994: 34).

Since senators had to promote provincial interests regarding draft legislation that had a bearing on the provinces and the drafting of the new constitution, it was advisable to establish some kind of mechanism to provide for interaction between the Senate and both the executive and the legislative provincial authorities. This could help to take care of provincial interests at national government level effectively.

In order to address relations between the provincial and national legislatures in the new constitution, the following options were available:

- Senators to be nominated by parties represented in a provincial legislature in accordance with proportional representation (in practice this means that the various party caucuses nominate such persons). Consideration may be given to providing for the appointment of senators by way of a resolution/motion of the provincial legislature, in order to address the matter of accountability.
- The provincial legislatures can participate directly, through the Senate, in the legislative process at national level. In Germany the second chamber consists of members of the Länder governments, which appoint and recall Bundesrat members. Members of the Bundesrat therefore represent the federated states and are bound by instructions from these states. This mechanism also provides an opportunity for specialists on certain matters (from the provincial legislatures) to be rotated in the Bundesrat to ensure the best possible input at national level (Department of Constitutional Affairs, 1995: 25).

2.10.5 Powers between the two chambers

The South African Senate clearly did not have legislative powers equal to those of the NA, which is not unusual if compared with international examples (See the discussion in section 2.2.5). The Senate nevertheless had substantial powers, but its composition (which does not differ substantially from that of the first chamber in party political terms) and the fact that there was no close interaction between senators and the provincial authorities they represented, placed a question mark over the exercise of these powers. A mechanism was established to improve interaction between provinces and senators, attempting to change the composition of the second chamber over time, so that this chamber would represent broader interests and thereby more effectively exercise the powers that it has (Murray, 1998: 45).

2.6 Conclusion

In December 1995 a joint South African and Namibian delegation participating in a study mission focused on the representative nature of the second chambers of parliaments in India and Malaysia¹². The common thread in the South African and Namibian situations was to decide on how to maximise presentation of provincial and regional interests in national policy (NDI, 1996: 8). The Bundesrat of Germany was also visited subsequently. The South African constitutional experts wanted to create a second house that would serve South Africa as a deeply divided society and as a country in transition at the same time. The product of their study tours and negotiations is a uniquely South African product - the National Council of Provinces.

In this chapter the route from Senate to NCOP was sketched. An attempt was made to outline the problems that led to the abolishment of the Senate and the process followed to establish the NCOP. It is clear that the senate was a mere duplicate of the NA without any different powers assigned to it. Senators were not accountable to provinces but rather to their political parties. This led to a situation where senators simply became divorced from their provinces. The duplication in functions between the Senate and the NA led to the abolishment of this institution and gave rise to the

¹² India and Malaysia were selected for the study among other countries based on two criteria:

1) the states' role in electing members to the second house
2) their status as developing nations (NDI, 1996: 1).

creation of the NCOP. In the following chapter a general description of the NCOP will be provided.

Chapter 3

Structure of the NCOP

3.1 Introduction

This chapter provides a general description of the structure, committee system, method of selecting delegates and the information flow in the NCOP.

The legislative authority of South Africa is vested in Parliament that consists of two chambers, namely the NA and the newly constructed NCOP. The NCOP, along with the NA, is a component of Parliament. It represents the provinces to ensure that provincial interests are taken into account in national government. It does this mainly by participating in the national legislative process and by providing a national forum for public consideration of issues affecting the provinces (NCOP, Imperative of Co-operative Governance, 1998: 5). The constitutional order of the South African State has undergone tremendous changes with the adoption of the final Constitution in 1996. The most prominent feature of this Constitution, legislatively, is certainly the erection of a new second house – the NCOP.

The NCOP is a uniquely South African product largely modelled on the German Bundesrat and the Indian House of Provinces (NCOP Hansard, 18 September, 1997: 133). It is believed that these models were used because of their acclaimed achievements insofar as the protection of provincial interests are concerned (NCOP Hansard, 18 September, 1997: 134). The most important constitutional functions assigned to the NCOP are to represent provincial interest in the national legislative process and to play an oversight role in relation to the provinces and the Executive (Constitution of RSA, 1996).

The NCOP replaced the former Senate and came into operation on 6 February 1997, in terms of South Africa's new Constitution. The first fifty-four Permanent Delegates of the NCOP made and subscribed to the oath under the presiding of the President of the Constitutional Court Justice Arthur Chakalson. On 6 February 1997, Mr. Lekota and Mr. Ngcuka were elected to the positions of Chairperson and Deputy Chairperson respectively. The Constitution provides for two deputy chairpersons, a permanent and

a rotating position. Mr. Frank Mdlalose, who was the Premier of KwaZulu-Natal Province at the time, was elected the first rotating Deputy Chairperson of the Council. Mr. Mathews Phosa of Mpumalanga followed him in 1998. Mr. Manne Dipico, Premier of the Northern Cape replaced Mr Phosa in 1999. Advocate Ngoako Ramatholdi is now holding this position (Office of the NCOP Chief Whip 29 November 2000). It was agreed that the position of second deputy chairperson would rotate among provinces, commencing in 1997 with KwaZulu-Natal (NCOP, NCOP in Review, 1999: 5).

Ms Naledi Pandor replaced Mr. Ngcuka as Deputy Chairperson after his departure to the National Directorate of Public Prosecutions in May 1998. Ms Pandor was appointed as Chairperson of the NCOP and Mr. M.L. Mushwana as the permanent deputy-chairperson after the 1999 elections (NCOP, *NCOP News*, August 1999: 5).

3.2 Composition of the National Council of Provinces

The NCOP consists of a hundred delegates. There is a single delegation from each of the nine provinces and each delegation consists of ten persons. The composition of the delegation is:

- a. four special delegates consisting of:
 - the Premier of the province or, if the Premier is not available, any member of the provincial legislature designated by the Premier either generally or for any specific business before the National Council of Provinces; and
 - three other special delegates; and
- b. Six permanent delegates appointed in terms of section 61(2) of the Constitution (Constitution of RSA, 1996).

The Constitution also makes provision for the representation of local government in the NCOP. The delegates representing organised local government do not have voting status. They may however participate in the committee meetings as well as the debates in the chamber. According to the liaison office of the South African Local Government Association (SALGA) in Cape Town, representatives of SALGA in the NCOP are nominated as follows. SALGA, national, consists of fifty-four members – six delegates from the nine provincial associations. Out of these fifty-four members

the executive committee and the chief executive officer nominate members to represent SALGA on the national platform. These nominations are done on the basis of interest and subject knowledge. The nominated members then participate in the necessary committee meetings to negotiate SALGA's position (SALGA's Parliamentary Liaison Office, 13 May 1998).

Table 2: Party representation in the Provincial Legislatures based on the 1994 & 1999 elections

Parties	Eastern Cape		Mpumalanga		KwaZulu-Natal		Northern Cape		Northern Province		North West		Free State		Gauteng		Western Cape	
	'94	'99	'94	'99	'94	'99	'94	'99	'94	'99	'94	'99	'94	'99	'94	'99	'94	'99
ACDP					1					1		3			1	1	1	1
ANC	48	47	25	26	26	32	15	20	38	44	26	27	26	25	50	50	14	18
DP	1	4		1	2	7	1	1		1		1		2		13	3	5
UDM		9		1		1				1						1		1
PAC	1	1			1					1						1		
IFP					41	40									3	3		
NP	6	2	3	1	9	3	12	8	1	1	3	1	4	2	21		23	17
MF					1													
FA																1		
FF			2	1			2	1	1		1	1	2	1	5	1	1	
Number of seats	56	63	30	30	81	83	30	30	40	49	30	33	30	30	86	73	42	42

(Parliamentary Public Education Department, 1999).

The ANC was the majority party in seven of the nine provinces after the 1994 elections. This gave the ANC the majority vote in the NCOP (See table 2) The scene did not change much after the 1999 elections. The ANC still is the majority party in seven provinces. The number of seats that a party holds in a legislature determines the number of delegates of that party in the NCOP (See table 3).

3.2.1 Manner of appointment

One could argue that delegates from the NCOP are appointed through a combination of nomination, direct election and partial election (See discussion in section 2.2.1). Political parties represented in provincial legislatures, whose members are elected by the voters, nominate delegates on a proportional basis, which therefore reflects the composition of the provincial legislature.

The allocation of delegates to the NCOP is facilitated through legislation. The Determination of Delegates (Act 69 of 1998) provides a formula to determine the delegates represented in the NCOP. The Act is a continuation of where the Constitution left off regarding the issue of determination of delegates to the NCOP. It provides the formula for the determination of permanent and special delegates that a party is entitled to in the provincial delegation.

Section 2(1) of Act 69 of 1998 refers to section 61(1) of the Constitution. The formula contained in Section 61(1) is provided for in Part B of Schedule 3 of the Constitution, which reads as follows:

“ The number of delegates in a provincial delegation to the National Council of Provinces to which a party is entitled, must be determined by multiplying the number of seats the party holds in the provincial legislature by ten and dividing the result by the number of seats in the legislature plus one” (Determination of Delegates Act No. 69 of 1998).

Table 3: State of Parties in the NCOP

PROVINCE	PERMANENT DELEGATES										SPECIAL DELEGATES					
	ANC		NP		IFP		FF		DP		ANC		NP		IFP	
Year	'96	'99	'96	'99	'96	'99	'96	'99	'96	'99	'96	'99	'96	'99	'96	'99
Eastern Cape	5		1								4					
Free State	4		1				1				4					
Gauteng	3		1				1		1		3		1			
Kwazulu-Natal	1		1		3				1		2				2	
Mpumalanga	4		1				1				4					
Northern Cape	3		2				1				2		2			
Northern Province	6										4					
North West	4		1				1				4					
Western Cape	2		3						1		1		3			

(Public Education Department, 1999 also see Section 60 of the Constitution of the Republic of South Africa)

An example will be used to illustrate the various permutations in the composition of the NCOP. The example will only concentrate on the 1994 party representation to avoid duplication. These permutations are very important because it determine the composition of the second house (NCOP). The composition is important in the sense that national legislation could be amended and initiated by this house. The ANC for

instance had a two third majority in the NCOP even though they lacked that in the NA. The ANC could thus force the NCOP to push legislation through without consideration of other parties' views.

Example¹³

Western Cape Legislature = 42 seats in the legislature

Proportional representation of each party for 1994 were as follows:

NP - 23 seats

ANC - 14 seats

DP - 3 seats

ACDP - 1 seat

Freedom Front - 1 seat

The formula is applied as follows:

$$\begin{aligned} \text{NP} &= 23 \text{ times ten divided by } (42+1) \\ &= 5,348837209 \end{aligned}$$

Likewise the other figures appear as follows:

$$\text{ANC} = 3,255813953$$

$$\text{DP} = 0,697674418$$

$$\text{ACDP} = 0,2320558139$$

$$\text{Freedom Front} = 0,2320558139$$

On the basis of these calculations, the NP is entitled to five delegates and the ANC to three delegates (fractions are disregarded). The total number of delegates to the NCOP from a province must be ten. There are therefore two seats left, which still need to be allocated.

The next step is to apply the provisions of Schedule 3 Part B (1) of the Constitution which provides that the surplus, (as the case is above) "must compete with similar surpluses accruing to any other party/parties, and any undistributed delegates in the delegation must be allocated to the party or parties in the sequence of the highest surplus". That would mean the DP, which have the highest remainder left must

¹³ As prepared for a committee briefing by M. Brandt in conjunction with M. Bhabha, June 1998.

therefore get the next seat. (Fractions now relevant). The second highest fraction is that of the NP and they would therefore get the second seat.

The allocation now reads as follows:

NP = 6 seats

ANC = 3 seats

DP = 1 seat

This makes the full contingent of the provincial delegation, both permanent and special delegates. Section 2 (2) provides a formula for the determination of the number of permanent delegates accruing to each party.

In terms of Section 2(1) the DP is entitled to one delegate only and therefore section 2(2) does not apply to them. The ANC and the NP are entitled to more than one delegate; hence section 2(2) applies to them. The formula provided in Section 2(2) is applied as follows:

Determination of permanent delegates.

NP = total number of delegates times six divided by ten, fractions disregarded.
= 6 times 6 / 10
= 3,6 (disregard fraction)
= 3

Likewise the ANC

= 1,8 (disregard fraction)
= 1

The allocation of permanent delegates is thus as follows:

NP = 3

ANC = 1

DP = 1 (In terms of Section 2(1))

Section 2(3) provides the formula for determining the special delegates allocated to a party.

It is done as follows:

Total number of delegate due to party minus permanent delegates as determined in terms of section 2(2) and 2(3).

NP: 6-3

= 3

The NP has 3 special delegates.

ANC: 3-1

= 2

Section 2(3) states that if the number of permanent delegates due to a party is less than its special delegate component, the special delegate component must be reduced to a number at least equal to its permanent delegate component. Accordingly the figures of the NP need not to be adjusted, however, certain adjustments need to be made to the ANC's allocation. The ANC's permanent delegate component is less than the special delegate component. The special delegate component therefore must be reduced in favour of the permanent component. The ANC's final allocation will thus look as follows: Permanent delegates: 2

Special Delegates: 1

The final permutation of permanent delegates is thus,

NP = 3

ANC = 2

DP = 1

Total number of permanent delegates = 6

The rationale behind ensuring that the number of permanent delegates is always higher than the special delegates assigned to the party is to guarantee that the ruling party in a province always has the higher member of permanent delegates. In the instance where parties enjoy the same degree of proportional representation in the legislature the remaining seat is allocated to the party that received the higher number of actual votes in the provincial election between the two parties.

Section 2(4) of the Act provides for the instance where the total number of special delegates is less than four. The undistributed number of special delegates must then be allocated to the party/parties to whom delegates were allocated in terms of item 2 of Part B of Schedule 3 to the Constitution in the same sequence that delegates were allocated in terms of that item.

Example

Western Cape Legislature = 42 seats

NP - 6 seats

ANC - 6 seats

FF - 6 seats

IFP - 6 seats

DP - 6 seats

ACDP - 5 seats

PAC - 5 seats

Party X - 2 seats

In terms of Section 2(1)

NP = 1,395348837

ANC = 1,395348837

FF = 1,395348837

DP = 1,395348837

IFP = 1,395348837

ACDP = 1,162790697

PAC = 1,162790697

Party X = 0,465116279

Seven Parties are each entitled to one delegate in terms of section 2(1). Because seven parties result in a fraction higher than one, seven parties are entitled to have a permanent delegate. However, there are only six seats for permanent delegates. One permanent delegate must now become a special delegate. In section 2(4) it is stated that: “delegates of the parties that are entitled to only one delegate in the delegation of that particular province must, despite subsection (1), become special delegates”.

The party with the lowest remaining fraction should give up its permanent seat for a special seat. The lowest remaining fraction is that of the PAC and the ACDP. In a case like this, where a tie occur, the party (one of the two) which received the lowest number of votes in the provincial election between the two should give up its permanent seat and be allocated one special delegate seat.

There are now three remaining seats left for special delegates. The parties compete for these three seats in terms of Schedule 3 Part B (2) of the Constitution. Party X has got the highest remaining fraction and therefore a special delegate should be allocated to them. The second highest is that of the ANC, NP, FF, IFP, DP. They all have equal remaining fractions. The ACDP and the PAC falls out because they have the lowest remaining fraction. In this regard a policy decision is needed. The remaining two seats are allocated to the competing parties which received the highest actual votes in the provincial elections. The two remaining seats are shared by the two parties, which received the highest number of actual votes in the provincial election.

The final allocation will thus look as follows:

NP = 1

ANC = 1

DP = 1

FF = 1

IFP = 1

ACDP = 1

Total number of permanent delegates = 6

Special delegates:

PAC which received the lowest vote of the two parties = 1

Party X in terms of Schedule 3 Part B (2) = 1

DP which received the highest vote of the competing parties = 1

NP which received the second highest vote of the competing parties = 1

All the parties agreed on this formula (Select committee on Constitutional Affairs and Public Administration, 31 August 1997). According to Bhabha the reason for this is that the formula was already negotiated during the constitution making process as it is contained in Section 60 of the Constitution (Meeting of Select Committee on Constitutional Affairs, 31 August 1997). The table assistants in the NCOP confirmed that this formula is followed through in practice (Office of the NCOP Deputy-Chairperson, November 1999).

3.2.2 Term of Office

The term of office of NCOP delegates coincides with that of the members in the NA. The Constitution states in section 49(1) that the NA is elected for a period of five years (Constitution RSA, 1996). This means that unless in extraordinary circumstances like a military coup, NCOP delegates are appointed every five years.

3.2.3 Qualification and nature of members

A permanent delegate of the NCOP must be eligible to be a member of the provincial legislature (Constitution RSA Section 62 (1), 1996). The requirements spelled out further in the Constitution does not differ from any requirements laid down for persons to become public office bearers e.g. the person must not be an unrehabilitated insolvent, or be declared of unsound mind by a court of law (Constitution RSA Section 106 (c and d), 1996).

3.2.4 Interest groups or institutions that are represented by the NCOP

The constitutional mandate of the NCOP is contained in Chapter 4 of the Constitution. According to Section 42(4) of the Constitution the “National Council of Provinces represents the provinces to ensure that provincial interests are taken into account in the national sphere of government. It does this mainly by participating in the national legislative process by providing a national forum for public consideration of issues affecting the provinces” (Constitution RSA, 1996 also see discussion in section 2.2.4).

The method of selecting delegates, as discussed earlier (See section 3.2.1), plays a vital role in ensuring that provincial interests are taken into account at national level. To be able to analyse the constitutional powers of the NCOP it is necessary to explore the responsibility placed on the NCOP by the constitution with regards to co-operative governance.

3.3 Constitutional powers of the NCOP

A discussion on the responsibility of the NCOP with regards to its constitutional powers such as oversight and intervention powers requires also an understanding of the following:

- the concept of co-operative governance

- the role that the NCOP is expected to play within the context of co-operative governance.

3.3.1 Co-operative governance

Before we can explore the importance of co-operative governance for the NCOP we should take time to consider why this concept was so important to South Africa's constitution-makers. According to Mr. Valli Moosa, Minister of Constitutional Development at the time, there are three reasons why the concept of co-operative governance was introduced in the constitution making process of South Africa (NCOP, NCOP in Review, 1999: 4).

The first imperative was to ensure a single, united South Africa. The members of the Constitutional Assembly introduced the term of co-operative governance to reverse the apartheid attempt to balkanise the country. The second imperative is that it was seen as a tool to address patterns of inequity, characterised by distinct areas of affluence and poverty. The government and state had to be structured in a way that it would allow it to overcome these distorted patterns of development. The third imperative was to take the government closer to the people. The constitution makers avoided the creation of an over bureaucratic state, because they felt that it would not be sufficiently responsive to the citizens of the country. Hence, the need for a more decentralised administration.

It is clear that the need for an inclusive government existed. The South African state had to unite a nation divided along cultural, language and religious lines. These imperatives resulted in the codification of the concept of co-operative governance as expressed in Chapter 3 of the South African Constitution. This section states that:

“ All spheres of government and all organs of state within each sphere must co-operate with one another in mutual trust and good faith by -

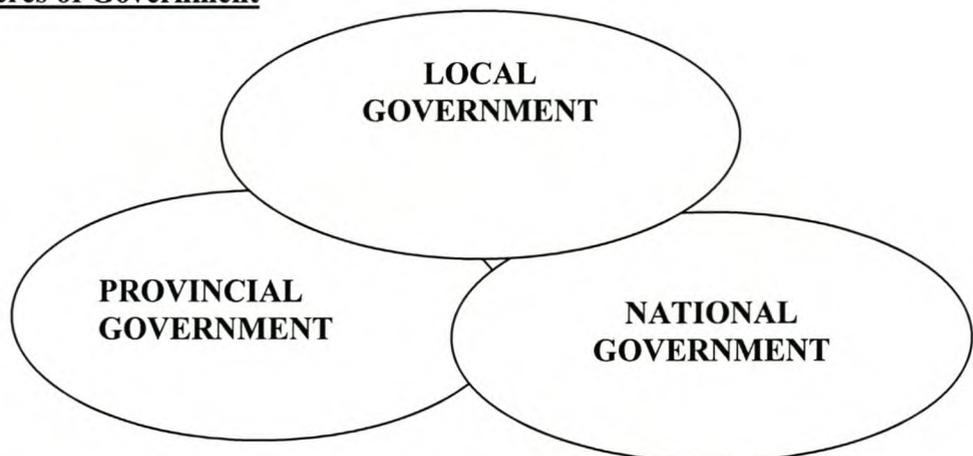
- *fostering friendly relationships*
- *assisting and supporting one another*
- *informing one another of, and consulting one another on, matters of common interests*
- *coordinating their actions and legislation with one another,*

- *adhering to agreed procedures and*
- *avoiding legal proceedings against one another” (Constitution RSA, 1996).*

Certain broad points about the principle of co-operative governance should be borne in mind on the topic of co-operative governance. First, is that the codification of co-operative government is a uniquely South African product, without precedent in any other country (NCOP, Imperative of Co-operative Governance, 1998: 18). Secondly, is it one of two inter-related concepts upon which the constitutional order was founded. The other concept is that of the notion of ‘sphere of government’. The White Paper on Local Government (1997: 26) illustrates the significance of these two concepts. The relevant section in this document reads that a:

“Sphere of government captures the idea that national, provincial and local government are each distinctive and have equal status and therefore must have constitutional leeway to define and express their unique characters. ‘Co-operative governance’ on the other hand implies that spheres are inter-dependent within the overall structure of the state, and so must work together to ensure effective government as a sum of its parts” (White Paper on Local Government, 1997:33).

Figure 1: Spheres of Government



3.3.2 Spheres of government

The South African Government is organized in three spheres of government (See Figure 1). It is important to note that the concept tiers or levels, which is commonly used in constitutional law, political science and public administration, are not used

(NCOP, NCOP in Review, 1999: 14). This provision has two important consequences. Firstly, the three spheres have constitutional protection, which means that local government may not be abolished by either the national or provincial governments. Secondly, the use of the concept “sphere” is not only symbolic, but is also important from both a theoretical and practical point of view (NCOP Hansard, 22 April 1998: 354). It emphasizes the non-hierarchical structure of the three spheres of government which in turn respects the right of each sphere to conduct its own activities within the framework of the constitution. In theory, the organisation of government is therefore more of a co-operative, matrix model than a rigid, top-down model as found in classical unitary states where provincial and local powers are based on decentralization of powers by the central government.

This approach to government captures three important properties of the constitutional dispensation for co-operative governance.

The first property of co-operative government is that it consists of a basket of substantive values to ensure good governance at the end. It also consists of procedural values that support the operating of processes and structures (Select Committee On Constitutional Affairs, 31 August 1997). The second is that co-operative government creates certain legal obligations such as avoiding legal proceedings against each other for all three spheres of government and organs of state (NCOP, Imperative of Co-operative Governance, 1998: 14).

Thirdly, the use of the concepts ‘co-operative government’ and ‘spheres of government’ requires a corresponding emphasis on defining roles, responsibilities, and relations (the three R’s) of and between the three spheres of government and the organs of state, at political and administrative levels (*Mayibuye*, 1997: 15). An informal policy structure, Minmec¹⁴, was designed to deal with this aspect of co-operative governance. Minmec consists of a Minister and members of the executive council of a province that deals with the relevant ministry. This informal executive leg of government is gaining more and more statutory power. At these meetings policy

¹⁴ Interdepartmental Ministerial Forum consisting of the national line functioning Ministers and the provincial Mec’s e.g. Minister of Education and the relevant MEC’s. These fora meet when it is deemed necessary, more or less four times a year (Setai, 1994: 13).

issues are discussed in detail and one can argue that it is here where the “seed of a new law is planted” (NCOP Hansard, 20 April 1998: 344).

Co-operative governance consists of three basic elements. The first element is the reduction of potential conflict amongst the three spheres of government. Competition for resources and the contest for political playground make conflict amongst the three spheres inevitable. The aim of co-operative governance is not to eliminate the competition, but rather to ensure that it is manageable (*Mayibuye*, 1997: 15 also see NCOP, *Imperative of Local Government*, 1998: 14).

Secondly, co-operative governance is about inter-sphere support. The interdependence of spheres asks for inter-sphere assistance to ensure effective performance. This means that the three spheres should assist one another in the carrying out of their functions. Inter-sphere assistance again calls for the co-ordination of government activities to eliminate wastage of resources that results from duplication (NCOP, *Provincial Comparative Study*, 1998: 17)

Lastly, co-operative governance is about the provision of a framework to resolve disputes. Mechanisms to ensure that disputes are settled in a constructive manner need to be developed. In chapter three of the Constitution the NCOP is charged with the important task of reviewing and mediating in the event of disputes between the various spheres. The Mediation Committee as referred to in Section 76(d) of the Constitution is an institutional mechanism that will avoid unnecessary legal proceedings amongst the spheres of government. By creating this mechanism litigation in the constitutional courts will by and large be minimised and local government will be spared enormous legal costs (NCOP, *NCOP in Review*, 1998: 12).

This brings us to the institutional mechanism employed to give substance to co-operative government – intergovernmental relations. The South African Constitution assumes that intergovernmental relations are about procedural relations such as structures and procedures. Indeed, intergovernmental relations are about the formal and informal institutional mechanisms of activities between spheres of government to utilise resources effectively and to avoid duplication and effort (NCOP Hansard, 17

September 1997: 312). A structure called the Intergovernmental Forum¹⁵ under the auspices of the Department of Constitutional Affairs bring the three spheres of government together to discuss and negotiate policy issues that directly affect the relationship amongst them informally.

The constitution also makes provision for ten representatives of organised local government to participate in the activities of the NCOP. These activities include making contributions at committee level as well as participating in debates at a plenary level. The local government representatives however do not have any voting rights (Constitution RSA, 1996). On 30 March 1998 SALGA participated for the first time in the proceedings of the NCOP. The reason for the delay in their participation was due to the fact that legislation was not in place to guide their participation. The Rules of the NCOP had to be amended accordingly (NCOP, Provincial Comparative Study, 1998: 11).

At the first national workshop (8-9 May 1998) of the NCOP in Cape Town, representatives of local government suggested to give organized local government voting rights. This issue requires a wider debate, because local government and provincial government emerge from different voting processes. Reservations were expressed about the appropriateness of equating the voice of a more representative structure such as a province with that of a more narrowly confined constituency like local government. This would create obvious constitutional challenges like the changing of the present electoral system (indirect representation) to a direct system of representation (NCOP, Imperative of Co-operative Governance, 1998: 4).

3.3.3 Accountability of the executive

The Constitution also expects the NCOP to fulfil an oversight function (See discussion in section 2.2 regarding the functioning of second chambers). In section 92 of the Constitution it is stated that the Executive is accountable to parliament. This means that the executive is accountable to the NCOP and that the NCOP may require a Minister, MEC or any national and provincial official to attend its hearings (Intergovernmental Relations Audit, 1999: 120). An institutional system called

¹⁵ Forum of Premiers where they meet to discuss matters of interest among themselves and with Ministers at national level. Meetings are called when it is deemed necessary more or less twice a year (Setai, 1994: 14).

“question time” has been employed by the NCOP to call the executive to account. On these days called “question days” (twice a quarter) Ministers are expected to answer individual questions from members in the NCOP. These questions are focussed on provincial concerns and prove to be a quite effective and active engagement of the executive and the members. Members can submit questions for written as well as oral reply to the ministries. In the case of oral reply members have the opportunity to ask follow up questions related to the initial question (Office of the NCOP Chief Whip, 5 October 2000). In the past several instances occurred where ministers failed to turn up for these special sessions. This created not only confusion and upset, but it also raised the question on how the NCOP is viewed by the executive (NCOP Hansard, 18 May 1998).

3.3.4 Intervention powers of the NCOP

Section 139 of the Constitution provides that "when a municipality cannot or does not fulfil an executive obligation in terms of legislation, the relevant provincial executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation" (Constitution RSA, 1996). It further provides that these appropriate steps may include the issuing of a directive describing the extent of the failure and stating the steps to be taken to meet its obligations. This could be followed by the assumption of the responsibilities of the municipality for the fulfilment of these obligations to ensure, amongst others, that the established standards for the rendering of a service are met (Constitution RSA, 1996). Section 139 requires the NCOP to review the intervention regularly. This denotes that the intervention is not permanent and must cease upon attainment of its objectives. The constitution states in Section 154 that:

“The national government and the provincial governments by legislative and other measures, must support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their duties.”

In the addition to this section 155(6) states that each province must by legislative and other measures:

- (a) *provide for the monitoring and support of local government in the province;*
and
- (b) *promote the development of local government capacity to enable municipalities to perform their functions and manage their own affairs.*

This give essence to inter-sphere support, as one of the elements of co-operative governance. Provincial authorities see the use of section 139 as the exception to deal with struggling municipalities. A provincial legislature member remarked in an audit by the Department of Local Government and Provincial Affairs that: “They are very well aware of the intrusive nature of an intervention” (Intergovernmental Relations Audit, 1999: 90). Despite the challenges such as cost implications for provinces, interventions are still regarded as the best way to deal with municipalities that fail to perform their executive function (NCOP, Provincial Comparative Study, 1998: 9).

On 20 April 1998 the NCOP approved the intervention of the Eastern Cape Provincial legislature in the municipality of Butterworth based on the fact that the municipality failed to maintain essential national standards or meet established minimum standards for the rendering of a service (Select Committee on Constitutional Affairs and Public Administration, 20 April 1998). Butterworth was the first intervention and all the other interventions that followed were modelled on the principles on which this intervention was based.

3.3.4.1 Terms of intervention¹⁶

The Constitution states in Section 139 that the relevant provincial executive may intervene in a municipality if that municipality cannot fulfil an executive function (Constitution RSA, 1996). On 19 March 1998 the Eastern Cape Provincial Government appointed two Administrators to take over the administration of the Butterworth Transitional Local Council in terms of the provisions of Section 139 of the Constitution. The Member of the Executive Council (MEC) for Local Government and Housing in the Province, on behalf of the Eastern Cape Government, sought approval for its intervention in Butterworth from the NCOP on 30 March 1998.

In terms of the provisions of Section 139(2)(c), the NCOP approved the intervention in the Butterworth Transitional Local Council to the extent that it is necessary to maintain essential national standards or meet established minimum standards for the rendering of municipal services. The Administrators were empowered to assume

¹⁶ Based on the Report of the Select Committee on Constitutional Affairs and Public Administration, 31 March 1998

executive and functional responsibility as envisaged in the Constitution, in the following areas:

1. Provision of Services

The Administrators had to ensure that:

- 1.1 the water supply is restored and maintained
- 1.2 water purification standards are met
- 1.3 electricity supply is maintained
- 1.4 refuse removal services are rendered on a regular and sustainable basis
- 1.5 sewage removal services are rendered on a regular and sustainable basis
- 1.6 all other services not currently being performed in accordance with the said minimum standards should be duly executed and that
- 1.7 the social, economic commercial and industrial viability of Butterworth is no longer threatened

2. Financial Management

The Administrators should ensure that:

- 2.1 rates, fees, service charges and other monies due and owing to it are collected
- 2.2 the financial obligations are met
- 2.3 the municipality is placed in a position to comply with the provisions relating to financial management as outlined in Section 10(G) of the Local Government Transition Act (Act 209 of 1993).

3. Administrative procedures

The Administrators should ensure that standards for effective, efficient and accountable administration are met and amongst others, that:

- policies and procedures for the use of the assets of the municipality are adhered to
- municipal services and assets are used solely for the purposes for which it was intended and
- the affairs of the municipality are conducted in an open, transparent, accountable and responsible manner

The powers of the Council were limited to the extent that the Administrators had assumed the duties of the Municipality to maintain essential national standards or

meet established minimum standards for the rendering of services. The Municipal Council was allowed to have regular communication with the Administrators, subject to the Management Regulations of the municipality. In terms of section 139(2)(d) of the Constitution, the NCOP “must review the intervention regularly and must make recommendations to the provincial executive with regards to the intervention” (Constitution RSA, 1996). A NCOP delegation under the leadership of the then Deputy Chairperson, Mr. B. Ngcuka visited the Butterworth community from 25 May 1998 to 26 May 1998. In their report they stated that the intervention should continue subject to certain recommendations made by them (Report of Select Committee on Constitutional Affairs, 1998: 2).

On 23 October 1998 the Municipality of Butterworth took the NCOP to court because of the nature of the intervention approved by the Council. The Court resolved that the present intervention must cease and that the Eastern Cape Provincial Government and the Municipality of Butterworth should draw up a new intervention (Report of Select Committee on Constitutional Affairs, 1998: 3). No application for a new intervention was made to the NCOP. According to the Procedural Unit in the NCOP the matter was resolved between the Provincial Government and the municipality without the involvement of the NCOP. Table 4 gives a summary of the current intervention until November 2000.

Table 4: Current Interventions as at November 2000¹⁷

	Town	Province	Date of Intervention	Date of Approval by NCOP
1	Warrenton	Northern Cape	17 February 1999	23 March 1999
2	Ogies	Northern Cape	11 May 1999	23 July 1999
3	Tweeling	Free State	19 July	23 August
4	Stilfontien	North West	3 August 1999	21 September 1999
5	Wedela	North West	3 August 1999	21 September 1999
6	Noupoort	Northern Cape	20 August 1999	21 September 1999

¹⁷ Procedural Unit in the NCOP October 2000. See also the Parliamentary ATC's on the mentioned dates.

The reasons for all of these interventions were thus based on the constitutional stipulation that a provincial executive may intervene into a municipality if that municipality cannot fulfil an executive function. In all cases except for Tweeling, where the councillors failed to meet, the financial situation led to the breakdown in basic services, which then led to an intervention.

3.4 The NCOP and the national legislative process

In reality the NCOP consists of two distinct legislative processes, one for bills that affect provinces (section 76 legislation) and another for those that do not (section 75 legislation). Before a government department tables a bill in Parliament, the State Law Advisors determine what process the bill must follow (Joint Rules of Parliament, 2000: 34).

Once a bill has been tabled in Parliament, it must pass through what is referred to as the “Joint Tagging Mechanism”. This committee, made up of Presiding Officers of each House of Parliament and the Legal Advisor to Parliament, then certifies the State Law Advisor’s classification of the bill e.g. 75 or 76 Bill. If there is a disagreement, the bill is referred to the Constitutional Court for mediation (Joint Rules of Parliament, 2000: 14). According to the Office of the Parliamentary Law Advisors, no bill has ever been referred to the Constitutional Court for mediation (Interview: Palmer, 10 December 1999).

3.4.1 Decision-making in the NCOP

Section 76 legislation, bills that are deemed to affect the provinces, requires provinces to formally arrive at a mandate. Each province is allowed one vote, and the legislation is passed with the support of at least five provinces. On the other hand Section 75 legislation, or so-called “national competency bills”, are voted on individual or party line votes (Joint Rules of Parliament, 2000: 14).

Bills that do not affect the provinces are those that relate to national functions (such as Defence, Foreign Affairs and Justice). When the NA has passed such a bill, it goes to the NCOP. Each delegate has one vote and can decide whether to vote in favour or against the bill without consulting the province (Joint Rules of Parliament, 2000: 24).

The process becomes considerably more complicated when a bill is deemed to “affect” the provinces. Legislative issues that affect provinces are listed in Schedule 4 of the Constitution and include bills on issues such as Welfare, Education, Health, Agriculture, etc., where national and provincial government have concurrent competence. These bills require that each province cast only one vote, and five provinces are needed to pass any bill (NCOP, Provincial Comparative Study, 1998: 13). Due to the fact that delegations vote according to the mandate of their provincial legislature, the legislative process in the NCOP must allow for the provinces to discuss the matter and formulate positions. At the same time provinces, through their delegations, need an opportunity to discuss matters with each other (Murray 1998: 17).

To allow proper consultation and discussion both within provincial legislatures and among provinces, the NCOP operates on a four-week cycle process (Murray 1998: 14 also see NCOP, Provincial Comparative Study 1998: 23).

A legislative cycle of the NCOP typically looks as follows.

- In the first week of the cycle the Department dealing with the legislation briefs the committee on the legislation. It is also during this week that information is disseminated to relevant stakeholders such as non-governmental organizations and lobbying groups. Legislation and information are also sent to provincial legislatures in order for them to start their own legislative processes.
- The second week is the so-called “province week”. During this week permanent delegates will return to their respective provinces to brief the relevant committee of the provincial legislature on the legislation. The committee then consider the piece of legislation in order for them to propose amendments as well as to bring out a negotiating mandate on the Bill.
- In the third week of the cycle the permanent delegates return to Cape Town. During this week the relevant select committee will meet again to discuss the proposed amendments of their respective provinces. After the negotiations

have taken place in the committee meeting, delegates will communicate the final deliberations on the Bill to their provinces. The standing committee in the provincial legislature will, after discussions, bring out a final mandate on the Bill.

- In the fourth week (plenary week) the house would meet to consider the legislation dealt with in the past three weeks. Provinces will at this occasion bring out their votes on the respective pieces of legislation. The provincial delegation will express their vote on behalf of the province. There is only one vote per province. When five provinces agree on a piece of legislation it is passed in the NCOP. The legislation is then referred to the NA.

The NA will consider the amendments made by the NCOP. If they agree on the amendments the Bill is sent to the president for promulgation. If they do not agree the following route is pursued.

3.4.2 Disputes between chambers

If the NA disagrees with the amendments made by the NCOP in the case of Section 76 legislation the Bill is referred to the Mediation Committee (Constitution RSA, 1996). The Mediation Committee consists of nine members of the NCOP and nine members of the NA (Joint Rules of Parliament, 1998: 29). If the Mediation Committee accepts:

- the NCOP version it goes back to the NA for consideration.
- the NA version it goes back to the NCOP for consideration.

If the Mediation Committee only agrees on its own version, the Bill is re-introduced in Parliament. If however the Mediation Committee cannot agree on any version, the Bill lapses (Constitution RSA Section 78,1996).

Section 75 legislation undergoes the same procedure as Section 76 legislation, except that the various parties in the NA would bring out their party vote and not the province as a multi-party institution. In the case where Section 75 legislation is referred to the Mediation Committee and the Mediation Committee cannot agree on any version the NA can revise it or pass the Bill with a two-thirds majority (Constitution RSA, 1996).

There was only one instance of disagreement on a piece of section 76 legislation. This disagreement will however be used as an illustration of the process. On 16 March 1999 the Harmful Business Practices Amendment Bill [B 138B – 98] became the first piece of legislation to be referred to a Mediation Committee. This committee were comprised of nine members from the NA and nine members of the NCOP. The Harmful Business Practices Amendment Bill [B 138B – 98] was passed by the NA on 6 November 1998 and submitted to the NCOP for approval. The NCOP passed the Bill on 24 February 1999, with a number of amendments agreed to by the Select Committee on Economic and Foreign Affairs.

Upon referral of the amended Bill to the NA, the house accepted the amendments to the Bill passed by the NCOP, except an amendment to Clause 2(b) of the Bill. The objection of the NA related to the inclusion of the words “in an open and transparent manner” with which the Minister would have had to comply in appointing members of the newly formed Consumer Affairs Committee. The bill was referred to the Mediation Committee on 16 March 1999 in terms of Joint Rule 133(1)(b) of the Joint Rules of Parliament, due to the fact that the NA rejected it. The Mediation Committee met on 17 March 1999 and heard submissions from the chairpersons of the relevant Portfolio Committee and Select Committee of the two Houses. Upon further deliberation, it was unanimously decided that the words inserted by the NCOP should be omitted. The Committee concurred that the Constitution adequately imposes the obligation by the executive as intended by the NCOP. The Mediation Committee therefore agreed to submit another version of the Bill (Parliamentary ATC, 23 March 1999).

Section 75 legislation can only be introduced in the NA. If the Bill is passed in the NA it is referred to the NCOP for consideration. Here the delegates vote as individuals and according to party lines. If the Bill is passed without amendments it goes to the President for consent. If the bill was amended by the council it is referred back to the NA. In the case where the NA disagrees with the amendments made by the NCOP, they can ignore those amendments and pass the Bill without the NCOP agreeing to it (Constitution RSA, 1996).

3.4.3 The committee system

There are nine select committees in the NCOP. These committees consist of a minimum of nine members to ensure that each province is represented in a committee. All nine provinces are represented in the committees. Parties are represented proportionally in the committees (NCOP Rules, 2000: 12).

Select committees in the NCOP are clustered. This means that they process legislation of more than one government department. According to the rules of the NCOP, Select Committees are established “to deal with legislation, oversight and other matters concerning the affairs of government” (NCOP Rules, 2000: 14). Since the NCOP guard over matters of provincial concern, it can be argued that these committees are established to scrutinise legislation and the workings of government from a provincial perspective. The Portfolio Committees in the NA as the name indicates, are attached to one specific Minister’s portfolio. One would thus have a Portfolio Committee on Justice and a Portfolio Committee on Constitutional Affairs in the NA. In the NCOP these two portfolios would be clustered as one namely, the Select Committee on Constitutional Affairs and Justice. As indicated in table four, all of the NCOP Select Committee Chairpersons always have been ANC members (See table 5).

Table 5: Select Committees and Chairpersons since 1996¹⁸

Clustering of Committees 1996-1999	Chairpersons 1996-1999	Clustering of Committees 1999-2004	Chairpersons 1999-2004
Constitutional Affairs and Public Administration: Constitutional and Provincial Affairs and Local Government	M. Bhabha <u>Party:</u> ANC	Security and Constitutional Affairs	J.L. Mahlangu <u>Party:</u> ANC
Education, Arts, Culture, Science, Technology, Sport and Recreation	I.W. Direko <u>Party:</u> ANC	Education and Recreation	D. Kgware <u>Party:</u> ANC
Social Services: Health, Home Affairs, Welfare and Population Development	Dr S.C. Cwele <u>Party:</u> ANC	Social Services	L. Jacobus <u>Party:</u> ANC
Environmental Affairs, Land Affairs, Tourism, Agriculture, Water Affairs and Forestry	R.Z. Nogumla <u>Party:</u> ANC	Agriculture and Land Affairs	Rev P. Moatshe <u>Party:</u> ANC
Public Services: Housing, Public Works and Transport	J.L. Kgoali- 1996-1998 N.E. Lamani 1998-1999 <u>Party:</u> ANC	Public Services	P.C.P. Majodina <u>Party:</u> ANC
Economic Affairs: Trade and Industry, Foreign Affairs and Mineral and Energy Affairs	H.J.P Lebona <u>Party:</u> ANC	Economic and Foreign Affairs	M.V. Moosa <u>Party:</u> ANC
Security and Justice: Defence, Correctional Services, Safety and Security, Intelligence and Justice	M. V. Moosa <u>Party:</u> ANC	Security and Constitutional Affairs	J.L. Mahlangu <u>Party:</u> ANC
Finance	S.L.E. Fenyane <u>Party:</u> ANC	Finance	Q.D. Mahlangu <u>Party:</u> ANC
Labour, Public Enterprises, Posts, Telecommunications and Broadcasting.	J.A. Foster 1996-1998 I. Mutsila – 1998-1999 <u>Party:</u> ANC	Labour and Public Enterprises	S.L.E. Fenyane <u>Party:</u> ANC

The Chairperson of each committee is selected out of the committee members by the members themselves at the first committee meeting of the committee (NCOP Rules, 2000: 20). Besides the select committees, ad hoc committees can also be established to deal with issues of urgency, like the ad hoc committee on the termination of pregnancies. Due to the wide spread public interest in this matter a special committee

¹⁸ Information obtained from the Office of the Chief Whip in the NCOP, October 2000

was established in 1996 to deal with this controversial piece of legislation (Parliamentary Public Education Department, 1999:4 also see Joint Rules of Parliament, 2000: 27).

Committees in the NCOP process legislation coming from the various departments. For example, the Committee on Constitutional Affairs and Public Administration will deliberate on pieces of legislation that originated within the respective departments. Committees may also organise public hearings¹⁹ on legislation or policy frameworks, if they deem it necessary. The committee can thus decide whether or not to have public hearings. This normally depends on the nature of the legislation. At these hearings the public, sectoral and other relevant stakeholders are invited to make submissions on the legislation on hand (Joint Rules of Parliament, 2000: 26 see also Parliamentary Public Education Department, 1997: 7).

3.5 Information flow

The success or effectiveness of the NCOP relies heavily on its ability to efficiently communicate with its members, partners in the provinces and SALGA. This is not an easy task considering that no single form of communication can be used to reach each and every individual (NCOP, Provincial Comparative Study, 1999: 25).

The NCOP Liaison Unit at Parliament has the primary responsibility of relaying information to the provinces and local government. This information is simultaneously sent to both Regis House offices²⁰, and to the provinces themselves (NCOP, NCOP Review, 1998: 28).

The quickest, and most accurate form of communication – electronic mail – is used by eight of the nine provinces. Eastern Cape is the only province that is not electronically linked to the NCOP liaison unit due to technical problems (NCOP Liaison Unit, 27 September 2000). Often the software packages are not compatible with those in use at Parliament. Communicating by fax is often not desirable since long legislative documents or minutes from meetings can consume reams of paper, and tie up phone

¹⁹ See *The Policy – making on a health issue: traditional healing in South Africa* by N. Mavunghu, 1998 for a full discussion on public hearings.

²⁰ Provincial liaison officers based in Cape Town, also see discussion in section 3.5.1.

lines and staff for hours. Additionally, the typeface may not be legible by the time it reaches its destination, as it will often be a third or fourth generation copy. Courier services that convey information from the NCOP to the provinces have also proven to be problematic, given the time constraints that provinces work under to deliver a mandate on time and the fact that the courier services operate only twice weekly (Interview: May, 13 March 1998). The result is that there is no uniform way in which information is transferred to the provinces and local government. Information is often duplicated, resulting in a time consuming and often confusing pattern. This confusion is exacerbated by a lack of understanding of the NCOP processes and procedures by provincial partners (Interview: Willemse, 23 March 1998).

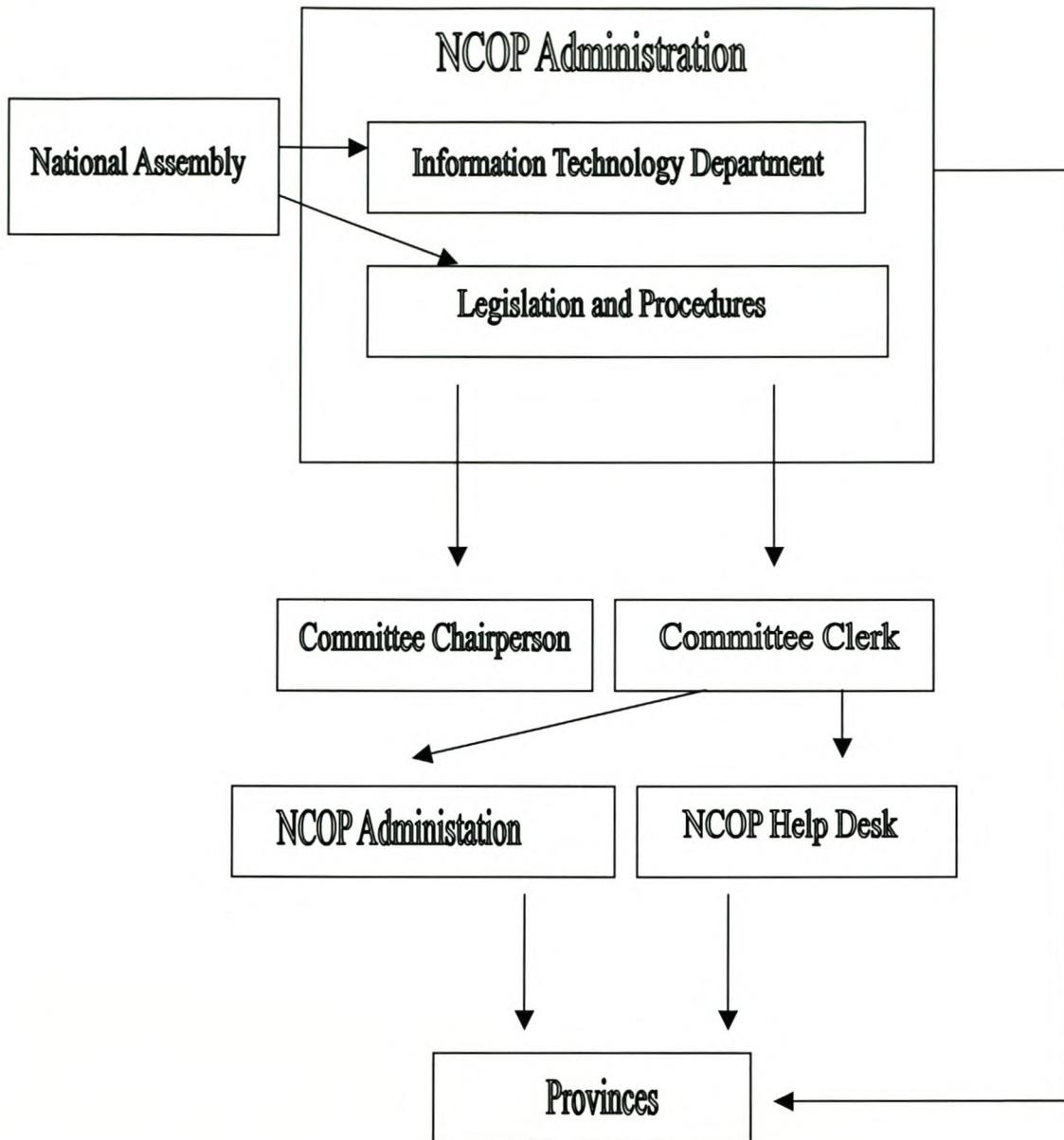
3.5.1 Regis House

In July 2000 eight out of the nine provinces had NCOP liaison staff in Cape Town at Regis House.²¹ These liaison officers are employees of the provincial legislatures, and their individual roles in the NCOP processes vary greatly based on the needs and structures of the provinces they serve (NCOP Liaison Unit, 22 October 2000). When originally created, the so-called Regis House offices were envisioned as being the focal point of provincial NCOP activity in Cape Town. Each province was allocated office space, basic office equipment, furniture and computers. Provinces were responsible for the hiring and salary of staff for these offices. The liaison officers liaise with their respective provinces on a daily basis via electronic mail and telephone (NCOP, Provincial Comparative Study, 1998: 24).

Table 6 is showing exactly what information is conveyed as well as the way in which it is transferred in the NCOP.

²¹ The Western Cape is the only province that does not have a Regis House office, due to their close proximity to the NCOP and a provincial hiring freeze that prevented the legislature from filling the position (NCOP Provincial Comparative Study, 1998: 24).

Table 6: Information flow in the NCOP



When the NA refers legislation to the NCOP it is first sent to the NCOP administrations, consisting of the Information Technology Department and the Legislation and Procedures section. From the latter it is then referred to the committee chairperson and committee clerk. The committee clerk submits status reports to the NCOP administration and the NCOP Help Desk, continuously while the committee is processing the relevant piece of legislation. Both these sections send off the information to the provinces.

3.5.2 Information sources within the NCOP

According to the NCOP Liaison Unit (22 October 2000) there are basically seven sources that deal with the official flow of information within and outside of the NCOP. Table 7 shows exactly what information is conveyed as well as the way in which it is transferred.

Table 7: Official NCOP Sources – Schematic Outline

Source/origin	Item	Mode of communication
1.Liaison Office	Programme	Faxed to province Internal Mail to Regis House Fax
	----- Bills passed by NA (In consultation with table assistant	----- Fax Courier; internal mail
	----- Back-up daily papers	----- Fax; internal mail
	----- Back-up documentation of rules/whips meetings	----- E-mail/fax
	----- Draft resolutions and order papers	----- Fax and internal mail to Regis House
	----- Amendments to bills (emergencies)	----- Fax; internal mail
	----- Requests for special delegates	----- Fax; internal mail
	----- Staff issues: agendas; minutes of meetings and workshops; staff contact info. Etc.	----- Fax; internal mail
2.Table assistants	Documentation re SALGA: cont. Info, govt. gazettes, etc.	----- Fax; internal mail
	Agendas and minutes of rules, joint rules and rules of sub-committees	Fax; internal mail
3.Committees	----- Letters to speakers re bills passed by NA	----- Fax; courier
	Committee documentation	Fax; courier
4.Legislation and proceedings	Status of legislation	Courier; internal mail to Regis House
5.Hansard stores	Daily papers, hansard departmental annual reports	Courier; internal mail to Regis house
6.Data section	Daily papers	E-mail

3.6 Conclusion

This chapter shows that the NCOP is a unique body created to facilitate provincial and local government participation in the national legislative process. The NCOP is a concrete expression of the principle of “co-operative governance” as set out in chapter three of the Constitution. The NCOP is a functioning partnership among the three spheres of government. The underpinning rationale of the NCOP is to ensure that national policy is sensitive to provincial needs and concerns. It also requires that

provinces do not act alone or in isolation. The NCOP institutionalises the principle of co-operative government by involving the nine provinces directly in the national legislative process. The process of building consensus among provincial delegations requires a great deal of consultation and communication. This communication ensures that each province is fully informed of the content of the legislation and able to consult public stakeholders and come up with a mandate in time. The result is an extremely complicated legislative process. This consultation demands an immense amount of co-ordination and synchronisation to ensure the successful running of the NCOP. The absence of effective communication systems would eventually result in the failure of the institution.

In the following and last chapter possible recommendations are considered to contribute in the better functioning of the institution.

Chapter 4

Conclusion

4.1 Introduction

The NCOP is still a fairly new institution. As it is often said about this institution, “It is still work in progress” (Murray 1998: 2). Like all of South Africa’s new democratic institutions the NCOP is also confronted with many challenges. In conclusion the study focus will be shifted to the various challenges that face this institution.

First, it has no direct precedent, in South Africa or in the world. It is a brand new institution. While it is modelled in some respects after the German “Bundesrat” it differs in important ways (See discussion in section 3.1).

Second, it is a legislature that bridges the spheres of government. Rooted in the provinces, by virtue of its purpose, membership and voting rules, it is also a part of the national legislature (See discussion in section 3.3.2). In this sense, it necessarily faces two directions, and the pressures arising from each may sometimes be in tension. As a bridge, communication must flow two ways: from the NCOP to the provinces, as it keeps provinces abreast of developments in the national legislative process; and from the provinces to the NCOP, as they communicate their voting mandates to the delegation in Cape Town (See discussion in section 3.6). This double aspect of the NCOP places enormous demands on communications systems, on the permanent and special delegates, and on their staffs.

Third, the requirement to develop and communicate mandates to their delegations means that provincial legislatures have become part of the national legislative system. They must be prepared to inform themselves about national legislation, consult their provincial electorate about it, and decide upon it – all in addition to carrying out their responsibilities of legislation and oversight on purely provincial matters. This is no easy task, given the distances involved, the background and preparation of members, their understanding of their role, and their resources (See discussion in section 3.5.1).

Fourth, the relationship between the NCOP and the NA might be described as 'legislative intergovernmental relations'. This exists in parallel with another critical set of intergovernmental relations, at the executive level (See discussion in section 3.3.1). Integrating these two is a major challenge, with important implications for the development of legislative-executive relations in both spheres.

Facing up to these challenges are not easy. Following is a list of recommendations to improve the technical requirements for the functioning of the NCOP.

4.2 Recommendations

- **Composition**

In an audit conducted by the Department of Local Government and Provincial Affairs it was found that permanent delegates do not function optimally as they lack the capacity and resources to interrogate the practical and policy implications of bills. According to an MP: "The NCOP is a place of patronage. The problem with the institution is that it is a repository for political parties. The result is that members don't actively participate in the NCOP" (Department of Local Government and Provincial Affairs, 1999: 128). This can be explained by the fact that permanent delegates are only appointed to the NCOP after an election. This uncertainty makes politicians aim for the NA or provincial legislatures (where the lists are drawn up before the elections) in the first instance.

The view is also held that special delegates do not add value to the NCOP. They hardly participate in the committees of the NCOP. A possibility that exists in this regard is to increase the delegates and make them all permanent delegates. Frustrations are expressed regarding the workload of permanent delegates on the one hand.²² On the other hand special delegates hardly have the time to do committee work in the NCOP (Department of Local Government and Provincial Affairs, 1999: 133). This increased number of delegates should also accommodate SALGA (Department of Local Government and Provincial Affairs, 1999:129). The composition of the NCOP could also become more provincial orientated if a new election system is considered.

²² Due to the clustering of portfolios in the NCOP members end up serving eight different portfolios. This lead to various problems like the attendance of meetings and public hearings as well as how to keep abreast of developments in all of these fields at the same time.

Currently the NCOP is dependent on provincial results for its composition although each province has an equal number of delegates notwithstanding variations in population density. Provincial legislatures are based on a single proportional representation list system. This means that there is no particular regard to regional interests within provinces. Proportional representation in provincial legislatures is constitutional required by the South African Constitution (Section 105 (d)).

A possible system that could be considered is the Additional Member System (AMS). This is a hybrid of the First-Past-The-Post (FPTP) and the List system. With AMS, electors have two votes each (Pomper, 1988: 34). They cast a FPTP vote for single candidate in the single constituencies. They also vote for the party list of their choice by placing a cross next to its name. When the constituency votes are counted the proportion of the seats won is compared with the proportion of the party votes casts. List seats are allocated to parties from the top of the list until there is as much of a match between the two proportions as possible. This would make provincial representatives directly accountable to the people and the province it serves. This could be a way in ensuring that the interest of the provinces are better served in the national legislative process.

- **Constitutional Powers of the NCOP**

A general view that is held is that the first NCOP (1997-1999) had not carried out its oversight function as competently as it was required to do. It is perceived that the NCOP Select Committees have been less active than their counter parts in the NA (Department of Local Government and Provincial Affairs, 1999: 124). A reason for this may be the lack of capacity. It is therefore recommended that the NCOP should give closer attention to the budget process and it should focus more on local government and its relationship to the provinces.

- **Oversight and role of executive**

In the past there was situations where Ministers did not turn up for question time allocated to them by the NCOP (*The Star*, 19 May 1998). During these sessions questions are put to Ministers to be answered orally. It created not only just anger

with the then Chairperson of the NCOP, Mr. Lekota (*Cape Times*, 19 May 1998) but it also raised the question on how serious the Executive perceives the NCOP to be. It seemed that the Executive argues that the question time in the NCOP is a duplication of question time in the NA. Sometimes the same questions are asked in both houses. To avoid this problem it is recommended that questions in the NCOP should be limited to issues of provincial concern.

The view that the first NCOP (1997-1999) had not carried out its oversight function, as it is required to do is expressed in an Audit by the Department of Provincial and Local Government Affairs (Department of Provincial and Local Government Affairs, 1999:120). They go further to say that part of the reason for this that there are too few permanent delegates with too many committee meetings to attend. To face the challenge of the lack of person power it is suggested that the NCOP must focus more on the budget process as well as the relationship between local government and the provinces. This would prevent a situation where the NCOP would get involved in a range of activities that are beyond the realm of focused provincial interests.

- **Future role of the NCOP in the legislative process**

Before the inception of the NCOP it was feared that the second house would merely become a rubber stamp for the NA. Up until now the fear has not been proved unjustified, because the NCOP's vote never differed from that of the NA so far. The NCOP are making amendments to bills, but never in its short history did it reject the version of the NA in its totality. The general view amongst the national executive is that the NCOP adds little value to the legislative process and that its legislative contributions have not been substantial (Department of Local Government and Provincial Affairs, 1999: 115). If provinces in the NCOP are voting according to party lines and not according to provincial interest the purpose of the NCOP is defeated. It is thus recommended that a more objective approach toward party lines be used when Bills concerning provinces are considered. This could be facilitated through the employment of a new electoral system or to give more political power to provincial governments.

- **Information flow**

Provinces liaise with the NCOP through different mechanisms. This sometimes results in confusion and duplication. For instance mandates will be faxed either to the Chief-Whip's office, Regis House, NCOP Liaison Office or the Office of the Chairperson of the relevant Select Committee. There is presently no standard mechanism in place to facilitate this area effectively. It is recommended that the existing roles and responsibilities in this field be re-assigned to offices, informed by the practical experiences of the past. A standard communication system based on sophisticated technological means needs to be developed in order for the institution to operate effectively. Members serving in this institution must also receive the necessary training in these communications systems.

- **Regis House**

This liaison centre perceived to be under utilised. According to the schematic outline of functions performed by the various information sources in the NCOP duplication of roles can be detected between the NCOP liaison office and Regis House. It is suggested that clear roles and responsibilities for this office should be re-allocated. This would require wide consultations with all the stakeholders involved, especially provinces, not just because they employ staff but it would have a direct effect on its liaison with the NCOP.

4.3 Concluding remarks

As described above, the NCOP is a unique institution with no precedent. Its successful operation requires careful co-ordination with nine provincial legislatures and the NA. Many challenges have been identified, some are political and require new political commitment and a change of mindset, other relate to infrastructure and physical resources. Some of the challenges and recommendations identified are small, requiring only minor changes to present practices, others are larger and to address them requires a substantial financial or organisational commitment. The larger question that however, remains is whether and how the NCOP will be able to implant itself fully into the national legislative system, as the Constitution envisages. This is a political question that cannot be fully answered.

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