PROMOTING PROVINCIAL INTERESTS: THE ROLE OF THE NCOP IN THE NATIONAL LEGISLATURE.

By

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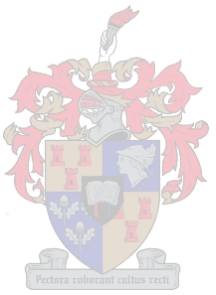

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DECLARATION.

I, the undersigned, hereby declare that the work contained in this 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 study's investigation focuses on the role played by the NCOP in the national legislature as the second chamber of parliament. It looks in particular at how the NCOP has managed in its deliberations, and as mandated by the Constitution to represent provinces. Subsection 42 (4) of the Constitution stipulates that; " The NCOP represent the provinces to ensure that provincial interests are taken into account in the national sphere of government" (RSA Act 108, 1996).

The question that the study seeks to answer is: does the National Council of Provinces in its deliberations work to represent the interests of provinces in the national legislature rather than those of the party in control of the province? In answering the research question the study's approach is qualitative in nature. In other words, data collection methods were confined to documents and other important sources such as NCOP Publications namely, the *NCOP News* and the *NCOP Review*.

Looking at the literature on second chambers, the study found that for second chambers to play an effective role in the legislature, the Constitution must equip them with adequate legislative powers. This means that the Constitution must give second chambers a veto on all Bills affecting their jurisdictions. Where a veto is non existent, irrespective of what legislative powers a second chamber may posses, if not elected directly by the electorate, it will suffer the accusations of rubber stamping Bills passed by the first house.

The NCOP falls in the same category of second houses with no veto over Bills affecting provinces. Its legislative powers on these Bills are blunted by the NA's two-thirds majority in the legislature and as a result remain a subordinate of the first house and that of the ruling party. Furthermore, administrative and communication problems experienced by the institution hinder it in its role of representing provinces. Equally so, the dominance of the ruling ANC in the provinces makes it difficult to determine whether mandates delivered by provincial legislatures carry the interests of provinces or those of the party in power.

Opsomming.

Die studie-ondersoek is gerig op die rol wat die NRVP (Nasionale Raad Van Provinsies), as die tweede huis van die Parlement. Die werk is spesifiek gerig op die manier hoe die NRVP vaar in hul debatvoerings, asook in hul verteenwoordiging van provinsies soos voorgeskryf in die Grondwet. Sub-artikel 42 (4) van die grondwet stipuleer dat "die NRVP verteenwoordig die provinsies om te verseker dat provinsiale belange in ag geneem word op die nasionale sfeer van die regering." (RSA Wet 108 van 1996).

Die vraag wat hierdie studie poog om te antwoord, is die volgende: wark die NRVP in hul debatsvoerings om die belange van die provinsies in die nasionale wetgewer te verteenwoordig inplaas van die belange van die party in beheer van 'n spesifieke provinsie? In die beantwoording van hierdie navorsings-vraag, is die studie benadering kwalitatief in aard. Met ander woorde – data invorderings metodes was beperk tot dokumente en ander belangrike bronne soos NRVP publikasies, naamlik die "NCOP News" en die "NCOP Review".

Na 'n bestudering van literatuur rondom die tweede huis van Parlement, het hierdie studie bevind dat vir die tweede huis om 'n effektiewe rol te speel in die wetgewer, die Grondwet dit moet toerus met genoegsame wetgewende magte. Dit beteken onder andere dat die grondwet die tweede huis 'n veto-reg gee oor alle wetsontwerpe wat hulle juridiksie raak. Waar 'n veto-reg nie bestaan nie, ongeag die wetgewende mag wat die NRVP mag hê, sal dit bieg gebuk gaan onder die beskuldiging dat dit 'n rubberstempel plaas op wetsontwerpe uitgevaardig deur die Nasionale Vergadering.

Die NRVP val in dieselfde katagorie van tweede huise wat nie 'n veto-reg het oor wetsontwerpe wat provinsies raak. Die NRVP se wetgewende mag oor hierdie wetsonwerpe word geskoei op die Nasionale Vergadering se twee-derde meerderheid en gevolglik bly dit ondergeskik aan die Nasionale Vergadering. Verder, administratiewe-en kommunikasie-probleme wat ondervind word deur die liggaam, hinder dit in die rol van verteenwoordiger van die provinsies. Gelykstaande hieraan, is die dominering van die bewindvoerende party – die ANC. In die provinsies is dit

moeilik om vas te stel of die voorskrifte van die provinsiale wetgewer werklik handel oor die belange van die provinsies self of die is van die party in die meerderheid.

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ABBREVIATIONS.

ACDP - African Christian Democratic Party.

ANC - African National Congress.

ATC – Announcement Tablings Committee.

AZAPO - Azanian Peoples Organisation.

DA- Democratic Alliance.

DP - Democratic Party before becoming DA.

FF - Freedom Front.

IFP - Inkatha Freedom Party.

IGR – Intergovernmental Relations.

JTMC - Joint Tagging Mechanism Committee.

KZN – KwaZulu-Natal.

MC – Mediation Committee

MEC - Member of the Executive Council of the province.

MINMEC - Ministers and Members of the Executive Council forum.

MPL - Members of the Provincial Legislature.

NA - National Assembly.

NCOP - National Council of Provinces.

NNP - New National Party.

PAC - Pan African Congress.

UCDP - United Christian Democratic Party.

UDM - United Democratic Movement.

CHAPTER ONE.
INTRODUCTION.

1. Problem statement.

There's generally little attention paid to parliament and in particular how it functions. Often we hear of parliament when either a member is involved in a scandal or a controversial Bill is under discussion. Other than that most of the general public know very little about parliament - its workings and component machinery. I refer in particular to the two chambers of parliament, namely the National Assembly (NA) and the National Council of Provinces (NCOP). The latter being the least talked about in political and academic circles.

Indeed, the role and significance of the NCOP in parliament remains one of the major challenges facing South Africa's new political system. "As a completely new institution, the NCOP must contend with the fact that few South Africans understand it. It has little to no profile in the public. Its role, purpose and *raison d'etre* are little understood – by citizens, by provincial legislatures, by members of the National Assembly and even by the delegates themselves" (Christina Murray, 1997:4). Not only the institution suffers because of its novelty, related to that is the fact that many MPLs lack the skills, knowledge and support necessary to deal with provincial legislative matters, making their roles in the NCOP less effective and from a provincial point of view unrepresentative.

The whole matter revolves around the NCOP's central role as defined by the constitution - that of representing the interest of provinces. In practice, there seem to be an overlapping tendency between the interest of provinces and those of political parties. The DA MPL in the Gauteng legislature pointed this out when he said that delegates must be able to articulate and "...negotiate between a party position and the perspectives of the province, and where there is a divergence of opinions between the view of the delegate's party and the mandate of the province, the delegate must morally and ethically be bound to represent the mandate given to him or her by the province" (*NCOP News,* 1999:4). The former Chairperson of the NCOP, Mosiua Lekota reiterated by saying, "many of the Premiers are very shy to come here and challenge cabinet ministers in the same party with them because of party loyalty, they

prefer to raise these issues in the confidentiality of party structures and resolve them there (*Parliamentary Whip*, June 1998:4).

As a body designed to promote the interests of provinces, the NCOP finds itself caught between two distinct roles. First, the Constitution states that the NCOP's role is to represent provinces. The same Constitution expects all spheres of governance, namely national, provincial and local to recognise the concept of intergovernmental relations. Where all government spheres work together to recognise the indivisability of the Republic in what is regarded as a unitary state. In view of all the above the question is; how does the NCOP manage to represent the different interests of provinces without undermining the indivisability of the Republic.

The above questions constitute the bedrock upon which the study's trajectory will be directed. The point of departure is whether the NCOP as a representative of provincial legislatures at national level is able to fulfill this role. Since under the present circumstances it is difficult to tell whether the NCOP does indeed represent the interests of provinces than those of political parties in control of provinces.

1.2 Purpose and significance of the study.

The purpose of the study seek to address the question of provincial interests and the role of the NCOP in representing provinces. In other words, does the NCOP on its deleberations work to ensure that national laws take provincial interests into account. Put somewhat differently, do provinces make full use of the opportunity afforded them by the constitution to participate in the formulation of national policy.

Furthermore, the purpose of the study is therefore to provide clarity on the NCOP's role as the second house of the national legislature. And whether the body has been successful in creating conditions for provinces to evaluate legislative proposals emanating from the national executive against those that prevail at provincial level. To elucidate whether the concept of the NCOP forms part of the democratic process envisaged in the constitution. Where power is decentralised and provinces are active participants in the law-making process at national level.

Accordingly, the study is significant in two respects. First it contributes to an understanding of the NCOP as the second chamber of parliament. Secondly it gives insight to the workings of the NCOP as a representative body of provinces. Thirdly, the study brings under the spotlight the constitutional mandate given the NCOP vis-a-vis provincial interests. Furthermore, the study can be regarded as an evaluation of what transpired from the negotiation process at Kempton Park regarding provinces. According to Chaskalson & Spitz (2000:122), "At the heart of the debate over provinces laid the question of the form of state, which was fundamental both to negotiators and to the future constitutional dispensation" . Has the NCOP therefore managed to give shape, clarity and meaning to that form of state?

Equally so, the study attempts to measure the distance travelled from the old Senate to the newly created NCOP. Whether the NCOP has overcome the "rubber-stamping" stigma once attached to the old Senate. According to Ngcuka, the NCOP former deputy chairperson; "the Senate tended to be a mirror image of the National Assembly. It tended to duplicate what was happening in the National Assembly..."(*NCOP Review*, 1994-1999). Representing no one and accountable only to party structures. The question that need to be answered is, has the NCOP transformed the role of the second house or has it " become like a senate with knobs on?" (*NCOP Debates*, 2000:1230). In other words, with the appearance of something different while doing the same thing it was set to rectify.

1.3 Research Methods.

1.3.1 Data collection methods.

The study's approach is qualitative in nature and geared to promote better understanding and insight to the NCOP's constitutional mandate in promoting provincial interests. The study begins with certain theoretical approaches to second houses from which, over the course of the research, specific lines of inquiry such as legislative powers of second houses are explored (Bridgman, 1999:38). It is often a qualitative approach that allows researchers this flexibility while also giving them the confidence that they have really understood what they are studying (Brandt, 2001:11). In addition to the above qualitative research has been advocated as the best strategy for exploring new or unknown phenomenon for better understanding.

Thus, answering the research question will require the use of documents and sources of data will revolve around parliamentary papers compiled in the form of Bills tabled before parliament. These sources will include NCOP Publications (eg *NCOP News*, *Reviews*, etc) which will be augmented by other sources outside of parliament such as newspaper articles, commissioned reports and conference papers by NGO's and/or research institutions whose subject matter is the NCOP or provincial interests. The choice of using documents stem from the following three justifications. Firstly, documents are important as a domain of signification or as Dorothy Smith in Mouton (1999:120) put it as "textual reality". This then make it easier for the researcher to analyse political phenomenon as "textual reality" by the use of documents through the preservation of records (Johnson & Joslyn,1995:252). Secondly, those writing and preserving the records are often unaware of any future research goal or hypothesis, which then eliminate biases from the records. Thirdly, a researcher using document analysis often save himself or herself some considerable time. For indeed, it is usually much quicker to consult printed government documents, reference materials, computerised data, and research institute reports than it is to accumulate data ourselves (Johnson & Joslyn, 1995:253).

The study will then cover the period between 1999 and 2003. The selection of this period is important for one specific reason. The NCOP officially came into being mid-term of the first parliament (February 4th, 1997). Which make it awkward for the study to conduct any coherent analysis from 1994 to 1999, since the NCOP was established after the adoption of the second constitution in 1996. After the adoption of the new constitution in 1996, the old Senate was officially dissolved giving way to the official luanch of the NCOP in 1997. Thus, the period between 1999 to 2003 covers a complete parliamentary term which render the NCOP more established than the one in the previous parliamentary term.

1.3.2 Data analysis.

While the Bill process constitutes the study's unit of analysis, the major and significant part of the study's analysis will focus mainly on section 76 Bills of the constitution. These are Bills that directly affect provinces. The Constitution identifies two kinds of ordinary Bills affecting provinces, namely section 76(1) and section 76(2). The distinction between the two relates to the procedure for the passing of such

legislation rather than the impact such legislation has on provinces. In principle section 76 (1) can only be introduced in the National Assembly, while section 76(2) can be introduced in the NCOP. However, ministers are not bound by the above principles as a result the choice for the House of introduction is discretionary. Mostly depending on how quick the Minister wants the Bill to be processed.

Data analysis will then be structured around the Bill process. Focusing on Bills introduced in the NCOP from 1999 to 2003. Selecting one Bill from each year. This will provide balanced analysis in terms of the varieties of the Bills and the different circumstances under which they were processed. In an orderly format the study will follow the Bill as it is tabled in the NCOP committees for deliberations. Purpose for this approach is to monitor how the Bill changes (e.g amendments and/or rejections) to a point where provinces confer their mandates.

1.3.3 Limitations of the study.

As Bromily, correctly stated that there are certain limitations that are beyond the researchers capacity, and though seen by some as frivolous, may actually have a tremendous effect on how the study unfolds, take shape, and ultimately becomes a success story (Sipho Nsingo, 1996:15). Accordingly, the study's limitations will concern the following; there is a great possibility to rely on secondary sources of information as indicated in the previous section. Secondly, since both parliament and the NCOP run their own websites – a high degree of using these sites as sources of information exists especially with regard to committee minutes and mandates. This includes the site run by the Parliamentary Monitoring Group (PMG). The latter has done and continue to do extensive work on the legislative activities of parliament of which Bills and committee deliberations are of major focus.

1.4 Key concepts.

1.4.1 National Council Of Provinces.

The NCOP replaces the old Senate that was brought into being by the *South African Act* of 1909. The difference between the old Senate and the NCOP is that the old senate was often accused of duplicating the work of the National Assembly and of "rubber stamping" Bills initiated by the first house. Conversely, the NCOP now has at its disposal certain legislative powers guaranteed to it by the constitution. According

to the Constitution (Act 108 of 1996), the NCOP may "consider, pass, amend, propose amendments to or reject any legislation before the Council". In terms of composition it is composed of single delegation from each province consisting of ten delegates. The ten delegates are; 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 and six permanent delegates appointed within 30 days of an election of a provincial legislature (Act 108, 1996).

The NCOP is the second chamber of parliament, the upper house of the National Assembly. During the negotiations around the transformation of South Africa, the idea of a more decentralised government was incorporated to accommodate parties such as the IFP and the then National Party who had an interest in protecting 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 (Chakalson & Spitz, 2000:135). According to Brandt (2001:9), one could conclude that the NCOP was a result of a compromise based on the original proposal of the ANC of a Council of Provinces. The NCOP therefore accommodated the more federal nature of provinces supported by parties such as the IFP and the NP.

1.4.2 Bills affecting provinces.

Subsection 76 of the constitution empowers the NCOP to consider Bills that may have an impact on provinces. Such Bills include legislation in areas such as agriculture, education, housing, health services, etc. The process requires such Bills to be passed by the NCOP. The supporting vote of five provinces is sufficient. However, if the NCOP and the National Assembly do not agree on such a Bill, the Bill must be sent to the Mediation Committee established to facilitate the resolution of disagreements between the two chambers. If, in spite of attempted mediation, the two chambers cannot come to an agreement the Bill lapses unless the Assembly passes the Bill with a supporting vote of at least two thirds of its members. In other words, even on Bills affecting provinces the NA because of its two-thirds majority can override the NCOP.

1.4.3 Provincial interests.

Subsection 42 (6) of the Constitution state that; "The National Council of Provinces represent the provinces to ensure that provincial interests are taken into account in the national sphere of government". There is in the constitution no specific example of what constitute provincial interests nor in the documents that explain the role of the NCOP. The whole exercise is made more cumbersome by the fact that provincial interests may change from time to time depending on the Bill tabled before the house. For example, a province might support the Gun Control Bill believing that such an Act will reduce the use of unlicenced firearms and crime in general. Another province might reject certain clauses of the Bill, that game-hunters, gun traders and individuals who use guns for protection reasonss are inversely affected by these clauses and propose amendments.

In that sense, delegates from their respective provinces with such mandates will be regarded as conveying the interests of provinces. Accordingly, the study will treat provincial interests to mean the mandates given to provincial delegates by their respective legislatures. In other words, once a province confer a mandate to its delegate for a particular Bill, such a mandate will be regarded as reflective of the province's interests.

1.4.4 Promoting provincial interests.

The study distinguishes between representing provincial interests and promoting them. For example the *Concise Oxford Dictionary* (1995:1167) explain to represent as to "stand for", "symbolise", "fill the place of", "be a substitute or speak for". Behind these assertions lie huge complexities and ambiguities: in what sense, and under what circumstances, does one entity "stand for" another, and on what grounds can one say that representation is or is not taking place (Bogdanor, 1987: 529). Corollary, representation is a matter that can only be established by evidence, and does not necessarily follow as a matter of logic (Bogdanor, 1987:531).

1.4.5 Provincial legislature.

In the three spheres of government, namely national, provincial and local, we have mainly two legislatures. These are the national legislature and provincial legislatures and at local level we have municipal councils. Unlike in the national legislature there

are no chambers (e.g NA and NCOP) in provincial legislatures except the ruling party (alone or in coalition) and opposition parties. Provincial governments are formed by parties that receive the highest votes during general elections where voters cast two ballots; one national and the other for provincial legislatures.

The function of provincial legislatures as stated in section 104 of the Constitution is to pass legislation for provinces on any matter related to schedule 4 of the constitution. Such matters include areas in health, housing, language, police, casinos, etc. In the NCOP these matters are classified as falling under section 76 of the constitution and are treated as Bills affecting provinces. Another function of a provincial legislature is to draft a constitution for that province. That is, if the legislature deem it necessary to do so. According to subsection 104 (3) of the Constitution such a regional constitution cannot override nor contradict the national Constitution (RSA Act 108:1996).

1.4.6 Control over the legislative process.

Control over the legislative process refers to the bicameral nature of the national legislature. The role played by each house in the legislative process and the powers allocated each by the constitution. In the South African case for example Bills are introduced in the National Assembly while only those affecting provinces are introduced in the NCOP. The NCOP in that sense has control over the processing of Bills affecting provinces, while the NA has control over all the other Bills. However, the NCOP's control over Bills affecting provinces is blunted by the NA's two-thirds majority. In other words, the NA can override the NCOP by a supporting vote of two-thirds.

1.5 Chapter outline.

The study's enquiry is addressed in three chapters. Chapter one mainly outlines the methodological framework of the study. It begins by giving an overview of the problem to be researched and proceed by explaining the key concepts employed in the study. It continues by giving an overview of the study's trajectory and the methods employed in answering the research question.

Chapter two constitute the literature review of the study. It begins by assessing the existing literature on the NCOP and proceed by sketching the theoretical basis on bicamerals worldwide. The focus is not on federal or unitary states but on second chambers. The chapter look at countries with bicameral legislatures such as the United States of America, Switzerland, the United Kingdom, etc. Again the aim here is not to compare countries than to give examples. Furthermore, this chapter attempt to reveal the reasons behind second houses; their roles and function inside parliament. Furthermore, the chapter focuses on the composition, representation and legislative powers of second houses. The main purpose being to illustrate how the South African second chamber fit within the theoretical framework of bicameral legislatures internationally.

Chapter three begins by articulating the legislative powers of the National Council of Provinces and proceed by focusing on the body's legislative work in promoting provincial interests. The chapter start off as descriptive and proceed with a critical analysis of how mandates are conveyed and whether they carry within them the interests of provinces. Furthermore, this chapter also covers issues such as committee deliberations around proposed Bills and the mandates as issued by each province. Chapter four lookk closely at the NCOP's role with respect to other aspects of the Constitution namely, amendments and intergovernmental relations. The last and final chapter illuminate on the main findings of the study before rounding off with some concluding remarks and recommendations.

CHAPTER TWO.
LITERATURE REVIEW.

2.1 Introduction.

Research on the NCOP is scant and the institution is fairly new and developmental in character (Murray 1999; Mbeki's Conference Speech, *9 May* 1998 and Brandt, 2001:21). Most within and outside the NCOP regard the institution as "work in progress" (*PPP News*, 1998:7). The then New National Party in its Parliamentary Audit in 1997 alluded to the same concern: "The NCOP is a new, developing institution and in the light of this the analysis of the activities of the NCOP is not extensive as that of the National Assembly" (NNP *Parliamentary Audit*, 1997:39). For any researcher on this subject this poses a number of challenges. Firstly, literature on the NCOP is confined to government publications and commissioned reports. Secondly, as a new institution the NCOP has "little or no profile" which makes it less attractive as a subject of study. As a result any academic endeavour on the NCOP is likely to be influenced by the scant literature and the gradual development of its character.

The NCOP may be new and unique in the category of bicameral legislatures. As a second chamber however it shares certain similarities with second chambers found in other countries. That is why before anyone can understand the workings of the NCOP or any second chamber, he or she must first understand the general characteristics of second chambers in other countries (Brandt, 2001:16). This brings familiarity with trends around the world and how in particular the NCOP fit within that scheme of second chambers. Yet, before we carry on with the task it is also important that we first clarify South Africa's status as unitary or federal state.

South Africa does not qualify as a federal state. According to Mezey (1990:14), "federalism is a method of dividing powers so that the general and regional authorities of a state each within a specific sphere can act in a co-ordinated way and yet independently of one another. The smaller circles and communities are given the greatest possible powers to undertake their own affairs and the attitude is that self-government is better than being well governed". Although the South African governance system is divided into three spheres, namely national, provincial and

local. The powers allocated to provinces do not accord each province full responsibility in running its own affairs.

For those reasons South Africa cannot be regarded as a federal state. Its governance system is decentralised but not federalised. According to Joachim Wehner (1997:7), "From a legal point of view, it bears all the essential features of a federal state, such as stipulated provincial powers, a rigid constitution and an independent constitutional court. Nevertheless, the *de facto* result compared to federal states can best be described as a quasi-federal arrangement".

As a nonfederal state with a second chamber South Africa's national legislature faces huge challenges both theoretically and practically. The fact that there's no prototype in which the NCOP can measure itself against makes the challenge even more cumbersome. Equally so, is the lack of understanding among NCOP members on what role the institution is expected to play at national level. Whether to challenge the first house on issues affecting provinces or simply allow the NA to impose its will over provinces. To equip members and counter some of these challenges, parliament has commissioned several studies to individuals and organisations to improve the NCOP's role within parliament.

Such studies include a report by Professor Murray on the NCOP's oversight role. A study regarded as a landmark in crystalysing the role of the NCOP (*NCOP Review*, 1994-1999). The study elaborated more on how the NCOP can use its constitutional powers to hold the executive accountable. The point being to send the message to cabinet and MPs in general that the NCOP was different from the old senate. That it had certain powers that were guaranteed to it by the constitution. The study conducted by the National Democratic Institute (NDI) was different in approach in that it compared the role and structure of second houses in bicameral legislative systems in selected countries (*NCOP Review*, 1994-19999). In its enquiry the study found that the NCOP cannot be compared with any other second house in bicameral legislatures. The closest being the German Bundesrat (NCOP News, 1998:5). Both these reports remain useful points of reference on any study whose subject matter is the NCOP.

Commissioned studies have been supplemented by ongoing initiatives in the form of workshops. And it has been in these workshops where NCOP members really got to understand what was expected of them. For example, in a two-day workshop held at Medicina Centre, Parow the then Deputy President Thabo Mbeki addressing delegates lambasted: "The experience of the NCOP would seem to indicate that provinces are failing to make use of the possibilities afforded them through the NCOP" (*Conference Speech*, 8/9May 1998). He maintained that provinces should do more than they were currently doing to ensure that their interests were taken into account at national level.

In this workshop deligates also deliberated on whether NCOP members should focus on all Bills or only those considered to have a direct impact on provinces, namely section 76 BIlls. This proposal was raised after concerns about provincial legislatures having little or not enough time to deliberate on all Bills referred to them by the NCOP. While delegates showed differing views on the matter it was however agreed that the NCOP should consider all Bills brought before it by parliament yet pay due regard to section 76 legislations as guided by the Constitution.

In academia, a growing interest in the NCOP is slowly gaining momentum. For example, in her descriptive study of the composition and workings of the NCOP titled; "From the Senate to the NCOP" under the subheading, "The future role of the NCOP in the legislation process" Brandt remarks; "If provinces in the NCOP are voting according to party lines and not according to provincial interests the purpose of the NCOP is defeated" (2001:21). Brandt is highlighting one of the most important aspects on the NCOP's role. Indeed, the question whether provinces vote according to party rather than provincial interests remain one of the determining factors of the functionality of South Africa's decentralised governance system.

Concordantly, while the issue of provincial interests remains pivotal in the work of the NCOP some studies have focused on individual provinces. For example, Cishe's study (2001) laments the lack of effectiveness on the part of the Mpumalanga's delegation. His study titled; "Improving the Effectiveness of the Mpumalanga Representation in the NCOP" focuses on mandates conferred to delegates. Cishe (2001:18) identifies the clustering of Bills with one single mandate as unprofessional and ineffective in promoting provincial interests. Consequently, he recommends that

mandates should follow a certain procedure. That they have to be written on paper bearing the letterhead of the Provincial Legislature. Signed either by the provincial Speaker or the Secretary to the legislature. The content of the mandate should reflect the conferring institution, the date of conferring, the date of plenary in the NCOP and the issue to be voted upon.

The implication is that provinces do not deliberate thoroughly on Bills either due to time constrains or lack of capacity. If indeed provinces don't pay proper attention or fail to identify their specific provincial interests. It is unlikely that the NCOP will effectively promote their interests. In some quarters the belief that the old senate, (despite all the negatives it was known for) was better than the present NCOP still persist. Comparing the NCOP to the old Senate, Godfrey Bhengu the IFP MP asserted that his party had favoured retaining the old Senate since in his view it enjoyed "full legislative competence with respect to all national legislation in areas of provincial competence" (*NCOP Review* 1994-1999). Sharing the same view is Steven Friedman (1999:2) in his article; " Power to the provinces". Friedman asserts that before the 1996 Constitution provinces had some leeway to make regional laws. Since then real law-making now takes place in the NCOP or at least in theory.

He argues that, while provinces are supposed to debate national laws that affect them (as indicated by section 76 of the Constitution), the complexity of the Bills and the speed with which they must be processed often makes it impossible for legislature members to give their NCOP delegates a considered mandate. In other words, time constrains contribute to poor deliberations by provinces and in turn to unconsidered mandates. Some provincial legislatures have complained about the programme of the NCOP. Arguing that it is not synchronised with that of provinces. That when changes are made provinces are not informed in time. According to Murray & Nijzink (2002:52), "this is perhaps the most persistent concern of provincial politicians – especially politicians from those provincial legislatures which have made progress in establishing annual programmes". According to Murray & Nijzink (2002:48) some of the concerns raised by provinces include the following;

- Cycles are too short for most pieces of legislation

- Programmes are often changed or abandoned
- The abolition of a clear 'provincial week' in the programme limits the ability of permanent delegates to liase properly with their provincial legislatures.
- Programmes are not properly co-ordinated with provincial programmes.

Concerns about the length of the programme persists although many permanent delegates are under the impression that the problems are more imagined than real. Permanent delegates also point to inefficiencies in provincial timetabling and suggest that problems with the length of the programme are often the result of bad provincial planning rather than the NCOP programme (*NCOP Review*, 1996-1999). Nevertheless, the fact that two of the provinces, namely Gauteng and the Western Cape with the most well-established timetabling and the best record of engagement with the NCOP put the NCOP programme high on their list of concerns suggests that the problem is more serious than national politicians admit (Murray & Nijzink, 2002:53).

A more optimistic view of the NCOP is reflected in Joachim Wehner's study (1998); "What is the future of South Africa's provinces?". Wehner notes; "While the NCOP has only been in existence for little more than one year, there are some indications that the Council, despite technical hitches and a still weak institutional capacity will facilitate co-operation between provinces with government from different political parties" (1999:14). Elsewhere in his discussion paper Wehner points out, "...the NCOP is the only transparent and open body, formalised by the constitution in this array of institutions. The configuration of interests whether common provincial interests will develop over party interests –which will then determine the extent of power the NCOP can exercise over law-making" (1994:14).

In view of all the research done prior to this study, this paper look at the provisions of the Constitution as pertains to the role of the NCOP. The Constitution makes it clear that the NCOP should represent provincial interests not party political interests. Section 42 (4) stipulates that, "the NCOP represents the provinces to ensure that provincial interests are taken into account in the national sphere of government" (RSA Act 108, 1996). Professor Gerhard Erasmus concurs by saying; "Provincial

delegations represents their provincial legislatures, not a political party. That is why each delegation generally has only one vote in the NCOP and why such a delegation must obtain a mandate from its own provincial legislature" (1997:5).

The study seek to answer the question: Does the National Council of Provinces in its deliberations work to represent the interests of provinces in the national legislature? The question resonate concerns raised by former Chairperson of the NCOP Naledi Pandor when she said: "We will also have to ask ourselves whether, in our practical reality we have trully sought to become an effective forum for the tabling of provincial interests. We will also have to ask ourselves whether those interests, when tabled are reflected in the legislation that emerge and in the manner in which our committees conduct their work and in the decisions that we take" (*NCOP News*, September:1999).

The objectives are to bring clarity to the function and role of the NCOP as far as provinces are concerned. To bring to light the process by which the NCOP promote or fail to promote provincial interests in the national legislature and also; to make known the obstacles that make the promotion of provincial interests cumbersome or less successful. Finally, to bring under the spotlight the NCOP as an institution and possibly stimulate further research on the institution.

2.2 Patterns of representation for second chambers:special interests.

Be it a bicameral or a unicameral legislature one thing for certain is that members of the legislature represent some constituents. For example, where legislature members are elected by popular vote, the constituents are the voters. In cases where members are indirectly elected by their federal or provincial legislatures, their constituency are indirectly the regional voters. According to Manin (1972:72) the purpose for representation is to "refine and enlarge the public's views by passing them through the medium of a chosen body of citizens" to give legitimacy on any decision taken by the government. The form of representation often depends on how large or small a country is in terms of population size. In some countries representation is the same while in others population size of the state or regions determine how many representatives are allowed for each province or region.

For example in the United States of America the Senate is composed of two members from each of the fifty one states (Polsby,1990:76).The notion of equal representation in the senate was to prevent legislative tyranny by the larger states over the small ones (Rieselbach, 1990:71). According to Rieselbach (1990:72), the United States pioneered equal representation in the second chamber when in 1787 in the Convention in Philadelphia negotiators insisted on the same number of votes in the upper house as the larger States threatened to disrupt the proceedings, until settled by allowing each State two votes regardless of status or population.

In terms of strengthening checks and balances within assemblies and between executives and assemblies, bicameralism has usually been seen as a central principal of liberal constitutionalism (Heywood, 1997:244). This was the case in the debates amongst the 'founding fathers' who drew up the US Constitution in 1787. Whereas earlier second chambers, such as the British House of Lords, had developed as vehicles through which powerful economic and social interests could be represented in government, delegates such as James Madison saw the US Senate as a means of fragmenting legislative and as a safeguard against executive domination (Heywood, 1997: 244).

In South Africa, the nine provinces, each is represented by ten delegates. According to the Constitution (Act 108, 1996) the ten delegates are; four special delegates consisting of the Premier, three other special delegates and also six permanent delegates elected in accordance with the outcome of the general elections. Subsection 61 (3) of the constitution states that a legislation must ensure the participation of minority parties in both the permanent and special delegates. The territorial or population size has no bearing on the number of delegates. All provinces have an equal number of delegations.

The Swiss system follows the same pattern: two representatives for each canton in the upper house. In the Australian Senate provision is made for thirty six members, six each from the six states despite population differences. Conversely, in the German second house representation follow population size (Manin, 1997;34). There are sixty-nine members in the second house. The Lander with more than 7 million inhabitants have six seats (Baden-Wurttemberg, Bavaria, Lower Saxony, and North Rhine-

Westphalia). The Lander with populations of between 2 million and 7 million have four seats (Berlin, Bradenberg, Schleswig-Holstein, etc).The least populous Lander, with fewer than 2 million inhabitants receive three seats each (Blair, 1993:61)

Second chambers are generally classified as either unicameral or bicameral. The former refers to one chamber while the latter refers to two chambers. Unicameral legislatures are associated with non-federal systems of governance. Where power is centralized and concentrated at national level. Bicamerals on the other hand have strong links with federal systems of governance. Lijphart in his study, *Patterns of Democracy* (1999:213) points to the fact that there's a strong empirical relationship between the bicameral-federal and unicameral-unitary dichotomies. In his view all "formally federal systems have bicameral legislatures, whereas some non-federal systems have bicameral and others unicameral parliaments" (1999:213).

According to Rieselbach (1990:4) fifty-five of the eighty-three countries surveyed by the Inter-Parliamentary Union in 1986 utilized a unicameral system. Of these unicameral systems, the majority were unitary countries, with political power typically concentrated in parliament at national level. Accordingly (Rieselbach, 1990:3), countries which are small in size are more likely to have one chamber rather than two, as the problem of balance of political power is less difficult to solve than it is in larger countries. Sometimes efficiency is cited as the primary reasons for a unicameral legislature, particularly for countries that are ethnically and socially homogenous. Equally so, unicameral advocates argue that one chamber structure expedites the legislative process. Since second chambers tend to delay the legislative process by amending or rejecting Bills referred to them by first houses.

Bicameral legislatures on the other hand are most frequently found in federal states since they accommodate the dualist structure of the state; with a means of representing both popular national interests as well as state and (or) regional interests. Bicameral legislatures are suitable in countries with large population sizes and where citizenship is composed of ethnically diverse groups (Blair, 1967:35). The primary reasons cited for bicameral legislatures include adequate territorial representation, stability, legislative-equality through extended deliberations, and protection against the 'tyranny of the majority'. In general, second chambers are well known for slowing

down the legislative process. Thus, if the goal is efficiency then, second chambers make for inefficient legislative processing. Conversely, if the goal is improved quality of legislation and increased representation, then the inclusion of a second chamber is an appropriate institutional means to achieve such ends (Leroy, 1994:56).

Noteworthy in these categories are non-federal bicameral legislatures and an example of a non-federal bicameral legislature can be found in South Africa. Though the country is decentralized into three spheres of government and the second chamber represent the different provinces. The Constitution state that: "All spheres of government and all organs of state within each sphere must preserve the peace, the national unity and the indivisibility of the Republic" (Act 108, 1996). Countries in the same category as South Africa are Denmark, Norway, Sweden and Japan (*See Table 1* below). All are classified as semi-federal or simply decentralized systems.

Table 2.2.1

Degrees of federalism and decentralization.

Federal and decentralized countries

Australia	Switzerland
Canada	United States of America
German	

Federal and centralized countries

Veńezuela
Austria and
India

Semi-federal countries

Israel	Papua New Guinea
Netherlands	Spain

Unitary and decentralized countries

Denmark	Norway
Finland	Sweden
Japan	

Unitary and centralized countries

Bahamas	New Zealand
Botswana	Portugal
Columbia	United Kingdom

Source: *Patterns of Democracy*, Lijphart (1999:189).

In their broad comparative study of bicamerals, George Tsebilis and Jeannette Morey (Lijphart, 1999: 132) report that about one third of the countries in the world have bicameral legislatures, and about two thirds have unicameral legislatures. In Lijphart study of thirty six countries (1999) bicameralism is much more common than unicameralism. For example in 1996 only thirteen of the thirty-six democracies, slightly more than one third had unicameral parliaments, and exactly one-fourth had unicameral legislatures. The thirteen countries with unicamerals, according to Lijphart (1999:144) tend to be the smaller ones in terms of size and/or population. With a population of slightly more than ten million being the largest.

Conversely, countries with high population numbers tend to have bicameral legislatures. The country is divided into regions provinces or states to decentralize power for efficiency purposes. The upper house therefore becomes the one institution to which these different states are represented in parliament (Manin, 1997:32). In the United States of America bicameralism resulted from a compromise between the large states and the small states at the Philadelphia convention in 1787 (Mezey, 1990:76). At parliamentary level the second chamber is used to temper the democratic aggressiveness of the first chamber or what is generally referred to as "the tyranny of the majority" with a representative body of a more "conservative" chamber to restrain the powers of the first chamber.

Legislative powers of second houses can be designed to reflect how the political system of the country in question came into effect. On the other hand, in countries characterized by deep divisions, majority rule could spell majority dictatorship and civil strife rather than democracy (Lijphart, 1999:33). In such countries, often what is needed is a consensus among contending parties. Democratic regimes that came about

as a result of negotiations or consensus are examples of this. In the German parliament for example the Basic Law (equivalent of the constitution) ensures that the different majorities in the two chambers ensure that all legislation, when approved has the support of a broad political spectrum – a particularly valuable attribute in the aftermath of unification, when consensus on critical policy decision was most needed.

Thus, the German bicameral system was designed to accommodate the different states after the fall of the Berlin Wall. Legislative powers of the Bundesrat as reflected in the Basic Law indicate these objectives. As a result, the formal representation of the Lander in the federal government through the upper chamber provides an obvious forum for the co-ordination of policy between the Lander and the federal government. The need for such co-ordination, particularly given the specific, crucial needs of the Eastern Lander, has become only more important (Rieselbach, 1990:64).

Similarly, the issue that shaped the South African model was the challenge of giving effect to the unitary state while also incorperating the demand for some form of provincial autonomy and differentiation. Other aspects of the South African model of parliamentary democracy are transparency of legislatures and their structures and the oversight of the executive at national and provincial level. This model provides strong support to the constitutional imperative of co-operative governance. It also gives provinces a measurable role in national matters (*NCOP News*, March1999).

This confirms Huntington's assertions (Jung & Shapiro, 1996:16) about the comming into being of democratic regimes; "...they were made through negotiations compromise and agreements". The United States federal system or its upper house also was as a result of laborious deliberations among the federalists and the unitarians. According to Hamilton and Madison, "the presumably impetuous, popularly elected House of Representatives would be checked and balanced by a more conservative Senate..."(Manin, 1997:38). The powers given the Senate are therefore a reflection of the political compromise between the different states in the United States and the need to address whatever challenges may confront the democratic process. Thus, legislative powers of second chambers often reflect the historical background of each country's political system. The compromise between different role players in establishing the kind of political system that will in the future be able to resolve (democratically)

competing interests.

2.3 Legislative powers for second chambers.

The legislative powers of second houses often depends on two factors. First, whether the executive authority is responsible to the legislature or each functions independently. Secondly, whether members of the second houses are directly or indirectly elected (Rieselbach, 1990:43). In cases where the executive and the legislative authorities function independently, both houses have equal status in respect of initiating and passing of Bills. Where the executive is answerable to the legislature, the result is that greater legislative authority is shifted to the lower house. The lower house dominates the upper house and according to Polsby (1990:74), the latter is functionally degraded to a revisory and testing body

The South African case differs slightly in that the NCOP has relatively more powers on Bills affecting provinces. Such a Bill can only become law after it has been approved by the NCOP. If there is disagreement between the first and second house about a Bill affecting provinces, the Bill is sent to the Mediation Committee which is comprised of nine NCOP members and nine National Assembly members (*NCOP Rules, Document* 1999:12). If the the MC resolves the issue both houses must vote on the Bill. If it does not, the Bill is returned to the National Assembly and a two-thirds majority is required to pass the Bill (*NCOP Rules, Document* 1999:12). In other words, even on Bills affecting provinces the first house can override the second house by a two-thirds majority.

However, where members of the upper house are not directly elected by the voters, their legitimacy is not concretised and their political influence less so than that of members of the first house. In other words, upper houses elected indirectly lack all the elements which popular elections confers on any institution. According to Murray & Nijzink (2002:57) there are good reasons for that: "The National assembly consists of direct representatives of the political party you have supported in the election. Delegates of the NCOP represent the legislature in each province and were elected to the province and not to the NCOP. This means they represent their provinces and do not reprresent the individual voters directly". This explains why legislative powers in the national legislature are skewed in favour of the first house.

In some legislatures, the legislative function is, in theory, shared equally between the two chambers, both of which must pass a Bill before it becomes law (Rieselbach, 1990:8). In other bicameral parliaments differences exist between the legislative powers of the popular (lower) and (upper) chambers (*See figure 2 below*). In Belgium, Brazil, Italy, and Switzerland there are no restrictions on the right of each chamber to introduce both financial and non-financial legislation. By contrast all Bills must be introduced into the lower chambers of the parliaments of Australia, Austria, the Netherlands and Spain (Lijphart, 1999:28). In the United Kingdom, government Bills which are highly controversial originate by custom in the House of Commons, and Bills which deal with legal and judicial matters often originate in the House of Lords.

The different rights of the chambers in bicameral parliaments can be seen most clearly in connection with financial legislation. In some countries Bills involving finance must originate in the lower chamber (Manin, 1997:58). This practice is based on the belief that the authorization of expenditure and the imposition of taxation must be the domain of the chamber elected by universal suffrage, and is founded on the principle that the people must first give their consent to the financial burdens which they will have to bear (Guissepe, 1994: 54).Whatever the relative strength of the two chambers, agreements between them on a Bill puts the final seal on the legislative process.

Table 2.3.1

Country and chamber/s	**legislative function**	**Agreements on Bills**
United States (Senate and the House of Represenatatives)	Laws must be passed by both houses	If differences exist a Committee Conference must seek a compromise and the report must be approved by both Houses.
United Kingdom (House of Lords and the House of Commons	Laws must be passed by both Houses	Amendments may pass to and fro by both Houses until an agreement is reached.
Switzerland (States Council and the	The State Council has more powers on matters	The first chamber's decision is final and

National Council)	relating to Bills amending the Constitution.	there's no formal procedure to reach agreement.

Source:Trevor L. Brown (www.wordiq.com/definition/bundesrat_Germany) 04/03/2004.

In terms of legislative powers the NCOP can only exercise those powers guaranteed to it by the constitution. These provisions are enacted to empower the institution to fulfill its mandate in representing provinces. However, a two-thirds majority from the NA can override the NCOP. The section below elaborate more on the NCOP's specific legislative powers in representing provinces.

2.3.1 Bills affecting provinces.

The Constitution (Act 108, 1996) distinguishes between two types of ordinary legislation; section 75 legislation which refers to ordinary legislation not affecting provinces and section 76 legislation which refers to ordinary legislation affecting provinces. The distinction tracks the broader constitutional division of functions into those that are purely of national competence (section 75) and those of concurrent legislative competence (*NCOP Rules document*, 1999:7).

Section 76 legislation can be introduced either in the NCOP or the NA. Generally speaking section 76 legislation is any legislation concerning a matter listed in schedule 4 of the Constitution. Schedule 4 of the Constitution include Bills on areas such as Welfare, Education, Health and Agriculture. These Bills are passed through Parliament in accordance with the procedure outlined in section 76 of the Constitution. They require provinces to formally arrive at a mandate. Each province is allowed only one vote, and the legislation is passed if it has the support of at least five provinces. Each vote is cast on behalf of the provincial legislature by the head of delegation.

When such a Bill is introduced in the National Council of Provinces the chairperson of the Council must send a copy of the Bill and the annexures to the Speaker of each provincial legislature for purposes of enabling the legislature to confer authority on its delegation to vote on the Bill; and table the Bill in the Council or, if the Council is not sitting, table the Bill on the day on which the Council resumes its sittings (*NCOP*

Rules document,1999:8). This means that the provincial legislature must also consider the Bill in its committees and hold public hearings where it is deemed necessary. The fact that the NCOP must obtain mandates on some national legislation creates significant opportunities for public participation.

2.3.2 Intergovernmental relations.

According to Penelope Andrews et al (2001:204), if the South African Constitution (Act 108 of 1996) was to be analysed against a formal federal checklist it could, with justification be classified as federal. It has all the hallmarks of a federal system; nine sub-national political entities called provinces, each possessing constitutionally protected boundaries. And in each province the constitution requires a democratically elected legislature and an executive accountable to it and to the inhabitants of that province. Yet a closer examination would also reveal that the treatment of provincial or regional powers in the constitution promotes or sanctions an integrated system of governance in which national and sub-national government are deeply implicated in each other's functioning.

In other words the three spheres of government operate under the auspices of what is termed intergovernmental relations. Subsection 40 (1) of Chapter three of the Constitution (Act 108 of 1996) elaborate more by saying: "In the Republic government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated". Subsection 4.1 (a) and (g) goes further by saying; " All spheres of government...must preserve the peace, national unity and the indivisibility of the republic" (Act 108 of 1996). That they must exercise their powers and perform their functions in a manner that does not encroach on the geographical functional or institutional integrity of government in another sphere and must co-operate with one another in mutual trust and good faith by;

(i) Fostering friendly relations.
(ii) Assisting and supporting one another.
(iii) Informing one another of, and consulting one another on matters of common interests;
(iv) co-ordinating their actions and legislations with one another;
(v) adhering to agreed procedures; and

(vi) avoiding legal proceedings against one another.

Thus, the principles of intergovernmental relations requires that the different spheres of government, be they national, provincial or local co-operate with each other "within each of these spheres as well as across spheres" (Devenish, 1998:105). In other words, intergovernmental relations is a process of harmonising the different spheres of administration in such a way that the lower spheres have the capacity to influence policy that they will have to execute. At inter-provincial level it implies co-operation to ensure that legislative processes are harmonised in order to guarantee the efficacy of the operation of the National Council of Provinces.

2.3.3 Public Access.

Public hearings are important for one specific reason for provinces and maybe for the NCOP as well. During public hearings individuals and organisations can make their submissions to provincial committees. Submissions by the public often identify areas in which the Bill will affect a particular segment of society or society in general. Such submissions often bring to the attention of legislators flaws that might have been overlooked during the drafting of the Bill. In all, submissions by organisations or individuals inherently translate the interests of voters in the province. Such submissions may even help provincial legislatures in reaching a well considered mandate. In other words, when a provincial legislature confers a mandate to its delegates it is aware of what the people in the province want or expect from NCOP delegates.

To enforce this practice subsection 72 (1) (a) of the Constitution states that: "The NCOP must (a) facilitate public involvement in the legislative and other processes of the Council and its committees; and (b) conduct its business in an open manner, and hold its sittings, and those of its committees, in public, but reasonable measures may be taken to regulate public access, including access of the media, to the Council and its committees. Subsection 72 (2) point out that the National Council of Provinces may not exclude the public, including the media, from a sitting of a committee unless it is reasonable and justifiable to do so in an open and democratic society.

In reality, "peoples' participation both at national and provincial level is weak"

(Bhabha, 1996:13). According to Bhabha, "...it is only the highly organised and the rich that take advantage of this accessbility. The rest cannot afford presence in parliament even though their input is most needed " (1996:14). The worst scenario case is the NCOP's low profile, where members of the public whether rich or poor by-pass the institution to present their cases to the National Assembly. This is a concern former Chairperson of the NCOP, Mr Patrick Lekota raised when he said that unless the public is involved at provincial level there will always be questions about provincial mandates, whether they give effect to the interests of provinces or those of political parties.

2.3.4 Money Bills.

There are generally four types of Bills that can be processed by the national legislature. They are sometimes referred to as section 74, 75,76 and 77 Bills. According to subsection 77 (1) of the Constitution (Act 108 of 1996), "a Bill is a money Bill if it;

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

Subsection 77 (2) stipulates that money Bills may not deal with any other matter except (a) a subordinate matter incidental to the appropriation of money; (b) the imposition, abolition or reduction of national taxes, levies, duties or surcharges;(c) the granting of exemption from national taxes, levies, duties or surcharges; or (d) all the authorisation of direct charges against the National Revenue Fund.

2.3.5 Bills amending the Constitution.

These are Bills designed to change or amend the constitution. The Constitution can thus be amended by a Bill passed by the National Assembly with a supporting vote of at least 75 per cent of its members; and the National Council of Provinces with a supporting vote of at least six provinces (Act 108 of 1996). The NCOP may also confer its support of six provinces if the Bill amending the Constitution relates to a

matter that affects the Council; secondly if it alters provincial boundaries, powers, functions or institutions; or amends a provision that deals specifically with a provincial matter.

If a Bill referred above or any part of it, concerns only a specific province or provinces, the National Council of Provinces may not pass the Bill or the relevant part unless it has been approved by the legislature or legislatures of the provinces concerned. Furthermore, a Bill amending the Constitution may not include provisions other than constitutional amendments and matters connected with the amendments.

CHAPTER THREE.
THE NCOP AND THE LEGISLATIVE PROCESS.

3.1 Provincial legislatures and the NCOP.

Provincial legislatures did not exist before April 1994 and, until February 1997, had no involvement with parliament on national legislation. This means that Members of Provincial Legislatures (MPLs) and staff in provincial legislatures were not familiar with processes at national level. To make matters worse, the new legislative process introduced by the 1996 Constitution was complex and needed to be tested in practice, and this meant more load on the work of provincial legislatures (Murray & Nijzink, 2002:63). Provinces had to transform themselves from legislatures that had dealt with an average of six or seven Bills a year to institutions capable of processing 108 Bills in 1997, 137 in 1998, and up to 40 Bills in the short two month parliamentary session leading up to 1999 (*NCOP Review*, 1996-1999, 30).

From a financial point of view, most provincial legislatures were battling with small budgets and inadequate infrastructure. As they were struggling to come to grips with the new situation problems of administration, communication and co-ordination abounded. The biggest obstacle however was the mindset of politicians themselves. Many MPLs had seen themselves as provincial politicians focused on provincial legislation and oversight of the provincial executive. While these functions remained fundamental however, the introduction of the NCOP, saw MPLs becoming national legislatures (Murray & Nijzink, 2002:64) and in turn conferring more responsibilities on the part of MPLs.

When the then Chairperson of the NCOP, Mr Mosiua Lekota was asked in March 1999 whether the situation has improved, he said that provinces were participating more actively. Noting also that, provincial governments would begin to focus more intensely on the NCOP when members of the public and various other stake-holders put pressure on the members (*NCOP News*, 2001, March:3). On the other hand, the former Minister of Local Government, Mr Valli Moosa told an NCOP strategizing workshop that the NCOP ought to take a different position to that of the National Assembly. "Don't be shy or squeamish," Moosa said. "What the NCOP has to do is to

bring to the table the conditions on the ground in the province which have an impact on legislation, which perhaps from a purely national level you could see in a slightly different way" (*NCOP Review*, 1994-1999:24).

The issue of what constitutes a provincial position as opposed to, or in relation to, a party position, is still a controversial one in the NCOP. This was something that Coetsee cautioned about in his final address to the senate in January 1997 (NCOP Review, 1996-1999:33). Coetsee said that a careful balance will have to be struck between the interests of the people in the provinces and party political interests, otherwise democracy will not operate properly (*NCOP Review* 1996-1999:32). Speaking six months later, Hernus Kriel former Premier of the Western Cape, picked up the same theme, pointing out that co-operative governance did not mean there would not be tension and differences to resolve. "Co-operative governance does not mean that this Council should become a mutual admiration society. It does not mean that we will never have or should never have any differences of opinion. Nor does it mean that central government prescribes and provinces jump. Co-operative government means that we talk to each other, that we listen to each other, compromise, persuade – that we give and that we take" (*NCOP Review*, 1996-1999:32).

3.2 Representation of political parties in provincial legislatures.

Political parties represented in a provincial legislature are entitled to a certain number of delegates in that province's delegation to the National Council of Provinces. According to section 61 (2) of the Constitution, once the results of provincial elections are declared, the legislature must within 30 days, determine how many of each party's delegates are to be permanent delegates and how many are to be special delegates (Act 108, 1996). This is determined in accordance with a formula set out in Part B of schedule 3 of the Constitution. Mathematically, the formula is as follow;

$$\frac{\text{No of seats of party x 10.}}{\text{No. of seats in legislature + 1}}$$

An example from the Western Cape legislature will illustrate this point. The results of the June 1999 election was as follows: the ANC had 18 seats, the NNP had 17 seats,

the DP had 5 seats, and the ACDP and UDM had both won one seat each (*Parliamentary Whip*, September 2000). There were in all 42 seats. The delegation to the NCOP was determined as follows:

ANC: 18 x 10 /43 = 4.18 (4 delegates)
NNP: 17 x 10/43 = 3.95 (3 delegates)
DP: 5 x 10/ 43 = 1.16 (1 delegate)
ACDP: 1 x 10/43 = 0.23 (0 delegates)
UDM: 1x10/43 = 0.23 (0 delegates)

Thus, the ACDP and the UDM were not entitled to a seat in terms of this initial calculation, since they did not have a full number that could be translated into a position for a delegate. However, they did compete as far as surplus were concerned. The NNP had the highest surplus (0.95) and was therefore allocated an additional delegate. The next highest surplus was a tie between the ACDP and the UDM (*NCOP Rules Document*, 2000:15). In such a situation, where the competing surpluses are equal, the undistributed delegates go to the party that recorded the largest number of votes in the previous election. This happened to be the ACDP and the final allocation was:

ANC: 4 delegates
NNP: 4 delegates
DP: 1 delegate
ACDP: 1 delegate
Total: 10 delegates.

According to section 61 (2) of the Constitution, once the result of a provincial election is declared, the legislature must within 30 days, determine how many of each party's delegates are to be permanent delegates and how many are to be special delegates. This process of determination takes place in terms of the Determination of Delegates NCOP Act, No.69 of 1998. The table below show the number of delegates each party won in each of the nine provinces.

Table 3.2.1

PROVINCIAL DELEGATION IN THE NCOP (FROM 1999 - 2003).

PROVINCE	PARTIES	PERMANENT	SPECIAL DELEGATES
EASTERN CAPE	ANC	4	3
	UDM	1	1
	DP	1	0
FREE STATE			
	ANC	4	4
	UDM	1	0
	DP	1	0
GAUTENG			
	ANC	4	3
	UDM	1	1
	DP	1	0
KWAZULU NATAL			
	IFP	2	2
	ANC	2	2
	DP	1	0
	NNP	1	0
LIMPOPO			
	ANC	5	4
	UDM	1	0
MPUMALANGA			
	ANC	5	4
	DP	1	0
NORTHERN CAPE			
	ANC	4	3
	NNP	2	1
NORTH WEST			
	ANC	4	4
	DP	1	0
	UCDP	1	0
WESTERN CAPE			
	NNP	2	2
	ANC	2	2
	DP	1	0
	ACDP	1	0

Source: Murray & Nijzinsk, *Building Representative Democracy (2002:47).*

The Act states that each party entitled to delegates in the provincial delegation must have at least one permanent delegate. In the above Western Cape example, this means that the DP and the ACDP automatically had one permanent delegate each. Unlike the formula in the Constitution, any fractions (or surpluses) must be ignored. This would mean that the ANC and the NNP were both entitled to 2 permanent delegates (*NCOP Rules Document*, 2000:21).

3.3 The Bill process in the national legislature.

3.3.1 Classification of Bills.

Before a Minister tables a Bill in Parliament, the State Law Advisors provisionally classify what process the Bill must follow. Once tabled in Parliament, the Bill must pass through the Joint Tagging Mechanism Committee (JTMC). This committee, which consist of the Presiding Officers of each house, is responsible for the final classification of the Bill (*NCOP Rules Document,* 2000:32). This is referred as 'tagging' the Bill. The Presiding Officers receive advice from the Parliamentary Law Advisors on how the Bill should be classified.

The JTMC committee serves the purposes of parliamentary proceedings as a decision making structure. To make final rulings in accordance with the classification of Bills introduced in the Assembly or the National Council of Provinces. It also distinguishes whether a mixed section 75/76 Bill may be proceeded with, or is out of order; and to ensure that amendments to Bills do not render the Bill constitutionally or procedurally out of order in terms of joint rules (NCOP *Rules Document*, 2000:32). A Bill that is out of order is a Bill that conflict with the provisions of the constitution or with parliamentary procedure as outlined in the rules committee. For example a Bill is out of order if it incorporates sections that affect provinces and yet is treated as an ordinary Bill not affecting provinces.

The JTMC's classification of and findings on a Bill are final and binding on both houses. Whenever the JTMC must rule on the classification of a Bill, the Bill, and a legal opinion on its classification or on the relevant question, must be submitted to the members of the JTMC (*NCOP Rules document*, 2000:36). If the JTMC classifies a Bill as constitutionally or procedurally out of order, the Bill may not be proceeded with. This however does not prevent a Bill from being corrected and reintroduced. If

it was found to be defective because of its contents; or if it was found to be defective on a procedural point.

3.3.2 The NCOP and law making.

In terms of section 42 (4) of the Constitution, the NCOP represents the provinces. It does this by mainly participating in the national legislative process and by providing a national forum for public consideration of issues affecting the provinces. In terms of section 44 (1) (b), 68 and 74 of the Constitution, the NCOP has the power to;

> "...participate in amending the Constitution in accordance with section 74 pass legislation with regard to any matter within a functional area listed in schedule 4 of the Constitution to be passed in accordance with section 76; and consider any legislation passed by the National Assembly" (Act 108 of 1996).

In terms of section 68 (a) of the Constitution, in exercising its legislative power, the Council may consider, pass, amend, propose amendments to or reject any legislation before it. Legislation may also be considered by the Council in terms of section 74,75, 76 and 77. Section 74 (8) further provides that if a Bill referred to in subsection (3) and (b), or any part of the Bill, concerns only a specific province or provinces, the Council may not pass the Bill or the relevant part unless it has been approved by the legislature or legislatures of the province or provinces concerned. This provision empowers provinces to take decisions on any matter that directly effects them individually. This provision has not yet been tested in that provinces have shown their approval on such matters such as on boundary demarcations.

3.3.3 Processing of section 76 Bills.

Because delegates vote according to mandate recieved from their provincial legislatures, the legislative process in the NCOP must allow for provinces to discuss such matters and formulate positions. At the same time, provinces, through their delegates, need an opportunity to discuss matters with each other. To allow proper consultation and discussion within the provincial legislatures and among provinces, the NCOP operates on a four-week cycle process, as detailed below (Murray & Nijzink, 2002:65).

Week One: A section 76 Bill is introduced in the NCOP. The relevant select committee arranges a meeting at which the Minister or department that initiated the Bill briefs it on the Bill. Special delegates may attend briefing sessions, but select committee minutes are made available as soon as possible after the meeting via the parliamentary website. Once the briefing has taken place, the chairperson of the select committee dealing with the Bill usually discusses the process that the committee wishes to follow with the programming Whip. Dates for the receipt of negotiating and final mandates are reflected in the programme once confirmation has been received that the relevant Minister is available on the envisaged date.

Week Two: Relevant provincial committees meet in the provinces to discuss the Bill. If necessary, permanent delegates go to their provinces to brief the relevant provincial committees on the Bill. Provinces may also hold public hearings during this week. At the end of the week each province prepares a negotiating mandate.

Week Three: At the beginning of the week the relevant select committee of the NCOP meets to discuss the negotiating mandates that provinces would have e-mailed or faxed. Towards the end of the week provincial committees are required to meet again to prepare final mandates for voting purposes.

Week Four: In the fourth and final week of the cycle the select committee meets again to consider the final mandates that it would have received and to prepare its report on the Bill. A plenary of the National Council of Provinces would also have been scheduled during this week. The tendency is to schedule section 76 Bills for Thursday plenaries. The delegation head votes on the Bill on behalf of each province. A section 76 Bill however does not have to be completed in a single four-week cycle. Sometimes a Bill is dealt with over two cycles, especially if the Bill would have substantial impact on the provinces or if public hearings in the provinces are required. It is important, however, to identify the date on which the Bill will be considered in plenary early in the cycle, so that the relevant committee would be able to structure its programme in respect of the Bill.

The objectives of the four-week cycles are two-fold namely, to enable the NCOP to fulfill its constitutional obligations in terms of its role in the national legislative

process, and in particular with regard to section 76 legislations. Secondly, to enable the NCOP to exercise its oversight and accountability role in terms of the implementation of section 76 legislation.

3.3.4 Mandates.

At the fourth stage of the cycle provincial delegates are expected to present their final mandates obtained from their provincial legislatures. Subsection 65 (2) of the Constitution requires national legislation to determine a uniform procedure by which legislatures can confer authority to vote on their delegates. That legislation has not yet been passed (*NCOP Review*, 1996-1999, 35). In the meantime legislatures have developed a number of different methods for determining mandates. Murray & Nijizink (2001, 49) outlines four models used by provinces to reach mandates for their delegates:

- The first model, applied by the Northern Province provides that only the House can confer the voting mandate to their delegation to the NCOP.

- The second model in use in provinces such as the Free State, Eastern Cape, Mpumalanga, North West and Western Cape takes account of the fact that the House may not be sitting. In these circumstances, certain committees can confer a mandate by a special majority.

- According to the third model, applied for example in KZN. Mandates are adopted by a special 75% majority of the NCOP Committee. If this fails, the House must confer the mandate.

- A fourth, more flexible model is also in use in Gauteng, according to which Bills are classified by a proceedings committee. Those Bills regarded as important must receive mandates from the House while ordinary Bills can receive Committee mandates. Technical Bills never have to go to the House and are simply included on the ATC and, if no objections are received, the report is taken as adopted.

The fact that no legislation exist to uniformly guide provincial legislatures to reach

their mandates smack of lack of seriousness on the part of the NCOP. This could be one of the factors contributory to the issuing of unconsidered mandates. For example, in the Eastern Cape, Free State, North West and Western Cape mandates are conferred by committees when the house is not sitting. In acassions where members of the committee are not in full attendance the mandate can be conferred by a special majority. The question is; can such people adequately deliver mandates that take the interests of the provinces into account? For provinces like Northern Province, KZN and Guateng, their methods would seem to suggest that house sittings must correspond with the programme of the NCOP. Otherwise mandates can be delayed because the house nor the committee was not sitting. These are the problems that have been identified in the previous sections as partly responsible for the provinces' poor deliberations on section 76 legislations.

3.3.5 NCOP Select committees.

Most committees in the NCOP are 'policy committees'. They mirror government departments. They are responsible for the oversight of a particular department as well as for the consideration of legislation produced by and relating to that department. In the National Assembly these specialized committees are called portfolio committees; in the National Council of Provinces they are called Select Committees (*see examples below*). Since the NCOP has fewer members than the National Assembly, policy areas have been grouped together and one select committee in the NCOP correspond with several portfolio committees in the National Assembly.

Examples of NCOP Select Committees.

Security and Constitutional Affairs.
Local Government and Public administration.
Social Development.
Education and Recreation.
Land and Environmental Affairs.
Public Service.
Labour and Public Enterprise and;
Finance.

The role of committees has been significant in the law-making process. Because of

their scrutiny of draft legislations many amendments are proposed and accepted in the committees. Changing the content of the Bill under discussion. Though the practice has not been uniform to include all committees, but in some cases the contribution often lead to legislation being changed significantly between its introduction in Parliament and its adoption (Murray & Nijzink, 2002:64). In other words, the role of committees in the law making process cannot be understated.

It is clear that NCOP Select committees do most of the work in terms of considering Bills affecting provinces. According to the former Minister of local Government, Mr Valli Moosa, (*NCOP Review,* 1994-1999:37), "unlike committees in a more traditional legislature such as the National Assembly, NCOP select committees function as negotiating mechanisms". It is here that the interests of provincial governments are negotiated. It is also here that provinces fail or reach a common provincial view point.

It is at the fourth stage of the cycle that provinces deliver their final mandates. That takes place in committees. Based on these final mandates from the committees, the NCOP then can cast its vote on its sitting on section 76 legislations. In other words the final mandates presented at the fourth-week of the cycle at committee level is transferred to the NCOP plenary for section 76 legislations. There has been no reported case where final mandates from the committees were changed once they reached the NCOP plenary.

Corollary, most legislatures in the NCOP do not always use the plenary effectively. Their view is that plenaries merely repeat committee discussions, leading politicians to provide bland statements of their party's position rather than to engage in issues affecting their provinces. A desire to avoid political confrontation, which might embarrass a member of the same party or the executive, seems sometimes to exacerbate this tendency. The result is that plenaries are poorly attended by politicians, the public and the press altogether (Murray & Nijzink, 2002:161).

3.4. Bills.

The following Bills fall under the category of section 76 Bills except for the Firearms Control Bill which is an ordinary Bill not affecting provinces. According to the

Constitution section 76 Bills have a direct impact on provinces. In other words, provincial legislatures and NCOP delegates must deliberate and assess how these Bills may promote their interests before delivering their mandates. The formula for tabling Bills during its procession is: (B34-1999). This indicate the number of the Bill (e.g 34th) and the year in which it is being deliberated (e.g 1999).

3.4.1 FIREARMS CONTROL BILL (B34-1999).

Introduced by the Minister of Safety and Security on 19 May 1999 as section 75* Bill. *As amended by the portfolio committee on Safety and Security (NA).

The Bill is intended to provide for the prevention of crime involving the illegal possession and use of firearms. It is designed to prevent the proliferation of illegally possessed firearms by providing for the removal of such firearms from society and by improving controls over the possession of legal firearms (www.polity.org.za/html/govdocs/bills/1999). It also provide for the control of the supply, possession, transfer and use of legal firearms; to replace the Arms and Ammunition Act of 1969 (Act No. 75, 1969) in order to establish a comprehensive and effective system of firearm control and management.

3.4.2 Reasons for the Firearms Bill.

The most serious problems with firearms in South Africa are the increasing number of both illegal and legal firearms and their direct and indirect contribution to the high levels of violent crime. There are about half a million illegal firearms in the country already and more keep flowing into this pool. The main sources of these illegal firearms are; firearms that have been stolen from private owners; firearms that have been lost from the South African Police Service, South African Defence Force and other state departments.

3.4.3 Provincial Concerns.

Provinces raised concerns around safety and security in which the Bill will become part of the crime prevention strategy. Such concerns included shortages regarding personal, vehicles and other equipment amounting to 928 million rand. The need for specific goals and targets around eradicating crime, the increasing incidents of hijackings, car thefts, border corruption, illegal immigration, robberies and vigilante

terrorism (www.pmg.org.za/archive/comittee/1999). The dissatisfaction of police reservists, the unacceptable treatment of rape victims at police offices, and the widespread involvement of the police in crime were also of major concern.

Members of the committee deliberated on the textual aspects of the Bill without any specific references to provincial interests. When the Bill was debated it was party political interests that dominated the discussions rather than those of provinces. Advocate Swart of the DP (as it was known then), complained that it was bad that the concessions which had been previously made by the ANC were taken away that morning. He was referring to the fact that the ANC moved for alternative formulations for certain clauses. This was to the surprise of the committee as these were not the formulations to which the committee had previously agreed. The opposition parties displayed general disapproval for this tactic of the ANC. They described it as a ''watering down of the whole practice of Parliament''(www.pmg.org.za/archive/committees/1999) As a result only the ANC voted in favour of alternative formulation while the DA, NNP, FF, ACDP, IFP and PAC voted against.

3.4.4 Final Mandates from provinces.

1. *KwaZulu-Natal Province:* expressed their support of the Bill.
2. *Gauteng Province:* presented their final mandate which supported the Bill.
3. *North West Province:* presented their final mandate which supported the Bill.
4. *Eastern Cape Province:* The Chair informed members that the Eastern Cape province had not submitted a final mandate, but had forwarded it to the Chairperson expressing their support.
5. *Limpopo Province:* expressed its support for the Bill.
6. *Northern Cape Province:* presented the Northern Cape final mandate which supported the Bill.
7. *Western Cape Province:* conveyed their final mandate which supported the Bill.
8. *Mpumalanga Province:* the province forwarded their final mandate of support of the Bill.
9. *Free State Province: S*upported the Bill.

The Bill was passed and ready to be tabled in the NCOP's next sitting.

3.5 ADULT EDUCATION AND TRAINING (B42-2000).
Introduced by the Minister of Education on 25 October 2000 (as section 76 bill).
As amended by the protfolio committee on Education (National Assembly).

To regulate adult basic education and training; to provide for the establishment, governance and funding of public adult learning centres and the registration of private adult learning centres for quality assurance and quality promotion in adult basic education and training for transitional arrangements (www.polity.org.za/html/govdocs/bills/2000).

3.5.1 Reasons for the ABET Bill.

To restructure and transform programmes and centers to respond better to human resource, economic and development needs of the Republic. To redress past discrimination and ensure representativity and equal access. To ensure to adult basic education and literacy, the creation of knowledge and development of skills in keeping with international standards of academic and technical quality. To advance strategic priorities determined by national policy objectives at all levels of governance and management within the adult basic education and training sector.

3.5.2 Provincial concerns.

Kwazulu Natal went through its submission, requesting clarity on any previous ABET legislation, trusts, fees which allows the Head of the Department to report directly to the Minister and skip the MEC. As far as the Chairperson was concerned there has been no previous ABET legislation. It is simply indicated in the Constitution as subsection 29(1), which acknowledges the right to basic education, including adult education. As for trusts, the Chairperson indicated that the Bill acknowledges tribal authority and indigenous law in terms of immovable property and trusts (www.pmg.org.za/archive/committees/2000). Therefore, a public centre on trust land is seen to be on public land, although it is acknowledged that it is part of a trust.

The Northern Cape raised concerns about the management of the public centre and the employment of educators. The Chairperson pointed out the Employment of Educators Act. He explained that, if the principal of the day school manages the public centre, he said overtime will have to be paid even though that would create labour complications. He agreed that it was not a good practice for a principal to have two posts. The Northern Province once again needed clarity on the number of co-

opted members. The Chairperson said that provinces can prepare their own notices in terms of this Act, it is left to the provinces to determine the numbers of co-opted members (www.pmg.org.za/archive/committees/2000). This issue elaborated the Chairperson is specific to provinces so it is hard to deal with it at the national level.

The Western Cape had no written submission at the time of the meeting. Free State and Mpumalanga Province and the Eastern Cape supported the Bill without any queries. Northern Province suggested that the number of co-opted members be limited rather than be left to the discretion of management. That according to the chairperson was the discretion of each province. North West Province had queries about the definition of "failure to perform", of a governing body of a public centre. According to the Chairperson "failure to perform" at clause 14 is consistent with the usage in the South African Schools Act (www.pmg.org.za/committees/2000).The responsibility is to keep a school running based on objective criteria.

3.5.3 Final mandates.

Each province presented its final mandate:

1. *Kwazulu Natal*: supported the Bill.
3. *Northern Cape*: supported the Bill.
4. *Western Cape*: declared its support for the Bill.
5. *Free State:* supports the Bill with no amendments.
6. *Northern Province:* supported the Bill after some clarification.
7. *Eastern Cape*: supports the Bill with no amendments.
8. *North West Province*: supported the Bill after amendments.
9. *Mpumalanga*: supports the Bill with no amendments.

3.6 *DISASTER MANAGEMENT BILL (B58-2001).*

Introduced by the Minister of Provincial and Local Government on the 17 of August 2001 as section 76 Bill. As amended by the portfolio committee on Provincial and Local Government (National Assembly).

To provide for an integrated and co-ordinated disaster management policy that focuses on preventing or reducing the risk of disasters, mitigating the severity of disasters, emergency preparedness, rapid and effective response to disasters and post-

disaster recovery and the establishment of national, provincial and municipal disaster management centres; and for matters incidental to that (www.polity.org.za/html/govdocs/bills/2000).

3.6.1 Reasons for the Disaster Management Bill.

The Bill is an outcome of a spate of floods and dangerous fires that affected a number of provinces. The Bill is therefore designed to provide relief equitably for those provinces that may not have the necessary and required resources for the relief of those affected by such disasters (www.polity.org.za/html/govdocs/bills/2000). It provides for the establishment of an inter-governmental committee on disaster management to co-ordinate efforts on post-disaster recovery within the borders of South Africa.

3.6.2 Provincial concerns.

Since the Bill provides a national framework for the financial assistance and management of disasters, powers were however delegated to provinces in terms of handling and funding such incidents. Provincial delegates accepted the Bill raising few concerns. Ms Joyce Kgoali Member of the Gauteng legislature (ANC) raised concern on the use of "may" instead of "must" in Clause 46(2)(a) of the Bill. Mr P Maloyi, MPL of the North West (ANC) maintained that the Department had clarified the reason behind the use of "may" instead of "must". It was said that provinces had the discretion on which structures to establish within their municipalities and therefore they cannot be directed by national parliament.

Kgoshi L. Mokoena of the Limpopo provincial legislature (ANC) commended Gauteng for having done its homework with regard to this Bill. However he noted that the committee must be viewed as a political forum, established to assist the MEC and therefore not an administrative forum (www.pmg.org.za/archive/committees/20001). He further held that some of the issues raised by Gauteng, since they cannot be included in the Bill, they would be catered in the regulations framework. The Chairperson concurred with the above argument. He further held that it should be noted that the discussion on this issue has been dragged for far too long with the intention of getting all parties to agree and can no longer be entertained. Gauteng should accept Clause 46 (2) (a) as interpreted by the Department.

The Eastern Cape Province raised concerned on the use of militaristic concepts in the Bill such as "unit commands". The Eastern Cape Provincial Parliament requested that something should be done as soon as the area has been declared a disaster area since declaration without action can be useless. The Chairperson noted the concerns and requested Mr L Buys: Head of the National Disaster Management Centre, to comment on the issues raised. Mr Buys noted that the Committee has the power to order the Social Development Committee to act immediately after an area has been declared a disaster area (www.pmg.org.za/archive/committees/2001). The Committee acknowledged the concern raised by the Eastern Cape Government regarding the use of militaristic concept in the Bill, however it advised the province to modify these militaristic concepts with regard to its community.

3.6.3 Final mandates.

The Chairperson requested Members to present final mandates from their respective provinces.

1.*Western Cape:* Mr C Ackermann (Western Cape) (NNP) said the Western Cape Provincial Parliament fully supports the Bill as it is.

2.*Gauteng Province:* Kgoali (ANC) noted that Gauteng fully support the Bill and would also appreciate the fact that its concerns would be catered in the Regulation to the Act.

3. *Eastern Cape Province*: Ms P Majodina (ANC) held that the Eastern Cape Provincial Parliament accept and fully support the Bill without raising any amendments to it.

4. *North-West Province:* Mr Maloyi (ANC) held that the North-West Provincial Parliament fully supports the Bill.

5. *Limpopo Province:* Kgoshi Mokoena (ANC) held that Limpopo Provincial Parliament fully backs the Bill as it is.

6. *Mpumalanga Province:* Mpumalanga fully supported the Bill, without any reservations.

7. *Northern Cape Province:* the Northern Cape Provincial Parliament, whose representative was absent from the meeting, according to the Chairperson support the Bill.

8. *Kwazulu-Natal Province:* Prince B Zulu (ANC) explained that his provincial Parliament also fully supported the Bill as it is.

9. *Free State Province:* The Chairperson noted that since the Committee had not received any formal document from the Free State government, it would be taken that no final mandate had been received from that Province. He then read the Committee's report on the Bill. The Committee unanimously accepted the report and the Bill.

3.6 DIVISION OF REVENUE BILL (B5-2002).
Introduced by the Minister of Finance on 23 February 2002 as section 76 Bill.
Referred to committees (select committe on Finance) from the National Assembly.

To provide for the equitable division of revenue raised nationally among the national, provincial and local spheres of government for the 2002/2003 financial year; to provide for reporting requirements for allocations pursuant to such division. To also provide for the withholding and the delaying of payments for the liability of cost incurred in litigation and in violation of the principles of co-operative governance and intergovernmental relations (www.polity.org.za/html/govdocs/bills/2002).

3.6.1 Reasons for the Revenue Bill.
The revenue Bill is intended to counter some of the problems experienced by provincial and local governments in terms of financial management often resulting to huge debts and/or financial crisis. The Bill is therefore designed to provide for the equitable division of revenue raised nationally among the three spheres of government (www.polity.org.za/html/godocs/bills/2002). To promote co-operative governance in the budget allocation and transfer process and promote better co-ordination between policy, planning, budget preparation and execution processes as well as predictability and certainty in respect of all allocations to provincial and local governments to ensure that such government my plan their budgets over a multi-year.

3.6.2 Provincial concerns.
The delays associated with the transfer of funds from provinces to municipalities dominated the discussion. It was generally agreed that one major problem was that grants went via the provinces instead of directly to Municipalities. Provinces in turn blamed National Government, saying that the delays emanated there (www.pmg.org.za/munites/2002). The Finance Department however cautioned against removing the discretion the Director Generals had in permitting direct transfers to municipalities given the shaky financial development of some municipalities.

Kwazulu Natal and Western Cape Province raised the same concerns. The former stated that grants are given by National Departments to the provinces towards the end of the financial year. This is problematic as provinces cannot effectively expend these funds within the limited space of time and without having planned for such expenditure (www.pmg.org.za/minutes/2002). It would be advisable if local municipalities were to be informed of the conditional grants early in the financial year in order to be able to plan for such funds before they are actually transferred to provinces.

The Kwazulu-Natal delegate also raised the issue of recurrent expenses. When National Government decide to allocate funds for the building of a school. It has an obligation to make provision for the recurrent expenses of such a school. To simply allocate funds to build the school without planning for its sustenance was unacceptable. Ms J Fubbs, ANC Gauteng legislature, commented that Gauteng had also raised a similar problem regarding timeous payments pertaining to the sustanance of government funded projects.

3.6.3 Final Mandates

1. *KwaZulu-Natal Province:* Mr Bekker presented the Kwazulu-Natal final mandate stated that it supported the Bill.
2. *Gauteng Province:* Dr E. Conroy (NNP) [Gauteng] presented their final mandate which supported the Bill.
3. *North West Province:* Mr Z. Kolweni (ANC) presented their final mandate which supported the Bill.
4. *Eastern Cape Province:* The Chair informed members that the Eastern Cape province had not submitted a final mandate, but had forwarded it to the Chairperson expressing their support.
5. *Limpopo Province:* Mr M. Makoela presented the Limpopo final mandate which supported the Bill.
6. *Northern Cape Province:* Mr G. Lucas presented the Northern Cape final mandate which supported the Bill.
7. *Western Cape Province:* Mr K. Durr (ACDP) presented the final mandate of support for the Bill.

8. *Mpumalanga Province:* The Chair stated that no delegate from the Mpumalanga province was present today, but the province had forwarded their final mandate of support to the Committee.

9. *Free State Province:* Mr Ralane presented the Free State final mandate which supported the Bill.

3.7 *SOCIAL ASSISTANCE BILL (B57-2003).*

Introduced by the Minister of Social Services and Development on 3 September 2003 as section 76 Bill. As amended by the protfolio committee on Social Services and Development(National Assembly).

To provide for the rendering of social assistance to persons; to provide for the mechanism for the rendering of such assistance (www.polity.org.za/html/govdocs/bills/2003). Also to provide for the establishment of an inspectorate for social assistance and for matter connected with rendering such services.

3.7.1 Reasons for the Social Assistance Bill.

To assist in securing the well-being of the people of the Republic and to provide effective, transparent, accountable and coherent government in respect of social assistance. Since the provision of social assistance requires uniform norms and standards and delivery mechanisms for the efficient, economic and effective use of the limited resources available for social assistance and the promotion of equal access to government services. The Social Assistance Bill was therefore deemed necessary.

3.7.2 Provincial concerns.

The commitee meeting was attended by representatives from the Department of Social Services with advocate W. Krull as the spokesperson. He pointed out that the main concern was the gap between national and provincial legislation. If the transition was not properly managed, there would not be any legal provision for social assistance. A related issue was that of managing the rights of citizens to access as well as the administration and operation of social assistance. "Beneficiaries", asserted advocate Krull, "should not even be aware of the change in legal administration and there should not be any interruption at the front end of operations." (htpp://www.pmg.org.za/archive/2003).

Advocate Krull stated that MPs could not prescribe to provincial legislatures. The Constitution could provide legislation for national administration and also provide the President with powers of assignment, but not for provincial counterparts. Ideally, there should be a mechanism in the Constitution to allow the President to assign powers from provincial to national level. There's a clause in the Bill that provide for the powers of the Director-General to be delegated to provinces. It was vital that co-operation and support from key role-players be secured, particularly from the various provinces so that the transition from provincial to national level is facilitated. Such issues where provincial legislatures acted independently had already been raised at MinMEC (www.pmg.org.za/minutes/2003). A great deal depended on the co-operation of the MEC's and their respective legislatures.

Ms G Borman (DA) asked whether centralisation would work if all provinces bought into the concept or whether Constitutional and legislative problems could still arise. Advocate Krull responded by saying; "the extent to which the Social Assistance Act had been assigned. The assigning provision in the Interim Constitution, Section 235 (8), stated that the President could assign functions from the national to the provincial sphere. The provisions stated that where certain criteria were met by the national legislation, this prevailed over any provincial law" (www.pmg.org.za/minutes/2003). This included situations where national law was required to set uniform norms and standards to maintain economic security, internal unity and so forth. If there was a provincial law providing for grants and a national law providing for the same, the national law would prevail

The Chairperson read the motion of desirability for the adoption of the Bill. All the other parties agreed with the exception of the DA as it abstained. It would seem that the committee was anxious to pass this Bill as quickly as possible. Beside while the Bill was still under discussion the Second Parliament was nearing its end of term. Elections where to be held on the 14th of April the same year. Avoiding to be behind schedule provinces delivered their provincial mandates.

3.7.3 Final mandates from provinces.

All the provinces submitted their final mandates, with the exception of Gauteng and North-West, whose final mandates would be submitted in the Plenary of the NCOP. The following provinces supported the Social Assistance Bill.

1. *Eastern Cape Province:* Ms N. Kondlo (ANC) said that they supported the Bill.
2. *Free State Province:* Ms N. Khunou (ANC) said that her Provincial Legislature supported the Bill.
3. *Gauteng Province:* The Chair noted that since the Gauteng Provincial Legislature would only convene on the 24 February to consider the Bill, they would submit their final mandate during the Plenary.
4.*KwaZulu-Natal Province:* The Chair saw that there was no-one representing the KwaZulu-Natal Provincial Legislature in the meeting to read their Final Mandate. However, it had been expressed that the province supported the Bill.
5. *Limpopo Province:* Ms R. Mashangoane (ANC) said her Provincial Legislature supported the Bill.
6. *Mpumalanga Province:* Ms M. Themba (ANC) noted that her Provincial Legislature supported the Bill.
7. *Northern Cape Province:* The Chair, noting that there is no one representing the Northern Cape Provincial Legislature in the meeting, and thus read out their final mandate which was sent. They supported the Bill.
8. *North West Province:* The Chair noted that the Committee had not yet received a final mandate from the North West Provincial Legislature.
9. *Western Cape Province:* Mr F. Adams (NNP) noted that his Provincial Legislature fully supported the Bill.
The Chair concluded that seven out of nine provinces supported the Bill.

While the chapter focuses on the Bill process there are however three important factors that need to be taken into account. The first is the outcome of provincial elections. Secondly, each seat received determines the balance of power in the NCOP and how that power is exercised. Thirdly, to understand the work of the NCOP will necessarily require understanding the composition of each provincial legislature. Reasons for this stem from the fact that election result are responsible for the political power each party gains and exercises both at provincial and national level. This will also give clarity on how provincial mandates are reached by members of provincial legislatures.

Provinces such as the Western Cape and Kwazulu-Natal provide good examples of

the balance of political power both at provincial level and in the NCOP. The two provinces were once under the rule of two opposition parties, namely the then New National Party and The Inkatha Freedom Party. While the ANC took control of the remaining seven provinces. After the 1999 election the then NNP in coalition with the Democratic Alliance formed the Western Cape government to curb the growing dominance of the ANC, while the IFP's dwindling support in the province saw the ANC taking control of the province after the Minority Front's only seat in the province was swayed to the ANC.

The NNP and DA coalition however was short-lived, and in 2000 the break-up became unavoidable forcing the then NNP to join forces with the ANC to form once more a new government in the Western Cape. These changes arguably had an effect on how the NCOP in its composition responded to section 76 Bills tabled before it. It may had an effect also on how the mandates were reached by provinces as indicated in the previous paragraph. That is, which political parties voted in favour and which voted against and whether the ruling party in the province used its majority vote.

4. Evaluation.

Before we answer the question whether mandates delivered in the NCOP select committees carry the interests of provinces, first lets look at how provinces cope with the NCOP legislative process. That will give us a background as to what effort provincial legislatures put in their deliberation to reach a mandate that truly carry the interests of provinces. According to Murray & Nijzinski, (2002: 75), formulating a mandate is substantial and a very demanding task. It means that small provincial legislatures have to grapple with major Bills over which the 400-strong National assembly deliberates for months.

For example, in 1999, 19 of the 60 Bills passed by national parliament fell under section 76 of the Constitution. In 2000, 20 of the 70 Bills passed fell under section 76. This inevitably meant that in a well-functioning provincial legislature, a review of national legislation would have occupied a considerable amount of time (Murray & Nijznk, 2002: 76). Add to this the lack of capacity, the irregular programming of sittings as well as the skewed understanding of what the NCOP role is in parliament among its own members.

Raising the same concerns is James Selfe, the then DA MPL in Gauteng who complains about poor programming, incorrect tagging of Bills, fast tracking of legislation and members of the executive who change their programmes at short notice, making it difficult for the NCOP delegates to properly consider section 76 Bills. James echoes the same sentiments expressed by delegates from the Northern Cape Province. Both Gauteng and the latter have been complaining about receiving updated information timeously from the NCOP structures in Cape Town. Bills often arrive late, sometimes a day before the sitting of the NCOP. As a result, committees do not have enough time to make informed comments on them.

This explains why some provinces like the Eastern Cape, Free State and Northern Cape have difficulties in delivering their mandates in time. It would seem that unless NCOP programmers take the matter of programming seriously functioning of the institution will be held hostage by administrative hitches. The fact that its always members from opposition parties who complain about the NCOP programme shows that members of the ruling party are reticent in embarrasing their colleagues about poor programming. This loyalty obviously has inadvertent consequences on the smooth functioning of provincial legislatures. Particularly in deliberating on section 76 legislations.

Beside administrative hindrances, most NCOP delegates especially from the side of the opposition have conveyed duanting views about the NCOP's role in promoting provincial interests. According to the former KZN Premier, Lionel Mtshali, " I do not believe that provinces have used the opportunity that the NCOP creates in enabling them to bring their concerns before the national parliament" (*NCOP News*, September, 1999:4). James Selfe argues that provinces need to develop self confidence to buck the majority party line whenever this is necessary. "We all know of provinces that were unhappy with legislation but which were persuaded to go along in order to get along"(*NCOP News*, August, 1998:7).

Although there is growing understanding of the purpose, role and functioning of the NCOP, in some quarters there is still lack of understanding of the NCOP conceptually. According to W. F Mnisi DA MPL in Gauteng, " some members of the ruling party seem to be unclear as to the role of the NCOP. Yet, the main difference

between the NCOP and the old Senate is that the NCOP is not a rubber stamp mechanism – at times members of the ruling party seem to be easily persuaded by the proceedings and decisions arrived at in the NA"(NCOP News, March 1999:4). The Procedural Manager, Desiree Le Roux, speaking at the 35th general meeting of the Society of Clerks-at the tables in Wellington New Zealand commented; " Some provinces see the NCOP as an institution in which they, acting in concert, can stare down central government", forgetting that they have constituences to represent (*NCOP News*, November, 1998:9).

Looking at the discussions and deliberations in the committees, the implication is that committees are the melting points. Here views are expressed and political differences are allowed to emerge as members deliberate on Bills. Amendments are sometimes made at the suggestion from opposition parties. The impression is that committees are not only melting points but also where party members and provincial delegates let off their steam and satisfy themselves that they've done their job.

For example the KZN delegate raised concernes regarding the province's interest where he asked about tribal authority and public centre on trust land in the Adult Basic Education and Training Bill (B42-2000). The Chairperson addressed some of the concerns raised by the KZN delegate. However, when the time to deliver their mandate came, the province supported the Bill. Criticising the Bill during deliberations and discussions and delivering a provincial mandate seem to be two different things among NCOP delegates.

The same attitude is noticeable in the Division of Revenue Bill (B5-2002). Provinces raised concerns about grants given to provinces instead of directly to local municipalities causing delays on expenditure. Kwazulu-Natal even hinted that when national government fund the building of a school, it is her obligation to provide for recurrent expenses. While these concerns seem genuine they didn't stop provinces in delivering their mandates in support of the Bill.

Another pattern that is noticeable is the voting pattern of provinces. For exampls from 1999 to 2003 all the selected Bills show that provinces under the ANC rule delivered their mandates in favour of the Bills (except for those who delayed their mandates).

Since 2000, and in all the nine provinces the ANC constituted the majority. As for opposition Mr C. Ackerman made it clear where the then NNP stood. He said, "It would be a mistake to continually see us as an opposition province which seeks to oppose national government at every opportunity...we want to play a constructive role to prioritise the interests of the people" (*Hansard*, *NCOP* debates, 2000: 6-8 June).

However, Dr Lucas Nel's views differed with his colleague's views in the Western Cape. Dr Lucas, the then Leader of the NNP opposition in the Mpumalanga legislature maintains: "There is a possibility that the NCOP can become a rubber-stamp for the National Assembly" (*NCOP News*, August, 2000:4). Lucas argues that the ruling party in the province becomes a slave to decisions made by the ANC nationally.

Dr Lucas cited the example of the Educational Laws Amendment Bill, "which was discussed at provincial level and adopted as introduced. The NCOP delegation was subsequently mandated to vote for this Bill; but when delegates went to Cape Town, they voted for a Bill amended by the NA portfolio committee on Education (in principle a different Bill). In the final analysis, the delegation failed to fulfill its mandate, following instead the lead of its political party (NCOP News, August, 2000:6). Mr Boy Johannes, ANC MPL in Mpumalanga disagrees; " We are committed to the NCOP as a structure that represent the views of the province rather than the political party. There are many examples (though none is provided) where ANC-dominated provinces made amendments to legislation that in principle went against what was decided in the NA or by the ANC..." (*NCOP News*, August, 2000:6).

The former Chairperson of the NCOP Mr Mosiua Lekota put it rather differently when he said, "if you were to look at provinces like the Northern Cape, Western Cape, Eastern Cape and KZN, and you increase fishing quotas all these provinces would probably vote in favour of such a system. It does not matter that they are ruled by three different political parties. Increasing quotas means increased jobs and food supplies for the people in their provinces. These are still political issues you're dealing with, but the responsibility of a provincial delegation is to look at the interests

of the people in those provinces" (*NCOP News*, March, 1999:4). Mr Lekota's example may be much more relevant prior to 1999 where at least two of the provincial legislatures were under the NNP and IFP rule.

From 2000 to the end of the second term of parliament all nine provinces where under ANC's control. This then makes it difficult to determine whether any mandate in favour of fishing quotas would be intended to benefit the province or its people rather than the party in power. A party as dominant as the ANC could gradually become accountable to itself in the absence of strong and effective opposition. This will then mean that whatever the NCOP say or does as far as provincial interests are concerned will be treated as such up until strong opposition hold it accountable or the people from provinces do so.

Lekota however, makes a good point in saying; "...but none of this will succeed unless we raise the level of public understanding and make people aware of the role they must play in Parliament" (*NCOP News*, March 1999:4). Indeed, as long as the people are not made aware of their in the decision making process at provincial level, delegates will continue to be accountable to their party structues rather than people in the province. In the meantime what they do or choose to do in the NCOP is only questioned by opposition parties. Even so where the power of the opposition is weak and ineffective, NCOP delegates can easily ignore opposition and always claim to represent the electorate. Thus, unless the public is made aware of the role of both provincial legislatures and the NCOP, and effectively participate in these structures the distinction between provincial interests and party political objectives will remain a grey area.

CHAPTER FOUR.

THE NCOP AND OTHER ASPECTS OF THE CONSTITUTION.

4.1 Amending the Constitution: the evidence.

The NCOP's role in representing provinces can also be evaluated in terms of how the body respond to Bills amending the Constitution. Bearing in mind that the procedure followed in amending the constitution differs from other Bills passed by the two houses. A two-thirds majority vote from the NA and a vote of six provinces from the NCOP are the basic requirements for passing a Bill amending the Constitution. In the period between 1999 and 2003 there have been few amendments to the constitution except for the 'floor-crossing' Bill. The Bill was introduced by the Minister of Justice and Constitutional Development, Mr Penuell Maduna through an ordinary Act of Parliament. Allowing MPs, MPLs and local councillors to join other political parties without loosing their seats.

The Amendment Bill went as follows; "To amend the Constitution of South Africa, 1996, in order to enable a member of the National Assembly or a provincial legislature to become a member of another party whilst retaining membership of the National Assembly or that provincial legislature. Also to enable an existing party to merge with another party, or to subdivide into more than one party, or to subdivide and any one of the subdivisions to merge with another party, whilst allowing a member of a legislature affected by such changes to retain membership of that legislature" (www.polity.org.za/html/govdocs/document).

This legislation was divided into four separate Bills, all addressing the floor crossing issue. The first Amendment Act and the Local Government Amendment Act both related to floor-crossing at local level (Devenish, 2001:146). The first Amendment Act provided for a 15 day period during the second and fourth year after a general election, as well as a one-off fifteen day period immediately following the commencement of the legislation, during which party allegiance could be changed without councillors losing their seats. The Local Government Amendment Act complemented the first Amendment Act by removing references to the bar on floor-crossing and making provisions for various aspects of local government to accommodate the new system of limited floor crossing.

The second Amendment Act and the Loss or Retention of Membership of National and Provincial Legislatures Act related to floor-crossing in national and provincial legislatures. The latter permitted a limited system of floor-crossing during a fifteen-day period during the second and fourth years after a general election as well as a once-off fifteen-day period immediately following the commencement of the legislation. The Second Amendment Act complemented the Membership Act by allowing the alteration of the composition of provincial delegations to the NCOP if the composition of a provincial legislature was changed due to floor crossing.

The controversial Bill was subsequently challenged by the United Democratic Movement in the Cape High Court. First a single Judge and then a full bench of the Court dealt with the matter. The full bench suspended the commencement and/or operation of the four acts pending the decision of the Constitutional Court on the application of the UDM to declare the acts invalid and unconstitutional. Responding to questions by NCOP members about floor-crossing, Deputy President Jacob Zuma said: "I must remind members that the amendments to our Constitution were supported by all nine provinces and all but three of the parties represented in the NCOP, namely the UDM, the IFP and the FF plus. The few parties that opposed floor crossing took the matter to the Constitutional Court and asked the court to rule that the amendments were unconstitutional..." (*Hansard, NCOP debates*, September 2000: 256). As far as the NCOP was concerned the floor-crossing legislation was done with as all provinces gave their support.

Judgement by the Constitutional Court on 4 October 2002 after complains by opposition parties ruled that floor-crossing by members of Parliament and the Provincial legislature could not be permitted through an ordinary Act of Parliament and that this objective could only be achieved by amending the Constitution. The Justice Minister, Mr Penuell Maduna went along and his team drafted a Bill amending the constitute arguing that the amendment was necessary since those members who have expressed their intention to cross in terms of the earlier legislation passed by Parliament at the time were still determined to exercise their rights.

Opposition parties both at national and provincial level saw this as the ruling party's attempt to weaken opposition. The UDM challenged the constitutionality of the legislation. The party argued amongst others that the legislation compromised the

constitutional requirement that the electoral system should allow for "in general, proportional representation" (www.polity.org.za/html/update/2001). In addition it argued that smaller parties would be negatively affected by the legislation as it encourage "cherry-picking" where larger parties offer more attractive positions to members of smaller parties and so lure them away from their parties (www.polity.org.za/html/udate/2001).

On 3rd and 4th July 2002, the Constitutional Court convened to consider as a matter of urgency the UDM's application and an appeal by the government against the orders of the High Court (www.sabcnews.co.za/news/2001). This Court, having heard argument issued an interim order on 4th July in order to stabilize the political situation, pending a decision by the Constitutional Court. On the 4th of October 2002 the Constitutional Court delivered three unanimous judgements concerning the matter (www.sabcnews.co.za/news/2001). The first of these, the so-called 'UDM interim judgement', which gave reasons for the interim order of July 4. The second the 'UDM appeal judgement' upheld an appeal against the order of the Cape High Court and set it aside. The third, the 'UDM main judgement' addressed the merits of the constitutional challenge to the legislation and ruled in favour of the justice minister (Devenish, 2000:3).

After the Constitution of South Africa fourth Amendment Act was passed the first window period (of 15 days) opened, allowing Members of Parliament and Members of Provincial Legislatures to defect to other parties or form a new party without losing their seats. Nationally the defections had a significant impact within the National Assembly, and provincially KwaZulu-Natal and Western Cape were the most affected (www.sabcnews.co.za/news/2001). The ANC increased its representation in the NA to 275 thereby gaining a two-thirds majority. The UDM's representation was reduced from 14 to 4 MPs. The DA also benefited with defections mainly from the NNP making its representation in the NA to be 46.

According to ACDP MP (NCOP) Kent Durr, the ACDP had opposed the crossing of the floor legislation on the basis that it would destabilise South Africa's political system and disenfranchise large sections of the public, striking at the heart of the principle of proportionality. " Both of these effects have occurred," Durr said. "There has been a change of authority and government in cities like Cape Town, provinces

like the Western Cape and dozens of municipalities. The parliamentary institution of the National Council of Provinces has also been seriously weakened (www.polity.org.za/html/update/2001). As members from one party crossed to another leaving smaller ones like the UDM in the Western Cape with no representation in the NCOP.

Provincially, the ANC gained outright majority in the Western Cape Legislature following defections from the NNP and UDM (www.sabcnews.co.za/news/2001). In KwaZulu-Natal the ANC's alliance with smaller parties increased its representation to 40 seats while the IFP alliance with the DA left them with 38 seats (www.sabcnews.co.za/news/2001). The floor-crossing legislation provide that twice in a five-year term MP's, MPLs and Local Government Councillors be given an opportunity to defect without losing their seats. The table below shows how the floor-crossing legislation has affected the two provinces. The bold figures in brackets show the party's loss rather than gain.

Table 4.1

WESTERN CAPE			
Party	**1999 elections**	**Defectors**	**After floor-crossing**
ANC	18	4	22
DA	5	2	7
NNP	17	**(6)**	10
UDM	1	**(1)**	0
ACDP	1	1	2
NEW LABOUR PARTY		1	1
TOTAL	42		42
KWA-ZULU-NATAL			
Party	**1999 elections**	**Defectors**	**after floor-crossing**
ANC	32	3	35
IFP	34	**(2)**	32
DA	7	**(1)**	6
UDM	1		1
NNP	3	**(1)**	2
ACDP	1		1
MF	2		2
P&DP		1	1
TOTAL	80		80

Source SABCnews.co.za/news/2001/22/02/2005.

4.2 The NCOP and Intergovernmental relations.

According to Murray & Nijzink (2002:44), some members of the national and provincial executives think that the NCOP's role in intergovernmental relations is redundant. This notion is based on the premise that co-operation between provinces and the national government can take place through intergovernmental forums established by the executive. Currently, it is in the MinMECs that most productive discussions of new legislations and policies affecting provinces takes place and not in the NCOP.

In these forums departmental officials are invited to provide detailed information relating to policy issues. However, the effectiveness of MinMECs varies and much depends on the relationship between the national Minister and the MECs. The implication is that if the Minister and the MEC belong to the same political party it is unlikely that they'll disagree. And according to Murray & Nijzink (2002:45), "Only in rare cases where disagreements are resolved in the NCOP, often disagreements are resolved in MinMECs or party caucuses and not in the NCOP". This smack of political expediency rather than efficiency for provinces.

The 1998 commissioned Audit Report on intergovernmental relations acknowledged the role the NCOP play in intergovernmental relations. It said: "In articulating and promoting provincial interests through the legislature, executive and judicial branches of government...the NCOP is regarded as an important instrument for giving effect to intergovernmental relations." Conversely, the report lamented what it called the NCOP's "overloaded, limited resources and disempowering legislative process" (IGR Audit Report,1998:35). The substance of the critique is that the NCOP is inundated with work due to its broad mandate in which it scrutinises both section 75 and 76 Bills. Provincial legislatures simply do not have the resources to cope with the exacting demands of legislative scrutiny or deal with Bills expeditiously within the legislative cycle.

The report was commissioned by the Department of Local Government to improve the weak intergovernmental relations between local and the other two spheres of government. The government's intention was that the system of intergovernmental relations must result to a seamless government system with all the other spheres

assisting government to set, execute and monitor key development priorities regarding the creation of work, fighting poverty and re-enforcing national pride. The Audit Report (1998:58) also noted that: "Poor Inter-Governmental Relations (IGR) co-ordination is frequently a problem of capacity and management rather than a problem of inappropriate intergovernmental relations". The report recommended that an enabling framework for the regulation of IGR in ways that would maintain the balance between an evolutionary system and the need for prescription.

Five years after in an unprecedented move, President Thabo Mbeki, Cabinet Ministers and Deputy Ministers, Premiers, Local Government MECs and representatives from South African Local Government Association met on 25th June to discuss the Intergovernmental Relations Framework Bill. According to the government's information website (http://www.info.gov.za/speeches/2004/04), the Bill seek to provide focus, clarity and certainty regarding core aspects of intergovernmental relations at the executive level of government. It does not deal with intergovernmental relations within the legislative branch of government, the clusters of public administration, or other clusters associated with cabinet.

The most persistent criticism levelled at the intergovernmental relations process is that it has eclipsed the NCOP's role (Murray & Nijzink, 2002:64). That is to say, when legislation comes before the NCOP, provincial interests have already been articulated by MEC's in the MinMECs or through other IGR processes. As a result, respondents on the commissioned report felt that little was added to the debate and the NCOP appeared to them as simply a "rubber stamp" of the National Assembly (IGR Audit Report, 1998:65).

4.3 Provincial party interests or provinces' interests?

In his address to the NCOP conference in May 1998, the then Deputy President Thabo Mbeki took provincial executives to task for their failure to participate in NCOP processes in provincial legislature. " It would appear", he said, "that MECs consider participation in MinMECs as the sum total of their contribution to the development of policy and have failed to grasp the significance of the role of the NCOP on intergovernmental relations" (*NCOP Review*, 1994-1999:31). In other words, MECs by undermining the NCOP are also undermining the interests of provinces.

Some of the reasons cited for this failure is that provincial legislatures do not have the experience and expertise needed when deliberating on section 76 legislations. Particularly on how such legislations will impact on the lives of the people of the province. In most instances, provincial legislatures approve legislation in the NCOP without having fully examined the capacity of the province to implement such legislation (*NCOP News*, March 2000:4). The final product that emerges from Parliament is impoverished because the kind of co-operation amongst provincial legislatures and executives, demanded by the Constitution has not happened (*NCOP News*, March, 2000:5).

Often, by the time a policy issue reaches the National Council of Provinces, NCOP delegates had already resolved the matter at their caucuses or at the MinMECs forums. Deliberations at the NCOP sittings become perfunctory stunts or formalities meant to meet procedural demands. This also explains why during committee meetings members limit themselves in identifying printing errors, punctuations, meanings and definitions of the legislation draft. So that when it comes to assessing whether the proposed Bill, will be implemented successfully. Instead members simply satisfy themselves by identifying and acknowledging problems while supporting the passing of the Bill.

When these Bills are tabled before the NCOP there is enough information for provinces to articulate their specific provincial interests. Surveys by the Institute of Race Relation and Statistics South Africa often provide enough scientific evidence from which provinces can base their arguments. For example the tables below show how each province rate in terms of crime murders, levels of poverty and unemployment. With this information, provincial delegates are well informed to make a huge impact on Bills such as *Gun Control* and *Social Assistance*. A reference to these statistics at least would have indicated that delegates are indeed informed of their provinces' challenges and that national legislations takes this into account.

Table 4.3.1

Murder crimes by province for 2000/01 and 2002.

Province	2000/01	2001/02	2000/01/2001/02 (-decrease/+increase).
E. Cape	51.0	51.2	+0.4%
Free State	**33.3**	**32.0**	**-3.9%**
Gauteng	62.2	58.4	-6.1%
KZ-Natal	**60.4**	**57.5**	**-4.8%**
Limpopo	14.6	14.9	-2.1%
Mpumalanga	**31.5**	**29.1**	**-7.6%**
N. West	29.5	29.7	+0.7%
N. Cape	**54..5**	**56.1**	**-8.2%**
W. Cape	82.7	79.3	-4.1%

Source: South Africa Survey 2002/2003: SA Race Relations.

Although these murder figures are not broken down to reflect whether they were all or partly related to guns. Generally, they reflect how the *Gun Control Bill* will help reduce murders by province. NCOP delegates do not even by way of insinuating refer to these figures. They support all the Bills introduced by ministers on the belief that they are addressing a national problem. Less concerned about the problems that might be encountered both at provincial level and local level for the successful implementation of the Act. The fact that some of the Bills are section 76 Bills, meaning that they require a provincial perspective seem to have little effect in their deliberations. An example can be made of the *Social Assistance Bill* of which both poverty and unemployment levels are related. The figures below show starkly how each province is affected by these two factors yet none of the NCOP delegates draw any link between these figures and the Bill.

Table 4.3.2

Province	Poverty levels	Unemployment(strict/expanded).
Eastern Cape	4 595 111	28.1%/39.2%
Free State	**1 549 479**	**33.5%/40.9%**
Gauteng	2 424 471	27%/35.6%
KwaZulu-Natal	**5 081 634**	**34.3%/46.7%**
Limpopo	3 471 474	36.7%/55.1%
Mpumalanga	**1 717 922**	**29.8%/41.7%**
North West	2 092 671	30.7%/46.3%
Northern Cape	**392 562**	**30.0%/41.0%**
Western Cape	933 614	18.6%/25.5%

Source: South Africa Survey 2002/2003: SA Race Relations Surveys

One is therefore left with the notion that very little that the NCOP does to represent provinces. It is likely that the majority party in the province take advantage of the situation, where provincial legislatures become party political vehicles. One major contributory factor to this is that members of the provincial committees where deliberations and mandates are taken have no pre-existing policy specialisation or experience of their work (Murray & Nijzink, 2002:48). Thus, it becomes very difficult for them to develop a proper understanding of the matters that come before their committees.

The ANC-NCOP Chief Whip, Henry Makgothi in his frank interview (*NCOP News*, 1998:8) alluded to the fact that there was a tendency among NCOP members during debates of delivering speeches that have a strong party political bias. According to the Chief Whip; "This has the potential to undermine provincial mandates...we must certainly make sure that the NCOP steers away from being a duplication of the National Assembly. The temptation among politicians is always there" (*NCOP News*, 1998:8).

4.4 Evaluation.

It is clear from the many factors cited above that the role of the NCOP has either not been fully developed or the institution is simply failing to fulfill its mandate. First as a mechanism to facilitate intergovernmental relations and secondly as representative of provincial interests. With regard to the former, the MinMECs fourms where most of the decisions concerning provinces are taken have relegated the NCOP to merely a processor of legislations. The idea that the NCOP will harmonise the interests of provinces through consensus thereby making the legislative process efficient. Has instead been substituted by political party caucuses, with a political agenda and rarely with the interest of provinces.

It is no doubt that the idea to amend the Constitution to pass the legislation on floor crossing was politically motivated. Among other benefits the ruling party expected in passing the floor-crossing legislation was the total control of all provinces. The intention was to consolidate its power, and through democratic means entrench the notion of a unitary state in a one party dominant system. The NCOP, or rather the provinces supported the passing of this legislation making real the fears that the institution may just become another rubber stamp like its predecessor.

The fact that the ruling ANC has taken control of all nine provinces makes the NCOP's role in representing provinces even more cumbersome. In the presence of a weak opposition this is even more dangerous. It is indeed unlikely that Ministers, Premiers and NCOP delegates in the MinMECs forums from the same political party will disagree. This best explains Murray's (2002: 63) concern that only on rare cases where disagreement are resolved in the NCOP, in most cases they are resolved in the MinMEC's forums or other intergovernmental relations structures.

With all the nine provinces under the ruling ANC and judging from the NCOP's reduntant role in intergovernmental relations, all things point to one direction. The possibility that the NCOP may become a rubber stamp of Bills paased by the first house looms large. Until of course measures are taken to avoid this scenario as the former Chairperson of the NCOP once said;

> "We should have a claer means of engaging with provincial legislatures. Our relationship with provincial legislatures should not be a top down one where the NCOP members go to brief provinces as though we are legal people going to brief provinces. If the memoranda sets out the impact on provinces, from this perspective we have a clear set of criteria to conduct a real investigation. I believe that if we are to really represent the provincial interests, we must know what we are representing. I feel at the moment we are not asking the harder questions and carrying out the detailed investigations that are required" (NCOP News, 1999:5).

It is obvious for the NCOP that to improve its image, role and status to the public it will have to show by way of disagreeing with the National Assembly particularly on section 76 Bills. This might be too demanding for the institution. However, only then will the institution gain the confidence of the public and in turn take it seriously. Currently, it has a low profile merely because it never draw the public's attention by vigoriously articulating the interests of provinces on any Bills so far.

CHAPTER FIVE

CONCLUSION.

5.1 Summary of the main findings.

The introduction of the NCOP by the 1996 constitution heralded a new era for South Africa's political system. It formed part of the non-federal unitary state of the Republic and part of the second sphere of South Africa's government system. Serving as a link between the national and local government spheres. Its role as described by the Constitution, mainly to represent the interests of provinces at national level. To ensure that provincial needs and concerns are taken into account in the formulation and passing of national legislation.

The study has revealed that the NCOP has battled not only to establish itself but also to fulfil its mandate. Mainly becuase it is a relatively new institution and its process very complicated (Murray & Nijzinsk, 2002:42). Secondly, it suffers problems of both internal credibility, where South African politicians and policy-makers alike pay little attention to it, and external legitimacy, where the public does not see it performing a useful role. In general the NCOP has little or no profile in the framework of South Africa's democratic process.

This obscurity is augmented in some way by the manner in which the organisational structure of the NCOP functions. This includes untimely programmes, characterised by changes at short notice, poor communication from national parliament to provinces and ministers who change their schedules whenever it is convenient for them to do so. These problems have contributed to the poor functioning of the NCOP and also affecting the institution in fulfilling its mandate. In some cases the institution has been undermined by structures unaccountable to the public, like the ruling party's caucus meetings and MinMECs who have relegated the body into a mere processor of legislations.

The possibility that the NCOP might degenerate into a rubber-stamp mechanism similar to its predecessor remains a potent possibility. There are a number of reasons why this may happen. First, the growing dominance of the ANC in South African

politics will make it difficult to distinguish between party and provincial interests. Secondly, there are no constitutional provisions that give official opposition veto at provincial level to at least review the mandates issued by the provincial majority party. In the period covered by the study (between 1999 and 2003) there hasn't been one instance where the NCOP rejected a Bill referred to it by the NA, this include section 76 Bills and that remains a worrying trend.

5.2 Fulfilling the mandate?

Based on the findings of the study, it is rather prematurely to conclude that the NCOP fulfills its constitutional mandate in representing the interests of provinces at national level. There are reasons why this is so; in the period covered by the study the NCOP was in its second term of parliament. According to its members it was "work in progress". The problems it was confronted with according to President Thabo Mbeki were regarded as "teething problems"(Speech Conference, 8 May 1998).

In turn criticism levelled against the institution has been viewed as improper and unfair since the institution is regarded as developmental in character and unique in essence. In other words, it has no prototype around in which it can measure itself except in terms of legislative powers. Accordingly, unless the NCOP is given more legislative constitutional powers, such as veto over Bills affecting province. Its role to represent provinces will remain ineffective except as a rubber stamp of Bills passed by the NA. Thus, the NCOP will need to improve its role either by demanding more constitutional powers or by being vigilant on Bills affecting provinces. In the period covered by the study the NCOP showed signs that it might easily allow itself to become a 'rubber stamp' of Bills passed by the first house.

Importantly, there's a great possiblity that MinMECs forums might contribute immensely in turning the NCOP to a 'rubber stamp' mechanism. If decisions concerning provinces are to be decided at party caucuses and in structures such as MinMECs, the NCOP cannot fulfill its mandate other than being a rubber stamp. In overall, the NCOP need to do more than just passing Bills; a thoughrough investigation of what constitute provincial interests as the former NCOP Chairperson Naledi Pandor once pointed out that; "...if we are to really represent the provincial interests, we must know what we are representing" (*NCOP News*, 1999:5).

5.3 Abolition or reform of the NCOP.

As a constitutionally constituted body it is clear that the NCOP will remain with us for a long time to come. Secondly, the institution itself was an outcome of negotiations of the future government system of the country prior to 1994 between the advocates of federalism and unitarians. Judging from the current situation it would seem that those who advocated a unitary state are on the winning side. With the ruling ANC in full control of the nine provinces it is unlikely that any suggestions to the abolition of the NCOP will see the light of day.

The one option however would be the reformation of the institution. There is no doubt that the nine different provinces have different interest economically and otherwise. This however can hardly be revealed since only one political party control all the nine provinces. The first step toward reforming the institution would be at constitutional level. Instead of boasting about its uniqueness the NCOP must follow the example of the German Bundesrat where the second house has veto on all Bills affecting the federal states.

To have real meaning and to counter the power of a one party dominant state, official opposition at provincial level must have veto over mandates on Bills affecting provinces. The constitution must specify excatly when and how such veto must be exercised to avoid party political objectives being carried out by opposition parties. Other than that, provincial legislatures must be elected directly by the electorate instead of the party list. This will then make NCOP delegates accountable to the electorate rather than their chief whips and party bosses.

Delegates will then come to terms with the fact that if they fail to represent the interests of their respective provinces they will be voted out of power in the next elections. Not only this will reform the NCOP and boost its profile to the public, but it will also stregthen our democratic ethos and solidify our vision for a truly democratic South Africa.

5.4. Recommendations.

Based on the findings of the study the following recommendations are provided:

5.4.1 Progress report on the NCOP.

To satisfy all the relevant stake-holders on the NCOP progress since its inception. A progress report on whether the NCOP has been able to fulfill its role in representing provinces must be conducted.

5.4.2 Intergovernmental relations.

The concept of intergovernmental relations seem to have a negative effect on the NCOP's role in representing provincial interests. Practically, there seem to be a conflict between representing nine different provinces and harmonising their interests through intergovernmental relations processes. This explain why major decisions concerning Bills affecting provinces are taken in MinMECs. The government need to review the role of MinMECs forums to avoid hindering the NCOP in fulfilling its mandate. The former is not constituted by the constitution and has no specific mandate.

5.4.2 Commitment.

It would be in the interests of the ruling ANC to guard itself from the evils of absolute power. The axiom that, "power tend to corrupt and absolute power corrupts absolutely" tends to be real where weak opposition exist (Collins, 1992:23). With this in mind the ANC will have to commit itself and its members to the constitutional provisions of our constitution and be an example to all the other parties. To do this, it must do everything in its power to give meaning to the NCOP as a true representative of provinces.

5.4.3 NCOP profile.

The low profile suffered by the NCOP can only be improved by the NCOP members themeselves. Provincial outreaches in the form of *Imbizos* apperently have done very little to publicise the NCOP. The institution need to work with NGOs whose area of work include parliament and the legislature to publicise the institution and explain its role within parliament to the general public by means of booklets or workshops.

5.4.4 Public access.

Provincial legislatures need to develop ways in which the public can have easy access to their sittings. For indeed, unless people from provinces put pressure on the NCOP

or their delegates, the issue of provincial interests will remain an exclusive preserve of the party in control of the provincial legislature - with little or no accountability to the people in the province.

4.5 Programming.

There's no doubt that one way or the other poor programming and communication between national parliament and provinces has had a negative effect on provincial delegates' preparation for deliberation in the NCOP. Thus, commitment to the institution must include improved programming and communication between parliament and provinces on a continuous basis.

4.6 Provincial interests.

Before the NCOP was established, the fear was that it might become another version of the senate with no meaningful role except that of rubbber-stamping Bills reffered to it by the NA. That fear has not been proved unjustified, because the NCOP's vote (as the study has shown) has never differed from that of the NA. In the period covered by the study the NCOP has never rejected the NA version (Brandt, 2001:72). To improve this situation more thoughrough study of what constitute provincial interests must be undertaken with the participation of local government structures to help identify provincial intersts.

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