The role of the National Council of Provinces within the framework of co-operative government in South Africa

A legal analysis with special regard to the role of the *Bundesrat* in Germany

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A. Introduction

Chapter 3 of the 1996 South African Final Constitution[1] deals with the principle of co-operative government.[2] This principle determines the relationship among the different spheres of government in South Africa.[3] Section 40 (1) of the South African Constitution (FC) states governments at the national, provincial and local spheres of government are distinctive, interdependent and interrelated. The principle of co-operative government enjoins the different spheres, be they national, provincial or local, to co-operate with each other as well as across spheres.[4] In addition to co-operation, the relationship among the spheres is characterised by consultation, co-ordination and mutual support.[5]

On a national level, South Africa 'voted for' a national Parliament comprising of two legislative bodies, the National Assembly and the National Council of Provinces (NCOP).[6] The national Parliament, nine provincial legislatures and 264 Municipal Councils exercise legislative authority in terms of the powers assigned to them by the Constitution.

The primary role of most of the second chambers in other constitutional systems is to review national legislation with a view to bringing to bear upon it regional interests and concerns.[7] Like other constitutionally-grounded jurisdictions the NCOP, as the second chamber of parliament in South Africa, ensures that provincial interests are taken into account in the national sphere of government. This is achieved by 'participating in the

1 Constitution of the Republic of South Africa 1996 Act 108 of 1996.

2 See section 40 and 41 FC.

3 *Rautenbach / Malherbe*, Constitutional Law, 1999, 3rd ed., p. 290.

4 See *Devenish*, Commentary on the South African Constitution, 1998, p. 105.

5 *Rautenbach / Malherbe*, Constitutional Law, 1999, 3rd ed., p. 290.

6 *C.M. Murray / R. Simeon*, From paper to practice: the National Council of Provinces after its first year, 14 (1999) SAPR/PL, 96, 97.

7 *R. Watts*, Comparing Federal Systems in the 1990's, p. 88.

national legislative process and by providing a national forum for public consideration of issues affecting the provinces'.[8]

As a constitutional body, the NCOP has no direct precedent in the world though it is closely modelled on the *Bundesrat,* that is the German 'Federal Council of provinces'.[9] The *Bundesrat* is one of Germany's two constitutional bodies of legislature on the federal level, the other being the *Bundestag* (the Federal Assembly). It serves as a link between the Federal Government and the states or *Länder* and is the channel through which the states can take part in the legislative and administrative processes of the Federal Republic and in matters affecting Germany's involvement in the European Union (EU). The NCOP is still very young while the *Bundesrat* brings with it a history of 53 years. Despite remarkable similarities between these two second houses of Parliament, the NCOP deviates from the German model in several respects.

This article[10] provides an outline of the multi-level system in South Africa. It examines some of the provisions relating to federal governance articulated in the 1996 Constitution and compares them with similar features found in the German Constitution. The main focus is the role of the NCOP within the framework of co-operative government. However, the role of the NCOP cannot be understood without an evaluation of the multi-level system, and its function must be analysed within the concept of co-operative government. By examining the role of the NCOP it is important to look at the reasons for its design and to understand the history of the second houses of Parliament in South Africa. Although the role of the NCOP is clearly stated in section 42 (4) of the South African Constitution, in practice the NCOP's specific functions and responsibilities are still developing.

The article evaluates the NCOP's composition and voting procedures, its special functions and its role in the legislative process. It will ascertain whether the NCOP fulfils its functions in a manner consistent with the principle of co-operative government provided in Chapter 3 of the constitution and question whether a change in the provisions relating the NCOP would enhance the principle of co-operative government. As a basis for comparison, attention will be paid to the model provided for in German federalism and the *Bundesrat*. The German federal experience is valuable not only because of its uniqueness, but also

8 Section 42 (4) FC.

9 *C.M. Murray*, South Africa's National Council of Provinces: Stepchild to the Bundesrat, p. 262; see also *C.M. Murray*, From paper to practice: The NCOP after its first year, 14 (1999) SAPR/PL, 96, 98; *N. Steytler*, Concurrency and cooperative government, p. 3; *R. Watts*, Comparing Federal Systems in the 1990's, p. 88.

10 The article is based on a LL. thesis submitted in the academic year 2000/01 to the University of Cape Town, Faculty of Law, School for Advanced Legal Studies, supervised by Prof. Christina M. Murray.

because of the immense influence that it had on the drafting of the South African Constitution.[11] The article further explores why the drafters of the South African Constitution relied so heavily on the German federal experience and illuminates the reasons for the NCOP's deviation from the model provided for by the *Bundesrat*. It scrutinises the issue whether the NCOP is able to fulfil its role as a representative of provincial interests on a national level and whether the structure and powers of the NCOP can be seen as an improvement to the conception of the *Bundesrat*.

B. The South African multi-level system of government

When the drafters of the South African Constitution considered the design of their constitutional system there were many different models from which to choose. The most important question to answer was whether there should be strong, centralised government or whether territorially defined regions should enjoy real autonomy.[12] Hence, discussion revolved around the issue of whether to adopt a unitary or a more federal system of governance.[13]

I. Notion and historical background of federalism in South Africa

Federalism is a widely used concept in law and political science. The word derives from the Latin word "foedus" meaning association, treaty or alliance.[14] Federalism therefore describes a community consisting of several states which recognises in particular their right of self-determination and their right to participate in decision-making processes.[15] The national government is responsible for those matters which must be dealt with in a uniform manner and which is in the interest of all people, while the constituent states determine other, more local matters.[16] The term 'federalism' has been introduced to constitutional terminology from Anglo-Saxon federations. In the United States in particular it has been used to describe the strict compartmentalisation of Federal and State powers.[17]

11 *De Villiers*, National-provincial co-operation – the potential role of provincial interest offices: the German experience, 14 (1999) SAPR/PL, 381, 386.

12 *G. Erasmus*, Provincial government under the 1993 Constitution. What direction will it take?, SAPL 9 (1994), 407, 408.

13 *G. Carpenter*, The Republic of South Africa Constitution Act 200 of 1993 – an overview, SAPL 9 (1994), 222, 230.

14 *D.J. Kriek*, Theory and practice of federalism, p. 12, in: *Kriek*, Federalism – The solution?

15 *Miebach*, Federalism in Germany, p. 2.

16 See http://www.bundesrat.de/Englisch/Wissen/Index.html.

17 *Philip M Blair*, Federalism and Judicial Review in West Germany, 1981, p. 208.

Terms like federalism or federal have been problematic in South Africa. The Apartheid State used the ideas of federalism and confederalism to help justify the existence of the homelands, also known as the Bantustans.[18] In the multi-party negotiations leading to the Interim Constitution the African National Congress (ANC) argued in favour of a unitary state.[19] It maintained that only a unitary state could secure majority rule and ensure that the concentration of resources necessary to undertake the massive process of social and economic transformation remained in the hands of a centralised government. Decentralising authority would make decision-making more difficult and would undermine the government's capacity to reconstruct and develop the country.[20]

However, other political players argued for a federal state. The National Party (NP), for example, favoured an American style system of checks and balances against majority power. They argued that federalism together with a Bill of Rights would be an important check on the power of the majority.[21] Some right-wing Afrikaners advocated the establishment of an 'Afrikaans Volkstaat', a homeland with an Afrikaner majority.[22] The Inkatha Freedom Party (IFP), on the other hand sought more autonomy by promoting the right for self-determination for the province of KwaZulu-Natal.[23]

II. Federal features in the Interim Constitution (IC) of 1993

The multi-party negotiations culminated in a compromise and a balance being struck between the powers of the central government and those of the regions.[24] Although the Interim Constitution of 1993[25] did not embody the principles of classical federalism, it was

18 *R. Simeon / C.M. Murray*, Multilevel governance in South Africa – an interim report, p. 2.

19 See *N. Steytler*, Constitution-Making: In Search of a Democratic South Africa, in: *M. Bennun / M. Newitt* (eds.), Negotiating justice, 1995, 62, 65.

20 *R.. Simeon*, Considerations on the design of federation: The South African constitution in comparative context, 13 (1998) SAPL, 42, 45; see also *R. Simeon / C.M. Murray*, Multilevel governance – an interim report, p. 5.

21 See *R. Simeon*, Considerations on the design of federation: The South African constitution in comparative context, 13 (1998) SAPR/PL, 42, 45.

22 See *A. Sparks*, Tomorrow is another country, p. 191, 204-206.

23 *R. Simeon / C.M. Murray*, Multilevel Governance – an interim Report, p. 5.

24 See *F. Venter*, Levels of government, in: *Konrad-Adenauer-Stiftung* (ed.), Aspects of constitutional development in South Africa, 1995, 41, 42.

25 Constitution of the Republic of South Africa Act 200 of 1993, assented to 25 January 1994, Date of commencement: 27 April 1994, as amended by Acts 2, 3, 13, 14, 24 and 29 of 1994, Acts 20 and 44 of 1995, and Acts 7 and 26 of 1996.

also not a completely centralised unitary form of state.[26] Indeed the federal principle was deeply embedded in the Interim Constitution.[27] Section 156 (1) (b) IC, for instance, gave the provinces the exclusive right to oppose taxes in respect of casinos, gambling, wagering, lotteries and betting. There was also an implicit exclusion of the power of Parliament to legislate in respect of provincial official languages[28] and the names of the provinces.[29]

The 'Constitutional Principles', contained in Schedule 4 to the Interim Constitution and which were included in the Constitution in order to guide the Constitutional Assembly in the writing of the Final Constitution, stated that 'Government shall be structured at national, provincial and local levels' (Constitutional Principle XVII). Furthermore the Principles stipulated that some forms of constitutional amendments required the approval of the provinces, or their representatives in a provincially constituted second house of parliament (Constitutional Principle XVIII) and that each level of government had 'exclusive and concurrent powers' (Constitutional Principle XIX). Above all these Principles endorsed the principle of subsidiarity, which requires that decisions should be taken at the level that is most 'responsible and accountable' (Constitutional Principle XXI). As a result in the process leading to the new Constitution of 1996 the drafters paid even greater attention to intergovernmental relations.

III. Federal features in the final Constitution of 1996

While working on the Final Constitution, the Constitutional Assembly closely studied several existing federations, including those of Canada, India, Germany, Switzerland and the United States. The model it chose closely resembled the German model of co-operative, shared or integrated federalism.[30] The idea of a national leadership with framework legislation implemented by the states (*Länder*), as well as a close interrelationship between central and *Land* governments achieved through the *Bundesrat* seemed to be more appropriate to serve the South African needs than for instance the Canadian model.[31]

26 *De Villiers*, Intergovernmental relations in South Africa, 12 (1997) SAPL, 197, 199.

27 *R. Simeon*, Considerations on the design of federation: The South African constitution in comparative context, 13 (1998) SAPL, 42, 45; *F. Venter*, Milestones in the evolution of the new South African Constitution and some of its salient features, 9 (1994) SAPL, 211, 219.

28 Section 3 (5) IC.

29 Section 124 (1) IC.

30 *R. Simeon / C.M. Murray,* Multilevel Governance in South Africa – an interim Report, p. 6.

31 *R. Simeon / C.M. Murray*, Multilevel Governance in South Africa – an interim Report, p. 6; see also *N. Steytler*, Concurrency and cooperative government: a South African case study, p. 1.

The 1996 South African Constitution does not allude to the term 'federal' or 'federalism' but it sets up a system in which both legislative and executive authority is divided between the different spheres of government. Each sphere is directly elected and each has at least some autonomous powers.[32] In effect this constitutional framework establishes a system of so-called 'co-operative federalism'.[33] In order to examine the multi-level system of governance enunciated in the Final Constitution one must pay attention to some of its most prominent federal features. Consequently, a comparison of similar German features will promote a better understanding of the South African model.

1. Vertical division of power

In South Africa, the national, provincial and local governments all exercise legislative authority.

a) Division of power in the Final Constitution

Section 44 (1) empowers the national Parliament to legislate on 'any matter'. In addition Schedule 4 lists a broad range of powers that are exercised concurrently with provincial and local governments, whereas Schedule 5[34] lists areas of exclusive provincial legislative competence.[35] However, Parliament may still pass legislation on the functional areas listed in Schedule 5. Section 44 (2) provides for this exception by conferring on Parliament the power to intervene in the areas of exclusive provincial competence listed in Schedule 5 in defined circumstances. Parliament has the power to legislate in these areas of provincial jurisdiction, if it is necessary to 'maintain national security', 'maintain economic unity',[36] 'maintain essential national standards', or to 'prevent unreasonable action taken by a

32 *De Villiers*, National-provincial co-operation – the potential role of provincial interest offices: the German experience, 14 (1999) SAPL/PR 381, 46.

33 See *De Villiers*, National-provincial co-operation – the potential role of provincial interest offices: the German experience, 14 (1999) SAPL/PR 381 382/383; *R. Simeon,* Considerations on the design of federations: The South African Constitution in comparative context, 13 (1998) SAPL/PR 42, 59.

34 Including: Abattoirs, ambulance services, archives, museums and libraries, other than national ones, liquor licenses, provincial planning, cultural matters, recreation, roads and sport, and veterinary services.

35 See section 104 (1) (b) (ii) FC.

36 In *Ex parte President of the Republic of South Africa in re: The constitutionality of the Liquor Bill* 2000 (1) BCLR 1 (CC) para 75 the Court held that 'economic unity' must be understood in the context of the system of co-operative government set up by the Constitution. This meant that the Constitution does not contemplate that the provinces will compete with each other and that in the context of trade the national government must be allowed to set up a single regulatory system for inter-provincial trade.

province which is prejudicial to the interests of another province or to the country as a whole'.[37] Where these circumstances do not apply, provincial legislation prevails.

Although the instances of intervention are broadly formulated the word 'necessary' considerably limits Parliament's power to legislate in respect of provincial issues. The term 'necessary' implies that there must be no alternative to deal with the circumstances therein stated other than by way of national intervention. In the *Liquor Bill Case*[38], the Constitutional Court held that the provisions of the Liquor Bill, which prescribes detailed mechanisms for provincial legislatures in the establishment of retail liquor licensing, infringed upon the provincial legislature's exclusive competence to enact legislation on liquor licenses and that this was not necessary for the maintenance of economic unity as prescribed by Schedule 5 of the Final Constitution. The Constitutional Court recognised that consistency of approach in the field is important, but held that 'importance does not amount to necessity'.[39] It further held that whether national legislation was 'necessary' had to be determined in the light of the system of co-operative government set up by the Constitution. Consequently, because this structure did not contemplate that provinces will compete with one another on an economic level, it was necessary for national legislation to establish a single regulatory system for the conduct of inter-provincial trade of liquor.[40]

Due to the 'necessity' requirement, the national power of intervention in an area of exclusive provincial competence is thus defined and limited.[41] The only incidence of exclusive provincial competence, in the sense of a power distributed to one competent level of government only, is the naming of a province,[42] the writing of a provincial constitution,[43] and the adoption of a language policy.[44]

b) Division of power in the German Constitution

37 See section 44 (2) (a-e) FC.

38 *Ex parte President of the Republic of South Africa in re: The constitutionality of the Liquor Bill* 2000 (1) BCLR 1 (CC) para 80.

39 *Ex parte President of the Republic of South Africa in re: The constitutionality of the Liquor Bill* 2000 (1) BCLR 1 (CC) para 80.

40 See *Ex parte President of the Republic of South Africa in re: The constitutionality of the Liquor Bill* 2000 (1) BCLR 1 (CC) para 75.

41 *Ex parte Chairperson of the Constitutional Assembly: In re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) para 257.

42 Section 104 (2) FC.

43 Section 142-145 FC.

44 Section 6 FC.

In Germany, the national government's legislative power extends to issues falling within Parliament's exclusive and concurrent authority. The catalogue of exclusive powers is short and only a limited number of legislative powers are allocated to the national government.[45] In most other cases 'the exercise of governmental powers and the discharge of governmental functions shall be incumbent on the *Länder*'.[46] However, where there is a conflict between the two, federal law overrides that of the *Länder*.[47]

The Basic Law, the German Constitution of 1949, contains a long list of powers exercised concurrently, including ordinary civil and criminal law and the administration of justice, public welfare, education, the environment[48] and other general areas which, taken together, cover nearly the whole range of public policy.[49] When federal legislative power is concurrent, the *Länder* are free to act to the extent the *Bund* does not. Article 72 sets out the conditions under which the federation has the right to legislate, reflecting the idea of subsidiarity.[50] The federal government's concurrent authority may only be exercised when there is a necessity for federal regulation. This is the case when state legislation cannot be effectively regulated by individual *Länder;* where *Land* regulation might prejudice the interests of other *Länder* or the country as a whole; or where it is necessary for the maintenance of legal and economic unity'.[51]

45 Including: Foreign affairs, citizenship and immigration, nuclear power, domestic and international trade, currency, postal and telecommunications, social insurance, air transport, railways and national highways and a few others; Article 73 No. 1-11.

46 Article 30 BL.

47 Article 31 BL.

48 See Article 74 No 1, 7, 13, 24 BL.

49 *D.P. Kommers*, The constitutional jurisprudence of the Federal Republic of Germany, 2nd ed., 1997, p. 76.

50 *R. Simeon*, Considerations on the design of federations: The South African Constitution in comparative context, 13 (1998) SAPL 42, 56.

51 Article 72 (2) BL.

c) Differences and similarities between the two models

The South African Final Constitution employs similar wording. With regard to the area of concurrent power listed in Schedule 4, section 146 sets out the conditions under which national law prevails. It must apply uniformly across the country; must deal with a matter that cannot be regulated effectively by the provinces acting individually, must set out national norms, standards or policies, and must be 'necessary' for the maintenance of national security, economic unity, and other matters.[52] National legislation also prevails where it is aimed at 'preventing unreasonable action by a province' that is prejudicial to the economic health or security interests of another province or the country as a whole'.[53] While the provinces have extensive law-making powers of their own,[54] the national government is competent to exercise significant legislative powers. However, its actions have to be justified and linked to specific national purposes, again reflecting the idea of subsidiarity.[55] Thus, the division of powers in the South African Final Constitution reflects a centralised federal system, but one in which there is enough space for notable provincial initiative.[56]

(aa) The German model of shared powers

The German system differs from the South African model in a number of respects. Compared to the South African system, the German concept is more akin to a "shared powers-model". Firstly, the German model provides for very few exclusive powers at the national and the provincial level, thereby offering more room for concurrent law-making power than in the South African Constitution. This difference is accountable to the history of the Basic Law. One of the basic prerequisites for Allied approval which was laid down when the *Länder* governments were authorised to call a Constitutional Convention in *Herrenchiemsee* in 1948, was that the new system be a federal one that protects the rights of the participating states.[57] Based upon allied insistence, the founding members of the Basic Law

52 See section 146 (2) FC.

53 Section 146 (3) FC.

54 Schedule 4 and 5 list 46 separate items and a range of local government matters.

55 *R. Simeon*, Considerations on the design of federations: The South African Constitution in comparative context, 13 (1998) SAPL/PR 42, 61.

56 *R. Simeon*, Considerations on the design of federations: The South African Constitution in comparative context, 13 (1998) SAPL 42, 62; see also *R. Simeon / C.M. Murray*, Multilevel governance in South Africa – an interim Report, p. 8.

57 *Frankfurter Dokument Nr. 1,* in: 2 Quellen zum Staatsrecht 197, 198, cited after *D.P. Currie*, The Constitution of the Federal Republic of Germany, 1994, p. 43.

redrafted Article 72 to ensure that concurrent federal powers could be exercised only upon a showing of special need.[58]

Whether a special need in fact exists when the federal government exercises its concurrent jurisdiction is a question which the Constitutional Court has left to Parliament. It has held that it is a question of legislative discretion that is by its nature non-justiciable and therefore basically not reviewable by the Constitutional Court,[59] although, it has reserved its right to review independently any abuse of this discretion.[60] Later judgements by the Constitutional Court even declared that the Court was entitled to inquire whether the Legislature correctly interpreted the terms employed in article 72 (2) and stayed within the parameters prescribed by it.[61] The Constitutional Reform Act of 27 October 1994 has subsequently changed the 'clause of special need' for the Federation into a 'clause of necessity' in favour of the *Länder*. Furthermore the law attempts to force the Constitutional Court to abandon its 'political question theory' by giving the Court an explicit power of jurisdiction in disputes over the new 'clause of necessity'.[62] However, It remains to be seen if this change has an impact on the court's approach.

(bb) The role of the *Länder* in Germany

Secondly, the German *Länder* do not have broad legislative powers of their own. All legislation has more or less been centralised to a federal level. As a result, the States do not have very much of their own legislation. Indeed the States only regulate a couple of matters exclusively: school education and science policies as well as police matters. The laws that the *Länder* implement are mainly those which the *Bundestag,* the German Federal Assembly, has adopted.

The German model is also one in which, subject to the approval of the *Bundesrat*, the national government has a broad scope to act, and to influence *Land* legislative and admin-

58 *D.P. Currie*, The Constitution of the Federal Republic of Germany, 1994, p. 43.
Article 72 reads as follows:
(1) In the field of concurrent legislative power, the States [Länder] have power to legislate as long as and to the extent that the Federation does not exercise its right to legislate by statute.
(2) In this field, the Federation has the right to legislate if and insofar as the establishment of equal living conditions in the federal territory or the preservation of legal and economic unity necessitates, in the interest of the state at large, a federal regulation.
(3) A federal statute can stipulate that a federal regulation for which the conditions of Paragraph (2) no longer hold true is replaced by law of the States [Länder].

59 See BVerfGE 2, 213 (224).

60 BVerfGE 4, 115 (127/128).

61 BVerfGE 13, 230 (234); 26, 338 (382); 78, 249 (270/271).

62 See article 93 (1) No 2a BL.

istrative discretion. But this legislative domination held by the *Bund* is counterbalanced by the primacy of the *Länder* in the administrative sphere.[63] Since the federal public service is relatively small, it obliges the states to implement federal policies.[64] It is therefore important for the *Länder* to be involved in the legislative process. The close involvement of the *Länder* has significant consequences as they try to exercise as much influence as possible on those laws during the national legislative process.

Besides, since the federal government is dependent on the *Länder* for the implementation of its policies, it is more inclined to accommodate the needs of the *Länder* concerning the content of legislation. As a result more attention is directed at the federal government in respect of legislation than the legislatures of the *Länder*. This attention of the *Länder* is channelled through the *Bundesrat* making it a powerful constitutional body.

Another important feature of the "shared-powers model" derives from the fact that the Basic Law provides for 'joint tasks', allowing for the federal government to participate in areas of *Land* jurisdiction. These tasks have to be 'relevant to the community as a whole', and 'necessary to improve living conditions'. Furthermore, with the consent of the *Länder*, federal law may partake in other issues of joint responsibility such as joint planning and financing.[65]

(cc) The role of the provinces in South Africa

The position of the South African provinces differs from that of the *Länder* in Germany. Since they enjoy extensive legislative powers, they do not have to wait for the implementation of national legislation in order to enact their own laws. They may take their own legislative initiative on a range of exclusive as well as concurrent matters. However, with the regard to the enactment of legislation, a pattern has evolved, whereby the majority of legislation is developed and passed at the national level. Subsequently, provinces have initiated little of their own legislation.[66] Their major role is to implement national legislation, a model borrowed from the German pattern of provincial implementation of national framework legislation.[67] Nevertheless, the provinces are able to influence national legislation through the NCOP.

63 *R. Simeon*, Considerations on the design of federations: The South African Constitution in comparative context, 13 (1998) SAPR/PL 42, 56.

64 *Malherbe*, The South African NCOP, (1998) TSAR 77, 93.

65 Article 91 (1) BL.

66 *N. Steytler*, Concurrency and cooperative government: a South African case study, p. 4, 5. The provinces overall legislative output has been low. For the first six years (1994-1999) the average number of laws passed annually was 6, 7.

67 *R. Simeon / C.M. Murray*, Multilevel governance in South Africa – an interim Report, p. 9.

There are in essence two reasons for the lack of provincial legislation. Because of their limited powers to raise or generate revenue, provinces have little financial means to implement provincial laws as to do so would dramatically add to their financial burden.[68] Secondly, the dominance of the ANC in all provinces except the Western Cape has minimised the presence of competing laws.[69] There remains, however, enough potential in the Constitution for provincial legislative initiative.

2. *Fiscal arrangements*

The dominant position of the national government is obvious when one has regard to the fiscal arrangements of the provinces. The provinces have only limited revenue-raising capacities. They are barred from income or sales or value added taxes.[70] Other provincial revenue raising and borrowing is subject to national regulation and legislation. Provincial revenue raising activities that 'materially or unreasonably' affect national economic policies, inter-provincial commerce, or the mobility of economic factors are prohibited.[71]

In contrast to the South African model, the German concept is one of shared revenue and taxing powers.[72] Articles 104a – 115 of the Basic Law provide for a division of fiscal authority between the *Bund* and the *Länder*.[73] Only a limited number of revenue sources are allocated exclusively to either level.[74] Carrying out the terms of the provisions made in articles 104a – 115 requires extensive co-ordination between levels of government. The federal government has the duty to ensure reasonable equality between financially strong and financially weaker states.[75] This may require federal grants to weaker states (vertical financial adjustments) as well as transfer payments from rich to poor *Länder* (horizontal

68 Provinces receive over 96% of all their revenues in the form of transfers from the national government, see *R. Simeon / C.M. Murray*, Multilevel governance in South Africa – an interim Report, p. 9 and *N. Steytler*, Concurrency and cooperative government: a South African case study, p. 5, fn. 26.

69 See *N. Steytler*, Concurrency and cooperative government: a South African case study, p. 5.

70 Section 228 FC.

71 See *R. Simeon*, Considerations on the design of federations: The South African Constitution in comparative context, 13 (1998) SAPR/PL 42, 62.

72 *R. Simeon*, Considerations on the design of federations: The South African Constitution in comparative context, 13 (1998) SAPR/PL 42, 56.

73 *U. Karpen*, Federalism, in: The Constitution of the Federal Republic of Germany, 1988, 205, 209.

74 Article 106 BL.

75 Article 107 (2) BL.

financial adjustments).[76] Federal law regulates the way these transfers are made subject to the consent of the *Bundesrat*.

3. The principle of co-operative government and its characteristics

With regard to the Interim Constitution, the Constitutional Court stated that the constitutional distribution of powers required co-operation between the various levels of government.[77] Chapter 3 the Final Constitution now explicitly details directives and principles in the conduct of intergovernmental relations. These principles found their way In the South African Final Constitution through the notion of co-operative governance.[78] The core of this framework is the fact that decentralisation of state power in terms of the constitution is not based on competitive federalism but on the norms of co-operative government.[79] Section 41 sets out the principles of co-operative government in terms of which government at all levels must promote national unity, ensure good government, obey the constitution, respect one another, refrain from encroaching on another's integrity, and co-operate in good faith.

Co-operative government further means that the spheres of government must govern as a type of partnership and that national legislation must be sensitive to the needs and concerns of the provinces.[80] Governments at the various levels are obliged to assist one another. In the determination of each province's and municipality's share of national income, it must be ensured that they are able to provide basic services and perform the functions allocated to them.[81] The national government must also assist the provinces to develop the administrative capacity that is required for the effective exercise of their powers and performance of their functions.[82] The national and provincial governments have a similar obligation towards local government.[83] Furthermore governments are authorised to delegate powers to

76 *D.P. Kommers*, The constitutional jurisprudence of the Federal Republic of Germany, 2nd ed., 1997, p. 90.

77 See *Ex parte Speaker of the National Assembly: In re: Dispute concerning the constitutionality of certain provisions of the National Education Policy Bill No 83 of 1995* 1996 (4) BCLR 518 (CC), 1996 (3) SA 289 (CC) para 34.

78 See section 41 (1) FC.

79 Intergovernmental Relations Audit, p. 9.

80 *C.M. Murray*, From paper to practice: The NCOP after its first year, 14 (1999) SAPL/PR 96, 97, see also *C.M. Murray*, Municipal integrity and effective government: The Butterworth intervention, 14 (1999) SAPL/PR 332, 342.

81 Section 214 (2) (d) and 227 (1) (a) FC.

82 Section 125 (3) FC.

83 Section 154 FC.

governments at other levels, facilitating co-operation between the different spheres. The Constitution provides for a general authorisation to delegate functions and to perform agency services for other governments.[84] In addition, Parliament may delegate any legislative power to a legislature at another level, except the power to amend the Constitution, and a provincial legislature may assign any legislative power to a municipality.[85] Structures to facilitate inter-governmental relations and for the settlement of disputes must be established[86] and governments are obliged to exhaust all other remedies in disputes before they approach the courts.[87]

a) The German concept of Bundestreue – model for the principle of co-operative governance in the South African Constitution

The above mentioned principles are derived mainly from the German concept of *Bundestreue* (doctrine of comity).[88] The partnership between the German national government (*Bund*) and the *Länder* is based on this fundamental principle. It is a uniquely German concept and describes the mutual trust, respect and obligation to co-operate as well as the interdependence of the *Bund* and the various *Länder* upon which the functioning of the federal system in Germany is founded.[89]

In the German federal system, the federation is a federal state as a whole, while the sixteen constituent states (*Länder*) are independent states with their own constitutions, parliaments, governments, administrations and courts. There is no general supremacy of the federal level over the states.[90] The term "co-operative federalism" is often used to describe German federalism and has been described as 'an active principle of government which achieves a balance between clear demarcation of responsibilities without which a federal order is inconceivable'.[91] The concept of *Bundestreue* does not appear in the text of the Basic Law.

84 Section 238 FC.

85 Section 44 (1) (a) (iii) and 104 (1) (c) FC.

86 See section 41 (2) and (3) FC.

87 See section 41 (3) and (4) FC.

88 *De Villiers,* Intergovernmental relations in South Africa 12 (1997) SAPL/PR 197 200/201; *N. Steytler*, Concurrency and cooperative government: a South African case study, p. 7; *N. Goolam*, The interim Constitution, the working drafts and South Africa's new Constitution – some observations, 12 (1997) SAPR/PL 181, 193.

89 *De Villiers*, Intergovernmental relations: a German perspective, 9 (1994) SAPL 430, 432; *De Villiers*, National-provincial co-operation, 14 (1999) SAPR/PL 381, 382; see also *D.P. Currie*, The Constitution of the Federal Republic of Germany, 1994, p. 77.

90 *E. Schmidt-Aßmann*, The Constitution and the Requirements of Local Autonomy, in: *C. Starck* (ed.), New Challenges to the German Basic Law, 1991, p. 167, 169.

91 *P.M. Blair*, Federalism and Judicial Review in West Germany, 1981, p. 209.

It is an unwritten constitutional norm which regulates the relationship between the national government and the *Länder,* as well as between the *Länder* themselves.[92] But it is also a dynamic principle and its scope is permanently developing.[93] When disputes arose between different levels of government, the Constitutional Court (*Bundesverfassungsgericht*) had to give content to the concept. The Constitutional Court applied the principle in one of its earliest decisions[94] and thus made it a legal standard. The principle is the centrepiece of intergovernmental relations in Germany and it represents a legal basis from which to monitor, evaluate and conduct the activities of government in a multi-tiered system. However, the effects of the principle are not restricted to the legal sphere. In addition, it applies to political conduct in negotiations undertaken in order to arrive at solutions which do not violate or weaken the federal concept as such.[95]

b) Executive intergovernmental relations

As part of the model of co-operative governance, the South Africa Constitution sets up a network between the different levels of government. In turn, section 41 (2) provides for the implementation of an Act of Parliament to establish structures and institutions to 'promote and simplify executive intergovernmental relations'.[96]

(aa) Some features of executive intergovernmental relations in South Africa

Two intergovernmental bodies have been established by legislation,[97] namely the Committee of Education Ministers[98] and the Budget Council[99]. Prior to the establishment of these bodies, other structures for co-operation in the executive branch of government have emerged rapidly, even without legislation.[100] An Intergovernmental Forum (IGF), established in 1994, brings provincial premiers and national ministers together quarterly and

92 See BVerfG 12, 205 (254).

93 *D.P. Currie*, The Constitution of the Federal Republic of Germany, 1994, p. 78.

94 See BVerfG 1, 299 (315).

95 *De Villiers*, Intergovernmental relations: a German perspective, 9 (1994) SAPL 430, 434.

96 See *R. Simeon*, Considerations on the design of federations: The South African Constitution in comparative context, 13 (1998) SAPR/PL 42, 64.

97 Intergovernmental Relations Audit, p. 9.

98 See National Education and Policy Act of 1997.

99 See Intergovernmental Fiscal Relations Act 97 of 1997.

100 *R Simeon*, Considerations on the design of federations: The South African Constitution in comparative context, 13 (1998) SAPR/PL 42, 64.

provides a forum for policy dialogue.[101] The IGF is supported by the 'technical intergovernmental committee' (TIC), the administrative counterpart of the IGF, consisting of national and provincial senior officials and chaired by the Director-General of the National Department of Constitutional Development.[102] In addition, about twenty ministerial forums (MinMECS) have been formed to facilitate consultation and joint action in several functional areas.[103]

(bb) Conclusion

Each of these authorities has important parallels in Germany. The need to co-ordinate voting and responses to *Bund* legislation, and the fact that the *Länder* administer most of federal law, means that *Bund-Land* and inter-*Land* co-operation is extensive. The *Bundesrat* makes the *Länder* governments participants in the federal legislative process, and thus gives them direct influence over the *Bund*. In addition to this intergovernmental institution at the core of the German constitutional structure, Germany also has a number of non-constitutional intergovernmental arrangements. Although non-constitutional, the working of these other intergovernmental bodies is co-ordinated with, and facilitated by, the working of the *Bundesrat*. The decisions of these institutions are formalised by treaties or agreements and the agreements have the full force and effect of law.[104]

South Africa has made great progress in a short time in the structuring and conduct of intergovernmental relations, although there is still an absence of mutually agreed-upon strategy of how to manage the new multi-tiered system.[105] The concept of the German *Bundestreue* is surely an illustration of how the complexities of a federal-type system can be managed. Although *Bundestreue* is not a constitutionally created concept, the German courts have used it to provide ground rules for intergovernmental relations. South Africa will also have to rely on more than its Constitution to be able to successfully implement and manage the directions contained therein. A culture that recognises the importance of partnership, co-operation and mutual trust should also be the core of intergovernmental relations in South Africa.

101 *De Villiers*, Intergovernmental relations in South Africa, 12 (1997) SAPR/PL 197, 206; see also Intergovernmental Relations Audit, p. 17.

102 *De Villiers*, Intergovernmental relations in South Africa, 12 (1997) SAPR/PL 197, 211; see also Intergovernmental Relations Audit, p. 18.

103 *R. Simeon*, Considerations on the design of federations: The South African Constitution in comparative context, 13 (1998) SAPR/PL 42, 64; see also Intergovernmental relations Audit, p. 36.

104 *R. Simeon*, Considerations on the design of federations: The South African Constitution in comparative context, 13 (1998) SAPR/PL 42, 57.

105 *De Villiers*, Intergovernmental relations in South Africa, 12 (1997) SAPR/PL 197, 212.

c) Legislative intergovernmental relations

The term 'legislative intergovernmental relations' describes the relationship between the two Houses of Parliament in South Africa, the National Assembly and the NCOP.[106] The relationship between the two houses is an important one within the system of South African federalism and can be described as a centrepiece for the model of co-operative governance.[107] South Africa has followed the German model of federalism by setting up a strong second chamber in the national Parliament. The NCOP has significant powers that vary according to the impact of the legislation in question on provincial concerns, thereby ensuring a provincial voice in national decision-making.

d) The significance of the model of co-operative governance in practice

While the impact of the concept of *Bundestreue* on the *Bund-Länder* relations in Germany is very strong, the significance of intergovernmental co-operation in South Africa is still developing. This is accountable mainly to the dominance of the ANC in all governmental processes. Co-operative governance only becomes an issue when different parties are in charge of national and provincial governments and institutional arrangements become more relevant to ensure co-operation and interaction. The fact that the ANC dominates eight of the nine provinces as well as the national government means that most co-operation takes place behind the scenes and is in many cases determined by the national caucus and leadership of the governing party.[108]

The notion of co-operative government in the Constitution is supported by the provision made for participation by governments in decision-making at other levels. This encompasses the main purpose of the NCOP, in which both the provincial legislatures and Executives are represented. In the following chapter the role of the NCOP within the South African system of co-operative governance will therefore be examined. Its role and functioning will be compared with that of the *Bundesrat* so as to provide a better understanding of how the two constitutional bodies work.

106 *C.M. Murray / R. Simeon*, From paper to practice: The NCOP after its first year, 14 SAPR/PL (1999) 96, 99.

107 *R. Simeon*, Considerations on the design of federations: The South African Constitution in comparative context, 13 (1998) SAPR/PL 42, 65.

108 *De Villiers*, National-provincial co-operation, 14 (1999) SAPR/PL 381, 383.

C. The National Council of Provinces within the framework of co-operative government

The legislative authority of the Republic of South Africa, in the national sphere of government, is vested in Parliament.[109] Parliament is a bicameral legislature which means that it consists of two houses, the National Assembly and the NCOP.[110] Traditionally the members of each of the two houses in a bicameral system are elected or appointed in different ways, with the intention that the members of each house represent different interests in society. Furthermore, the bicameral system promotes the idea that the two houses will act as a check on one another. In South Africa, the National Assembly represents the interests of all South Africans while the NCOP is supposed to represent the interests of the nine provinces.[111]

I. History of second houses of Parliament in South Africa

The existence of a second chamber of Parliament is not new in South African constitutional history. When the two British colonies of the Cape and Natal and the two Boer Republics of the Transvaal and the Orange Free State joined in 1910 to form the Union of South Africa, the drafters of the Union decided to create an upper house of Parliament, called the Senate, to protect the interests of the smaller provinces and the 'coloured people'.[112] However, the Senate achieved neither of these goals during the 68 years of its existence. To achieve a two-third majority to remove the 'coloured people' from the common voters role in the Cape, the National Party government simply adopted legislation that increased the size of the Senate.[113] This fact discredited the Senate, which was eventually abolished in 1980.[114]

Despite the history of the Senate in the South African Union, the drafters of the Interim Constitution again opted for a second house of Parliament which was aimed at protecting the interests of the provinces at a national level.[115] The senators were nominated and owed

109 See section 43 (a) FC.

110 Section 42 (1) FC read with section 43 (a) FC.

111 *C.M. Murray / R. Simeon*, From paper to practice: The NCOP after its first year, 14 SAPR/PL (1999) 96, 97.

112 See *G. Carpenter,* South African Constitutional Law, 1987, p. 241.

113 *G. Carpenter*, South African Constitutional Law, 1987, p. 242; see also *L. du Plessis*, An Introduction to Law, 1999, p. 170.

114 In terms of section 13 by the Republic of South Africa Constitution 5th Amendment Act 101 of 1980; see *G. Carpenter*, South African Constitutional Law, 1987, p. 276.

115 *C.M. Murray*, South Africa's NCOP – stepchild to the Bundesrat, p. 263.

their seats to the party to which they belonged.[116] During negotiations on the Final Constitution, various politicians criticised the composition of the Senate, arguing that the composition of the Senate was merely a duplication of the composition of the National Assembly and that it did not provide for effective representation of the provinces.[117]

In the *First Certification Judgment* the Constitutional Court also expressed its disapproval at the conception of the Senate, arguing that the representation of the provinces in the Senate was weak and indirect because the senators owed their appointment to the parties and not directly to the provincial legislatures or electorates.[118] As a result, the conception of the NCOP is intended to remedy this detrimental state of affairs.[119] Section 42 (4) of the Final Constitution now provides that the purpose of the NCOP is to 'represent the provinces to ensure that provincial interests are taken into account in the national sphere of government'.[120] The NCOP does this by allowing representatives of the provincial legislatures and their Executive Councils to participate directly in the legislative process and 'by providing a national forum for public consideration of issues affecting the provinces'.[121] The question is in how far the composition and the powers of the NCOP allow and encourage it to represent provincial interests in the national sphere of government and in how far the Council is able to enhance co-operative governance.

II. Composition of the NCOP and voting

Appointments to the NCOP and the functioning of the NCOP differs notably from that of Senate set up by the Interim Constitution.[122] Under the 1996 Constitution, the NCOP consists of 9 delegations, each comprising ten delegates that represent a province.[123] In addition, organised Local Government may participate in the proceedings of the Council. Section 67 of the Final Constitution provides for a maximum number of ten representatives without a vote to represent the different categories of municipalities.[124] This role granted to

116 See section 48 IC.

117 See *Malherbe*, The South African NCOP, (1998) TSAR 77, 79/80.

118 *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) 1318 para 319.

119 *Devenish*, Constitutional Law, 1998, p. 126.

120 See section 42 (4) FC.

121 *Devenish*, Constitutional Law, 1998, p. 126.

122 *De Villiers*, Intergovernmental relations in South Africa, 12 (1997) SAPR/PL 197, 203.

123 Section 60 (1) FC.

124 The Organised Local Government Act 52 of 1997 provides the method for identifying representatives for the NCOP. NCOP rule 107 (see NCOP rules in plain language – draft,

local government is unique for second houses. From the point of view of a strict vertical separation of powers between the different spheres of government, this type of representation could be questioned.[125] But the model of co-operative government adopted in the South African Constitution does not envisage such a strict separation. On the contrary it demands close co-operation between the spheres of government and thus, the inclusion of local government in the NCOP reflects the importance of co-operative government in the South African Constitution.[126]

1. Special and permanent delegates

Each provincial delegation represented in the NCOP consists of four special delegates and six permanent delegates.[127]

a) Permanent delegates

The different political parties comprising the provincial legislatures nominate their permanent delegates which are appointed in terms of a system of proportional representation. The system aims to ensure that all parties form part of the delegation and that the strength of a political party is reflected proportionally in the delegation to the Council.[128]

The permanent delegates do not have to be members of the provincial legislature, however.[129] If the appointed delegate is a member of the legislature than he or she loses his or her membership upon such appointment. His or her party may than fill the vacancy in the provincial legislature.[130] Permanent delegates are appointed for a full parliamentary term. Generally they will serve as a permanent delegate until after the next general election when the newly elected provincial legislature appoints new permanent delegates to the NCOP.[131]

http://www.parliament.gov.za/Documents/rules/3657373178) states when a representative of local government may take part into a committee meeting. They are allowed when 'the interests of local government are affected by a matter that is being discussed'. Section 67 FC permits participation of local government representatives 'when necessary'. NCOP rule 107 is a further qualification and does not clarify the term 'necessary' in section 67 FC.

125 *Rautenbach / Malherbe*, Constitutional Law, 1999, 3rd ed., p. 292.

126 *De Villiers*, National-provincial co-operation, 14 (1999) SAPR/PL 381, 407.

127 Section 60 (2) FC.

128 See section 61 FC. Schedule 3 Part B provides the formula.

129 Section 62 FC only provides that the person must be eligible to be a member of the provincial legislature.

130 Section 62 (5) FC provides that national legislation is to determine how the vacancy needs to be filled.

131 Section 62 (3) FC.

(aa) Loss of membership

A permanent delegate loses membership if he or she ceases to be eligible for membership, becomes a member of Cabinet or is absent from the NCOP without permission in terms of section 62 (4) (e).[132] A permanent delegate will also cease to be member of the NCOP if the party that nominated the person recalls the delegate. This may be the case if he or she ceases to be a member of the party or if the person loses the confidence of the provincial legislature or his or her political party.[133]

(bb) Implications of the right to recall

A political party's right to recall a delegate seems to establish a strong link between the delegate and the provincial legislature who nominated the person. It reflects the fact that the delegate has to represent the provinces' interests in the national sphere of government, thereby promoting co-operation between the national and provincial level of government. But one also has to take into account that the right to recall belongs to the party and not to the legislature. It is therefore more likely to strengthen the leadership of the party and to enforce party discipline than to promote the accountability of the permanent delegate to the provincial legislature.

This impression is emphasised by the fact that the respective NCOP delegation votes as a single entity and only has one vote. In practice the delegation will always reflect the views and interests of the majority in the provincial legislature. Based on this position one can state that the relation between the permanent delegates and the legislature as an institution is a weak one. The individuals form part of their party caucuses but they are not directly involved in the provincial legislature.[134]

b) Special delegates

The legislature of each province must select from its members three special delegates to sit on the NCOP.[135] This nomination must be in proportion to the representation of the various parties in the legislature and must be done in concurrence with the premier and the leaders of all parties.[136] In practice however, premiers do not take part in choosing the special

[132] See section 62 (4) (a) (b) and (e) FC.

[133] See section 62 (4) (c) (d) FC.

[134] See also *De Villiers*, National-provincial co-operation, 14 (1999) SAPL 381, 407.

[135] Section 60 (2) (a) (ii) FC.

[136] Section 61 (4) FC.

delegates.[137] The special delegates are not based at Parliament, but simply attend meetings held for a special purpose and period of time. In theory special delegates could be nominated only for a special session of the NCOP.[138] The premier of the respective provincial legislature constitutes the fourth special delegate who leads the delegation.[139] In contrast to the permanent delegates, a 'special' delegate keeps his or her membership of the provincial legislature after the nomination.

(aa) The provisions relating to special delegates and the principle of co-operative government

The rationale behind having special delegates is to link the NCOP delegation closer to the province.[140] Furthermore, in theory, the special delegates are meant to show greater allegiance to their province than to their party interests.[141] Their position stands in contrast to the former senators who were not only physically removed from their legislature, but were also not obliged to operate under provincial instructions.[142]

The provision for the premier or his or her designate to head the provincial delegation in the NCOP will also add weight to provincial delegations because their executives will generally be obliged to execute the national laws.[143] In theory it seems as if under the provisions of the Final Constitution it is more likely that provincial interests will prevail over party interests in the NCOP.

(bb) The Constitutional Court's opinion on the special delegate-provisions

The Constitutional Court, however, is skeptical of whether the provisions relating to special delegates will ensure an effective representation of provincial interests. In the *First Certification Judgment* it argued that the structure of the NCOP as provided for the Final Constitution is better suited to the representation of provincial interests than the functioning of the

137 *C.M. Murray*, South Africa's NCOP: Stepchild to the Bundesrat, p. 267; *C.M. Murray / R. Simeon*, From paper to practice: The NCOP after its first year, 14 (1999) SAPR/PL 96, 105.

138 *R. Simeon / C.M. Murray*, Multilevel governance in South Africa – an interim report, p. 11.

139 Section 60 (3) FC.

140 See also *Ex parte Chairperson of the Constitutional Assembly: In re certification of the amended text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC); 1997 (1) BCLR 1 (CC) para 61.

141 *Malherbe*, The South African NCOP, (1998) TSAR 77, 88.

142 See *C.M. Murray*, South Africa's NCOP: Stepchild to the Bundesrat, p. 263; see also *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 744 (CC) ; 1996 (10) BCLR 1253 (CC) para 330.

143 See section 125 (2) FC; see also Malherbe *The South African NCOP* (1998) TSAR 77 93.

Senate under the Interim Constitution. Nonetheless the Constitutional Court could not unequivocally confirm that the changes that had been made would necessarily enhance the collective interests of the provinces.[144] Its uncertainty arose from a number of variable factors, including the difference in the powers of the two Houses; the method of appointing the members of the Houses; the contrast between direct and indirect representation; different methods of voting and the influence of the parties on the voting pattern.[145]

(cc) Conclusion

The variable most likely to affect the extent to which the NCOP represents the interests of the provinces in an effective manner is party affiliation and the degree to which parties allow their delegates to diverge from the party line. Co-operative government as the underlying rationale of the Final Constitution presents a unique challenge to special delegates to rise above party politics and promote the interests of the provinces, rather than sectional party politics.[146] Where the majority party in Parliament is also the majority of a provincial legislature, delegations will often adhere to their party line. Adherence to strict party discipline will mean that those provincial delegations controlled by the majority party will be reluctant to challenge the political consensus of the majority party in the National Assembly. In South Africa, the majority party of the ANC holds just under two-third of the seats in the National Assembly and 7 of the 9 provinces. It is therefore unlikely that the National Assembly and the NCOP will differ on an issue.[147]

2. Voting procedures

The members of the NCOP delegations vote on the instruction ('mandate') of the provincial legislature. This reflects the purpose of the NCOP, namely to bind the provinces into national government.[148]

144 *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 744 (CC) ; 1996 (10) BCLR 1253 (CC) para 331.

145 *Ex parte Chairperson of the Constitutional Assembly: In re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) para 332.

146 *Devenish*, Constitutional Law, 1998, p. 108.

147 Although experiences in Germany show that *Länder* delegations in the *Bundesrat* do not always adhere to the party consensus reached in Cabinet in the Federal Assembly. Especially in matters affecting the *Länder* budgets majority party governed delegations tend to diverge from the party line in favour of *Länder* interests.

148 *C.M. Murray*, South Africa's NCOP: Stepchild to the Bundesrat, p. 267.

a) Matters affecting and matters not affecting the provinces

On matters affecting the provinces, the members of the various NCOP delegations vote as a single unit, i.e. as a province and each delegation has one vote which is cast by the head of each delegation.[149] Although the view of a minority party can be heard, only the vote of the majority party is cast when legislation is considered. Where a province is governed by a coalition between parties, it will need prior agreement on how to cast its vote before voting as a delegation in the NCOP.[150]

In matters not affecting the provinces,[151] the members of the delegations vote as individuals or party members.[152] The fact clearly indicates that the main function of the NCOP is to represent the interests of the provinces. When it comes to matters not affecting the provinces, the role of the NCOP is merely to serve as an advisory body. However, this function is tactically important as it gives the NCOP the power to delay the passing of controversial bills.[153]

b) The procedure to confer authority on the delegations

The fact that the provincial legislatures need to confer authority on their NCOP delegations in order to cast a vote on their behalf serves to closely connect the delegations to the provincial legislatures.[154] The Final Constitution states that an Act of Parliament 'must provide for a uniform procedure by which provincial legislatures confer authority on their delegations to cast votes on their behalf'.[155] Until the Act is passed the provinces may decide for themselves how authority is given to their respective delegation.[156]

Because such legislation has not yet been passed, the provinces have in the interim established their own practices to determine mandates.[157] There are two different types of mandates: Negotiating mandates are given to guide the delegations at the first stages of

149 Section 65 (1) (a) FC.

150 *De Villiers*, National-provincial co-operation, 14 (1999) SAPR/PL 381, 408.

151 See section 75.

152 *C.M. Murray / R. Simeon*, From paper to practice: The NCOP after its first year, 14 (1999) SAPR/PL 96, 98.

153 *C.M. Murray / R. Simeon*, From paper to practice: The NCOP after its first year, 14 (1999) SAPL 96, 97/98.

154 *C.M. Murray*, South Africa's NCOP: Stepchild to the Bundesrat, p. 267.

155 See section 65 (2) FC.

156 Item 21 (5) to Schedule 6.

157 *C.M. Murray / R. Simeon*, From paper to practice: The NCOP after its first year, 14 (1999) SAPR/PL 96, 118.

NCOP discussions whereas final mandates are given to decide the vote in the NCOP plenary.[158] Common to both types of mandates is that they are specifically given in respect of each piece of legislation and that they leave little to no leeway in the delegation's vote in the NCOP plenary.[159]

Four different models on how the final mandate is conferred have developed in various provinces and yet they allow only minor or no deviation from mandates.[160] The result of this practice is that important aspects of NCOP decision-making takes place in the provincial legislatures.[161]

3. Comparison with the Composition and voting procedures of the Bundesrat

In order to better understand the functioning of the NCOP in terms of composition and voting procedures one can compare it with the *Bundesrat* upon which the NCOP is closely modelled. The *Bundesrat* is the intergovernmental chamber through which the *Länder* take part in the legislative process and administration of the Federation as well as in matters concerning the European Union.[162]

a) Composition and Voting Procedures in the Bundesrat

The members of the *Bundesrat* belong to the sixteen different *Länder* governments. The *Länder* governments appoint and recall their delegates[163] and each *Land* may appoint as many members to the *Bundesrat* as it has votes in the *Bundesrat*.[164] The number of votes of each *Land* depends on the size of its population.[165] The role of the members of the *Bundesrat* is to represent the *Länder* at a federal level.[166] They are bound by the decisions of the

158 *C.M. Murray / R. Simeon*, From paper to practice: The NCOP after its first year, 14 (1999) SAPR/PL 96, 119.

159 *C.M. Murray*, South Africa's NCOP: Stepchild to the Bundesrat, p. 268.

160 *C.M. Murray / R. Simeon*, From paper to practice: The NCOP after its first year, 14 (1999) SAPR/PL 96, 119.

161 *C.M. Murray*, South Africa's NCOP: Stepchild to the Bundesrat, p. 268.

162 Article 50 BL.

163 Article 51 (1) BL.

164 Article 51 (3) BL.

165 See article 51 (2) BL.

166 *Maunz / Zippelius*, Staatsrecht, p. 271.

Land government[167] and each *Land* must cast its votes in the *Bundesrat* as a block.[168] The *Länder* do not have equal voting strength as the numbers of votes apportioned to each *Land* is determined by the size of its population. In turn, smaller *Länder* have relatively more votes than larger states. Though this system is open to criticism the principle that all the votes of a *Land* must be cast uniformly and cannot be split is generally accepted in Germany.

b) Differences to the NCOP

Although the design of the NCOP is strongly influenced by the design of the *Bundesrat*, the composition of the *Bundesrat* is significantly different to the NCOP. The appointment of permanent members to the NCOP delegations and the inclusion of opposition politicians into NCOP delegations are purely South African features.[169] Another striking difference to the *Bundesrat* is the role of the provincial legislatures in the mandating process. Although the members of the *Bundesrat* are also bound by the mandate conferred to them, they receive their mandate from the *Länder* governments.

As mentioned, the *Bundesrat* consists of members who remain part of their provincial governments and legislatures. This is different to the NCOP where permanent members, once nominated, no longer sit in their provincial legislatures and unifies legislative and executive federalism.[170] The inclusion into the NCOP of members of provincial legislature rather than an Executive Council was implemented in reaction to the criticism concerning the composition of the *Bundesrat,* namely doubts if the legislative process in the *Bundesrat* fully complies with the 'separation of powers doctrine', thereby creating a 'democratic deficit'.[171]

[167] *Maunz / Zippelius*, Staatsrecht, p. 273; *Maunz*, in: *Maunz / Dürig / Herzog / Scholz* (eds., MDHS), Grundgesetz, Art. 51, Rn. 16; *Hendrichs*, in: *von Münch* (ed.), Grundgesetz-Kommentar, Vol. II, 2nd ed., 1983, Art. 51, Rn. 19; *v. Münch*, Staatsrecht, p. 297; *Jarass / Pieroth,* Grundgesetz, Art. 51, Rn. 6; *Stern,* Staatsrecht II, p. 138; see also BVerfGE 8, 120.

[168] Article 51 (3) BL.

[169] *C.M. Murray*, South Africa's NCOP: Stepchild to the Bundesrat, p. 272.

[170] *R. Simeon / C.M. Murray*, Multilevel governance in South Africa – an interim report, p. 11, fn. 41.

[171] *Jekewitz*, in: Alternativkommentar, Grundgesetz, Vol. II, Vorb. Article 50, Rn 11; see also *De Villiers*, National-provincial co-operation, 14 (1999) SAPR/PL 381, 387 and *F. Gress*, Interstate co-operation in the USA and in the FRG, p. 411, in: *De Villiers*, Evaluating federal systems, 1994. For a more general view on the principle of separation of powers regarding the legislature and the executive see *Ex parte Chairperson of the Constitutional Assembly: In re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) para 106-113.

However, this criticism is not fully justified. Despite the fact that the *Bundesrat* is not directly elected, *Land* delegations in the *Bundesrat* gain their legitimacy from their election into the *Land* legislature.[172] Furthermore, the provincial legislatures (*Landtage*) are able to control the political and voting behaviour of these delegations in the *Bundesrat*.[173] In addition the party-political structures of the *Landtage* are not reproduced in the composition of the *Bundesrat.* This is a consequence of the observation that the more directly one bases the composition of the second chamber on the same foundations as that of the first – i.e. the elective principle – the more one will have competition and deadlock between the two houses.[174] A deadlock can arise due to the fact that both houses claim the same legitimacy. In federal states such deadlocks can weaken the federal structure. In such situations the party headquarters at national level will naturally attempt to influence the party representatives in the second chamber.

c) Reasons for the conception of the Bundesrat *in terms of composition and voting procedures*

The incorporation of governmental members in the *Bundesrat* was the result of a compromise between a 'Senate-model' and the *Bundesrat*-model in the Parliamentary Council, which drafted the Basic Law.[175] The perception of a 'democratic deficit' about decision-making in the *Bundesrat* can be justified, for the reason that the inclusion of Executives in the *Bundesrat* is to guarantee that the laws, which are enacted on a national level, can be implemented through the *Länder* governments.[176] Thus, although Germany is relatively more centralised in legislative terms than South Africa, it is more decentralised in terms of constitutionally determined administrative jurisdiction.

d) Reasons for the conception of the NCOP in terms of composition and voting procedures

The composition, voting procedures and mandating process of NCOP delegations seems to be a direct response to South African fears of an executive-driven legislative process. South African history has generated skepticism regarding executive dominance in government. In a system of so-called "executive Federalism", major policy decisions tend to be made within the intergovernmental structures which are generally dominated by the executives

172 *v. Münch*, Staatsrecht I, p. 294; *Maunz*, in: *MDHS*, Grundgesetz, Article 50 Rn. 8; *De Villiers*, National-provincial co-operation, 14 (1999) SAPR/PL 381, 387.

173 *Robbers*, in: *Sachs* (ed.), Grundgesetz, Article 50 Rn. 15.

174 *Maunz / Zippelius*, Staatsrecht, p. 272.

175 *J. Rau*, Bewährt oder erstarrt? Unser föderales System auf dem Prüfstand, 17, 18; see also *Robbers*, in: *Sachs* (ed.), Grundgesetz, Article 50 Rn. 3.

176 *C.M. Murray*, South Africa's NCOP: Stepchild to the Bundesrat, p. 274.

and civil servants. These decisions are often not sufficiently transparent and open to public scrutiny. Such a lack of transparency could lead to 'collusion' between governments which have their own interests and not the concerns of the voters at heart.[177] To involve provincial legislatures in the NCOP appears to be an attempt to restrict the power of executives and to guarantee greater legislative control of the process.[178]

e) Ways to promote co-operative government

Both constructions of a second house of Parliament have their advantages and drawbacks. The South African idea of including provincial executives as well as opposition politicians is part of an endeavour to promote co-operative government between the national and provincial spheres of government. The views of minority parties are heard in debates and within the committees of the NCOP, however ultimately only the vote of the majority party is cast when legislation is considered. Thus, it remains to be seen whether the notion of the NCOP in terms of composition can enhance co-operative government and guarantee sufficient representation of provincial interests. The danger lies in the very real fact that due to of the overall political configuration, party-political considerations will supercede those of the provinces.

(aa) The German permanent *Länder* interest offices

The German experience with the permanent *Länder* interest offices may also provide South Africa with ideas to strengthen the role of provinces in national policy formulation and implementation within the framework of co-operative governance. The existence of the permanent *Länder* interest offices in Berlin is one of the most unique characteristics of the German federal system. However, there is no constitutional or statutory base for the interest offices. They are purely a creation of the respective *Länder* governments and can be described as internal embassies or missions of the respective *Länder* in the federal capital to represent the interests of the *Länder* in the national governmental process.[179] The main function of the *Länder* interest offices is to represent the views of its *Land* in the *Bundesrat* and in the *Bundesrat's* committees and to inform the *Länder* governments about legislation that may be on its way to the *Bundesrat.*[180] For this purpose their civil servants have the constitutionally guaranteed right of access to all *Bundestag* plenary sessions and committee meetings.[181] Furthermore, the *Länder* interest offices inform the *Land* legislatures about

[177] *De Villiers*, National-provincial co-operation, 14 (1999) SAPR/PL 381, 405.
[178] *C.M. Murray*, South Africa's NCOP: Stepchild to the Bundesrat, p. 274.
[179] *De Villiers*, National-provincial co-operation, 14 (1999) SAPR/PL 381, 389.
[180] *De Villiers*, National-provincial co-operation, 14 (1999) SAPR/PL 381, 393.
[181] Article 43 BL.

their activities in the *Bundesrat*.[182] The *Länder* offices, however are not only involved in 'vertical' co-operation between the *Länder* and federal government but also in horizontal co-operation between *Länder* and thus promote and facilitate interaction and co-operation with other *Länder* at the federal level.[183]

(bb) The development of South African provincial desks

Similarly, in the last few years the South African provinces have established provincial 'desks' in Cape Town with the aim of facilitating close interaction with the national legislative process. They do so mainly by providing a support base for members of the NCOP visiting Cape Town, by sending information to the provincial capitals and communicating with Parliament on behalf of the provinces.[184] Although at the moment the provincial desks still suffer from a lack of clarity on their role and in the most cases simply receive and send information between Parliament and the provinces. Thus, most of the offices add little value to the process of co-operative governance.[185]

In order to enhance co-operative government between the national and the provincial spheres of government, the enactment of legislation stipulating the role of the provincial desks in the legislative process is needed. Another way to promote co-operative government would be to integrate the provincial desks into other structures and institutions involved in facilitating intergovernmental relations. To be able to intensify the relations between the provinces and the NCOP, it is imperative that staff members should at least attend the major meetings of the IGF and the Premiers Forum as well as other meetings at which senior national-and provincial leadership convenes.

III. Duration and Dissolution of the NCOP

Like the *Bundesrat,*[186] the NCOP is a permanent body without a fixed term. The rules of the NCOP nonetheless provide that Bills lapse at the end of the annual session, but that they may be reinstated on the Order Paper during the next session by resolution of the Council.[187] The tenure of the permanent delegates, however, is linked to the provincial

[182] *Benda / Maihofer / Vogel* (eds.), Handbuch des Verfassungsrechts, 1994, p. 1172.
[183] *Benda / Maihofer / Vogel* (eds.), Handbuch des Verfassungsrechts, 1994, p. 1191.
[184] *De Villiers,* National-provincial co-operation, 14 (1999) SAPR/PL 381, 406/407.
[185] *De Villiers*, National-provincial co-operation, 14 (1999) SAPR/PL 381, 409.
[186] See *Robbers*, in: *Sachs* (ed.), Grundgesetz, Article 50, Rn. 14.
[187] NCOP Rule 223 (1).

legislature they represent.[188] Accordingly, if a new legislature is elected, it may appoint a new delegation.

IV. Special functions of the NCOP

To be able to assess the role of the NCOP within the South African framework of co-operative government it is important to examine the special role and responsibilities of the second house of Parliament. Oversight of the Executive is among the main functions of any legislature. This applies equally to the NCOP which in terms of section 42 (4) of the Final Constitution is given a set of specific roles and functions to ensure accountability.

1. The Overseeing/Monitoring role of the NCOP and the principle of co-operative government

Oversight describes the important role of legislatures to observe and review the executive actions of government.[189] The National Assembly and the NCOP together exercise the national legislative authority in South Africa. The following section answers the question which special oversight functions are vested in the NCOP and whether these functions enable the NCOP to fulfil the requirements of co-operative government.

The constitutional rationale behind the NCOP is to represent the provinces in the national sphere. The overseeing role of the NCOP is therefore determined by this function. However, this role is limited by the fact that the NCOP oversees only the national aspects of provincial and local government.[190]

a) Oversight to protect spheres of government

An important responsibility of the NCOP is to protect other spheres of government. This role comes into play where one sphere of government interferes in the affairs of another and such intervention violates the integrity of the other sphere. For example where the national executive intervenes in a matter of exclusive determination by the province[191] or where a provincial executive intervenes in a municipality.[192] In such a case, the NCOP must not

188 See section 62 (3) FC.

189 *Corder / Jagwath / Soltau,* Report on Parliamentary Oversight and Accountability, Chapter 4.

190 *Corder / Jagwath / Soltau*, Report on Parliamentary Oversight and Accountability, Chapter 4.2.

191 Section 100 (1) FC.

192 Section 139 (1) FC. There have been provincial interventions under section 139 (1) FC for instance in municipal areas as Butterworth, Warrenton, Wedela, Ogies, Sunnieshof and Nouwpoort; see: Address of President Mbeki at the National Council of Provinces, 28 October 1999, http://www.polity.org.za/govdocs/speeches/1999/sp1028html. For a comprehensive description of

only ratify the intervention but also 'review the intervention regularly and make appropriate recommendations to the provincial executive'.[193]

The right to intervene in the integrity of another sphere of government is not always consistent with the requirements of co-operative government. The Constitutional Court is slowly shaping the role of the NCOP as a monitoring body by giving content to the provisions in Chapter 3 of the Final Constitution. In the *First Certification Judgment* the Court held that the discretion to intervene in another sphere's administration should be exercised in terms of the general principles of co-operative government.[194] In order to harmonise apparently contradictory mandates, the power of intervention and the duty to respect that sphere's functional and institutional integrity, a minimalist approach to intervention should be followed.[195] According to the principle of proportionality, the intervenor has to choose the least intrusive means of an intervention.[196] Furthermore, the powers have to be exercised only in exceptional circumstances.[197] Notwithstanding these pronouncements as part of its commitment to co-operative government, the Constitution provides that an action taken under section 139 must mainly aim at assisting municipalities which are unable to fulfil their obligations in an effort to enable the municipality to govern effectively.[198]

The provisions made in sections 100 and 139 give the NCOP a critical role in a sensitive area of intergovernmental relations: In overseeing provincial intervention in municipality affairs the NCOP is required to support the actions of one of its members, whereas in reviewing national intervention in provincial affairs, the NCOP has to deal with actions against one of its members. In effect, the NCOP is asked to assume the role of both monitoring body and mediator,[199] thereby fulfilling the requirements of the principle of co-operative government.

the *Butterworth Case* see *C.M. Murray*, Municipal integrity and effective government: the Butterworth intervention, 14 SAPR/PL 332-380.

193 See section 100 (1) (b) FC and 139 (1) (b) FC respectively, and also NCOP rule 240 (1).

194 *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) 1318 para 264.

195 *C.M. Murray*, South Africa's NCOP: Stepchild to the Bundesrat, p. 271.

196 Intergovernmental Relations Audit, p. 12.

197 See the remarks by the Constitutional Court in *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) 1318 para 254-257, 262-266.

198 *C.M. Murray*, Municipal integrity and effective government, 14 (1999) SAPR/PL 332 357.

199 *C.M. Murray*, South Africa's NCOP: Stepchild to the Bundesrat, p. 271.

b) Disputes regarding the administrative capacity of the provinces

Disputes about the administrative capacity of provinces present another example of the monitoring role of the NCOP. Implementing national legislation affecting provinces is generally a task of the provinces. Yet problems can arise when a province administers national legislation despite its inability to implement such legislation.[200] Accordingly, disputes on the administrative capacity of the provinces must be resolved by the NCOP under section 125 (4).

c) National Defence and Treasury decisions preventing the transfer of funds to a province

Both Houses of Parliament must approve a declaration by the State President of a state of national defence.[201] Similarly, in cases of decisions of the treasury to stop the transfer of funds to a province, both the National Assembly and the NCOP have to give their approval.[202] These provisions illustrate the dual character of the NCOP: It is required to act both as like a traditional Senate (providing a second view on certain matters) and as a chamber representing distinctly provincial interests.[203] This "partnership" with the National Assembly makes sense in view of the impact of these decisions on the interests of the provinces**.**

d) General oversight of the executive on provincial matters

Although the Final Constitution does not refer to a general overseeing role for the NCOP, the National Assembly is tasked with a general monitory function in sections 42 (3) and 55 (2) of the Final Constitution. Similarly, section 102 gives the National Assembly the final oversight power to oversee decisions of the national Executive as well as the power to dissolve the Cabinet. However, only the National Assembly may impeach the President,[204] a judge, the Public Protector, the Auditor General, or a member of a commission established by the constitution.[205]

[200] *C.M. Murray / R. Simeon*, From paper to practice: The NCOP after its first year, 14 (1999) SAPR/PL 96, 103.

[201] Section 203 FC.

[202] Section 215 FC.

[203] *Corder / Jagwath / Soltau*, Report on Parliamentary Oversight and Accountability, Chapter 4.5.

[204] Section 89 FC.

[205] Section 177 and 194 FC.

The NCOP's general monitoring role is limited and shaped by its constitutional mandate. Its role is to represent the provinces and to ensure that provincial interests are taken into account in the national sphere of government. Furthermore, the NCOP is a part of Parliament to which the Cabinet is accountable.[206] The role of the NCOP provides a forum for discussing provincial issues developed by the national Executive and which the provinces are obliged to carry out. This judicates that the constitutional role of the NCOP also encompasses an oversight of the Executive generally in matters where provincial issues are concerned.[207]

The Constitutional Court has not yet delivered a judgement on how the NCOP has to exercise its general overseeing function that meets the requirements of co-operative government. As a result of its pronouncements in the *First Certification Judgment,* it can be presumed that the oversight power would have to be used in a co-operative manner which is comparable to the way the NCOP has to deal with interventions.

2. Legislative functions of the NCOP

The significant constitutional role of the NCOP within the framework of co-operative government is further emphasised by its legislative function which can be described as its primary task.[208] The NCOP has the right to consider all national bills, but the legislative powers of the NCOP vary according whether the legislation falls under section 75 or section 76 legislation.

a) Section 76 Legislation

Section 76 of the Constitution provides for a special mechanism for the passing of ordinary bills affecting the provinces and other bills specified by various provisions of the Constitution. So-called section 76 legislation deals with bills 'affecting' the provinces and covers any legislation which falls substantially in the functional areas listed in Schedule 4[209] of the Constitution and for which the national and provincial governments share responsibility.

206 See section 92 (2) FC.

207 *C.M. Murray / R. Simeon*, From paper to practice: The NCOP after its first year, 14 (1999) SAPR/PL 96, 104; see also *Malherbe*, The South African NCOP, (1998) TSAR 77, 92; *Chaskalson*, Constitutional Law of South Africa, 3-13, states that the national executive is only accountable to the National Assembly and not the NCOP but does not differentiate between matters affecting and those not affecting the provinces.

208 *Chaskalson*, Constitutional Law of South Africa, 3-13.

209 Section 76 (3) FC.

Section 76 legislation also includes bills relating to a range of specific matters.[210] Bills which fall into this category must be passed by the NCOP for which a supporting vote of five of the nine provinces is sufficient.[211] If the National Assembly and the NCOP cannot agree on such a Bill, then a mediation committee is set up,[212] consisting of nine members of the National Assembly and one representative of each provincial delegation.[213] The mediation committee's decision requires a majority of five of the nine representatives from each house.[214] If consensus cannot be reached an agreement the National Assembly can still pass the Bill, however in this case it needs a two-thirds vote to do so.[215] The mediation committee can also suggest an alternative version of the Bill, which would then be passed by a simple majority in each house.[216]

b) Section 75 Legislation

Section 75 of the Constitution sets out the procedure concerning the passing of ordinary bills that do not affect the provinces. Regarding ordinary legislation which does not affect the provinces, the NCOP may support, amend or reject bills passed by the National Assembly.[217] In these cases the voting procedures in the NCOP are different. Members of the delegations all vote as individuals and the bill must be passed by a single majority of the votes.[218] This arrangement reflects the limited significance of these bills for the provinces. Since the bills do not affect the provinces directly, voting is not required to take place on provincial instructions.[219] If the NCOP does not pass a bill that falls into the scope of section 75 legislation, the Bill may nevertheless become law if the National Assembly passes the Bill, again with a simple majority of its members.[220]

[210] See *Chaskalson*, Constitutional Law of South Africa, 3-17, fn. 6-10.

[211] See section 75 (2) (a) FC read with section 65 (1) (b) FC.

[212] Section 76 (1) (d) FC.

[213] Section 78 (1) (a) FC.

[214] Section 78 (2) (a) (b) FC.

[215] Section 76 (1) (i) FC.

[216] Section 76 (1) (h) FC, see also *R. Simeon*, Considerations on the design of federations, 13 (1998) SAPR/PL 42, 66.

[217] Section 75 (1) (a) (i-iii) FC, see also *R. Simeon*, Considerations on the design of federations, 13 (1998) SAPR/PL 42, 66.

[218] See Section 75 (2) (a) (c) FC.

[219] See also *C.M. Murray / R. Simeon*, From paper to practice: The NCOP after its first year, 14 SAPR/PL 96, 102.

[220] See section 75 (1) (c) (i) FC.

Thus, while both houses are required to consider ordinary bills not affecting the provinces, the National Assembly has the power to override the NCOP and pass the bill despite opposition from the NCOP. The absence of an absolute power of veto on section 75 and section 76 legislation is the result of a political compromise in the drafting process. Since the provinces gained much more power in the Constitution than the ANC had initially wished, the drafters granted in return the right of the National Assembly to override the NCOP in a case of disagreement over legislation.[221]

c) Constitutional amendments – Section 74 Legislation

Finally section 74 of the Final Constitution enables the NCOP to participate in the enactment of bills amending the provisions of the Constitution. Section 1 of the Constitution declares South Africa 'one sovereign, democratic state'. At least 75 per cent of the members of the National Assembly and 6 of the nine provinces must pass proposed amendments to section 1, or to the amending procedure itself.[222] A majority of six votes in the NCOP and two-thirds of the members of the National Assembly for instance can amend Chapter 3 of the Constitution, which sets out the principles of co-operative government.[223] Finally a two-thirds majority of the National Assembly alone can pass all other amendments to the Constitution provided that the provinces are not affected by such amendments.[224] If the amendments in fact affect the NCOP, alter provincial boundaries, powers, functions or institutions, or affect a provision, which deals specifically with a provincial matter, the National Assembly can only pass the bill with the concurrence of six provincial delegations of the NCOP.[225] This shows that provinces have sufficient power to guard themselves against amendments, which may negatively affect them.

3. Comparison with the functions of the Bundesrat

Like the NCOP, the *Bunderat's* most important function is its legislative function. As a parallel to the South African Constitution the German Basic Law also sets up a house of provinces to protect the interests of the German *Länder* in the legislative process. The *Bundesrat* is the forum through which the 16 *Länder* participate in the legislative and administrative processes of the Federation.[226] As a matter of principle, the *Bundesrat*

221 *C.M. Murray*, South Africa's NCOP: Stepchild to the Bundesrat, p. 276.

222 Section 74 (1) FC.

223 Section 74 (3) FC.

224 Section 74 (3) (a) FC read with 74 (3) (b) (i-iii) FC.

225 Section 74 (3) (b) (i-iii) FC.

226 Article 50 BL.

participates in passing every law adopted by the *Bundestag*. The extent of its participation, however, depends on whether the Bill in question is one to which the *Bundesrat* may lodge an objection or merely one requiring the *Bundesrat's* consent.[227]

a) Legislative Functions of the Bundesrat

Laws affecting the interests of the *Länder*[228] cannot enter into force unless the *Bundesrat* expressly consents to them (*consent Bills*).[229] These include, for instance Bills that would change the constitution[230], Bills affecting state finances[231] and Bills that affect the administrative jurisdiction of the states[232]. Furthermore, the *Bundestag* cannot override a rejection by the *Bundesrat*, giving the *Bundesrat* an absolute veto in such cases. Thus, where it refuses to give its consent, the Bill fails.[233] The *Bundestag* cannot override this veto, regardless of how large a majority of its members support the Bill. However, the *Bundestag* and the Federal Government can invoke the Mediation Committee (*Vermittlungsausschuss)* in an attempt to reach an agreement.[234] This right of veto over consent Bills gives the

227 *I. v. Münch*, Staatsrecht I, p. 303, Rn. 740.

228 The Basic Law does not use the term 'laws affecting the *Länder*'. But all consent bills basically affect the interests of the *Länder,* see *Robbers*, in: *Sachs* (ed.), Grundgesetz, Art. 50 Rn. 23; also *Lücke*, in: *Sachs* (ed.), Grundgesetz, Art. 77, Rn. 14.

229 Article 78 BL.

230 See Article 79 (2) BL. Article 79 (1), (2) BL reads as follows:
" (1) This Constitution can be amended only by statutes which expressly amend or supplement the text thereof. In respect of international treaties, the subject of which is a peace settlement, the preparation of a peace settlement or the phasing out of an occupation regime, or which are intended to serve the defence of the Federal Republic, it is sufficient, for the purpose of clarifying that the provisions of this Constitution do not preclude the conclusion and entry into force of such treaties, to effect a supplementation of the text of this Constitution confined to such clarification.
(2) Any such statute requires the consent of two thirds of the members of the House of Representatives and two thirds of the votes of the Senate."

231 See Articles 105 (3), 106 (4), 106 (5) (2), 107 (1) (2), 107 (2) BL.

232 Article 84 (1) BL. Two-thirds of all consent bills are bills, which fall under the regime of Article 84 BL (1), see *Jarass / Pieroth*, Grundgesetz, Art. 77 Rn. 4. Article 84 (1) BL reads as follows:
"(1) Where the States execute federal statutes as matters of their own concern, they provide for the establishment of the requisite authorities and the regulation of administrative procedures insofar as federal statutes consented to by the Senate do not otherwise provide."

233 See *I v. Münch*, Staatsrecht I, p. 305, Rn. 748.

234 Article 77 (2) (4); see also *v. Münch*, Staatsrecht I, p. 305, Rn. 749.

Bundesrat a great degree of influence on legislation,[235] especially considering that in practice, consent bills make up at least half of all federal legislation.[236]

If not specifically provided for in the Basic Law, a Bill does not need the consent of the *Bundesrat.* In such cases, the *Bundesrat* may lodge an objection to the Bill.[237] If the *Bundesrat* wishes to object to a Bill it must first request that the Mediation Committee convene.[238] The *Bundestag* can reject an objection from the *Bundesrat* by an absolute majority, i.e. a majority of its statutory members present.[239] Thus, by holding another vote, the *Bundestag* can overcome the opposition of the *Bundesrat* and open the way for the law to be promulgated.

b) The Overseeing/Monitoring Function of the Bundesrat

Like the NCOP, the *Bundesrat* oversees executive actions. The Basic Law obliges the Federal Government to keep the *Bundesrat* constantly informed of all government business.[240] This includes its legislative and administrative plans, the general political situation as well as its foreign defence policy.[241] With regard to European Union (EU) affairs, the Federal Government must inform the *Bundestag* and *Bundesrat* of all EU plans, since national law and thus also the interests of the states are often materially affected by EU law. The right of the *Bundesrat* to be involved in EU affairs has been materially strengthened and enshrined in the Basic Law since 1993.[242]

c) Other Functions of the Bundesrat

235 *Robbers*, in: *Sachs* (ed.), Grundgesetz, Article 50, Rn. 23; see also *R. Watts*, Comparing Federal Systems in the 1990's, p. 88.

236 *Robbers*, in: *Sachs* (ed.), Grundgesetz, Article 50, Rn. 23; see also *Davis / Chaskalson / de Waal*, Democracy and Constitutionalism: The role of constitutional interpretation, 1, 114, in: *Van Wyk / Dugard / De Villiers / Davis*, Rights and Constitutionalism, 1994. For the period from 05 September 1949 till 15 September 2000, consent bills made up 53, 1% of all bills which passed parliament; see http://www.bundesrat.de/Englisch/PDundF/index.html.

237 See *v. Münch*, Staatsrecht I, p. 303, Rn. 741.

238 Article 77 (3) (1) BL read with Article 77 (2) BL.

239 Article 77 (4) (1) BL read with Article 121 BL. As a rule, the *Bundestag* adopts Bills by a majority of the members present; see Article 42 (2) BL.

240 Article 53 BL.

241 *Jarass / Pieroth*, Grundgesetz, Art. 53, Rn. 2.

242 See article 23 BL.

The *Bundesrat* elects half the members of the Federal Constitutional Court.[243] It may state its views on matters before the Constitutional Court[244] and launch proceedings itself.[245] Furthermore, if the Federal Chancellor no longer has the confidence of the *Bundestag,* the Federal Government may enact laws with the consent of the *Bundesrat*.[246]

Finally the *Bundesrat* serves an important function as a guardian of the Basic Law. Article 79 (3) requires a two-thirds majority in both the *Bundestag* and the *Bundesrat* in order to amend the Basic Law. However, provisions regarding the division of the Federation into *Länder*, or their participation in the legislative process cannot be amended.[247]

4. Differences and similarities between the NCOP's and the Bundesrat*'s functions*

The preceding description of the *Bundesrat's* functions reflects its influence on the design of the NCOP. The role of the Mediation Committee, for instance is nearly identical to that of the German Mediation Committee.[248] The way, however, in which the Mediation Committee functions differs in these two constitutional systems.

a) Differences between the Mediation Committees

The Mediation Committee in Germany functions as a bridge between the *Bundestag* and the *Bundesrat.* Like its South African counterpart, its responsibility is to submit compromise proposals whenever there is a difference in opinion between the *Bundestag* and *Bundesrat* on the content of Bills.[249]

(aa) The functioning of the German Mediation Committee

243 Article 94 (1) (2) BL.

244 *Robbers*, in: *Sachs* (ed.), Grundgesetz, Art 50, Rn. 37.

245 See Article 93 (1) No 1 BL.

246 See Article 81 BL.

247 See Article 79 (3) BL, the so-called "eternity clause". Article 79 (3) BL reads as follows: "Amendments of this Constitution affecting the division of the Federation into States, the participation on principle of the States in legislation, or the basic principles laid down in Articles 1 and 20 are inadmissible."

248 *C.M. Murray*, South Africa's NCOP: Stepchild to the Bundesrat, p. 272.

249 Article 77 (2) (4) BL.

Like South Africa's Mediation Committee it has equal representation from each house:[250] It comprises 16 members of the *Bundestag*, who reflect the relative strengths of the parliamentary groups in the *Bundestag*, and 16 members of the *Bundesrat*, one for each *Land*.[251] The members of the *Bundesrat* on the committee are not, however, bound by instructions from their Land governments (as they are when the *Bundesrat* takes decisions).[252] Furthermore, the meetings of the Mediation Committee are strictly confidential.[253] Minutes of the meetings are generally not available until the electoral term following the one during which the meeting was held, i.e. not until at least 5 years have passed. If meetings were not strictly confidential committee members would be unable to reach compromises with each other and would be put under pressure by their respective *Land* governments or political parties to refuse to make concessions on particular issues.

Like the South African committee, the German Mediation Committee is only eligible to make proposals. In turn, it has no decision-making powers as regards the content of a Bill.[254] Mediation proceedings in the Committee can lead to four different outcomes: The Committee may recommend that a Bill passed by the *Bundestag* be revised, i.e. that provisions not acceptable to the *Bundesrat* be reformulated, that additions be made, or that parts be deleted.[255] Secondly, a Bill passed by the *Bundestag* may be confirmed, in which case amendment proposals submitted by the *Bundesrat* are rejected.[256] Thirdly, the proposal may be made that the *Bundestag* repeals the Bill in question. This happens when the *Bundesrat* rejects a Bill in its entirety and gains acceptance for its standpoint in Mediation Committee proceedings.[257] Finally, Mediation Committee proceedings may also be concluded without the submission of a compromise proposal, like for instance, when there is a committee deadlock.

(bb) Outlook on the Functioning of the South African Mediation Committee

The existence of the South African Mediation Committee reinforces the strong underlying commitment to co-operative government in the South African Constitution. Disagreement

[250] Article 77 (2) (2) BL. The composition and the procedure of this committee is regulated by rules of procedure, the *Gemeinsame Geschäftsordnung des Bundestages und des Bundesrates fuer den Ausschuss nach Art. 77 des Grundgesetzes [Vermittlungsausschuss] (GO VermA).*

[251] See paragraph 1 GO VermA.

[252] Article 77 (2) (3) BL.

[253] *Lücke*, in: *Sachs* (ed.), Grundgesetz, Art. 77, Rn. 26.

[254] See *Lücke*, in: *Sachs* (ed.), *Grundgesetz* Art. 77, Rn. 25, 30.

[255] Paragraph 10 (3) (1) read with paragraph 10 (1) (1) GO VermA.

[256] See paragraph 11 (1) GO VermA.

[257] See paragraph 10 (1) (1) GO VermA.

regarding the content of legislation must be resolved in a manner that respects the other sphere's interest.

The German Mediation Committee, however differs in one material aspect from the situation in South Africa. For the South African Mediation Committee's recommendations to become law, the NCOP and the National Assembly must pass them. However, where there is a deadlock, the National Assembly can veto the NCOP's position and still pass the law alone under the override provision.[258] Naturally, because of the current political situation in South Africa, it seems unlikely that the National Assembly will exercise its override power. As long as the same party dominates each the NCOP and the National Assembly and as long as the party system is in fact a 'single party system', the question of an override is irrelevant. Differences between the two houses will therefore be rare in the near future.[259] To date, the Mediation Committee has only been convened twice.[260] Nonetheless, because meetings of the South African Mediation Committee are strictly confidential and not open to the public, the efficiency of the committee is very high and on both occasions the contentious issues were resolved and agreement reached within 2 – 3 hours of the meeting being convened.[261] When comparing the South African model with the German system, one can surmise that matters might be different if the political landscape of the national and the provincial level were to change and the composition of the National Assembly and the NCOP were different. The NCOP would perhaps be tempted to show its strength and influence more regularly. Although, the small number of convocations of the Mediation Committee can also be seen as a sign that co-operative government is effectively in operation and that because of the high degree of consultation between the National Assembly and the NCOP differences between the two Houses on legislation are minimised.

In Germany, the frequency with which meetings of the Mediation Committee take place is an indication of the extent to which the Federation and the *Länder* disagree over legislation. Furthermore, it reflects the political constellation at the federal level. Where the political majority in the *Bundesrat* is not the same as that in the *Bundestag*, then both organs are more likely to disagree.[262] However, this does not mean that the parties generally exploit

258 See section 76 (1) (i) FC.

259 *C.M. Murray*, South Africa's NCOP: Stepchild to the Bundesrat, p. 276.

260 One disagreement occurred on the *Local Government: Municipal Structures Act No 117 of 1998*, the other one on the *Republic of South Africa National Land Transport Transition Act No 22 of 2000,* discussion with Mr. M.E. Surty, Chief Whip of the ANC in the NCOP, on 28 March 2001.

261 Discussion with Mr. M.E. Surty, Chief Whip of the ANC in the NCOP, on 28 March 2001.

262 During the 7th electoral term (1972-1976) when there was an SPD-FDP coalition government, the *Bundesrat* demanded that the Mediation Committee be convened on 96 occasions and, in the following 8th legislative term (1976-1980), on 69 occasions. During the 10th electoral term (1983-1987), however, when the CDU/CSU-FDP coalition was in power, the Mediation Committee was

the mediation procedure depending on the political composition of the *Bundestag* and the *Bundesrat*. The fact that either the *Bundestag* or the *Bundesrat* resorts to the mediation procedure also reflects the different political policies at federal and regional level and shows that the *Bundesrat* is also a political organ.[263]

5. Conclusion

An analysis of the functions of the NCOP and the *Bundesrat* shows that both second houses in theory enjoy significant influence and responsibilities within their respective constitutional systems. With regard to constitutional amendments, the NCOP has considerable powers to prevent the enactment of legislation affecting the provinces negatively. However, these powers are not as strong as those exercised by the *Bundesrat.* Articles 79 (1) and (2) of the German Basic Law require approval of two-thirds of the members of both the *Bundestag* and the *Bundesrat* in order to amend the Basic Law. However, the Basic Law prohibits any amendment affecting the division of the Federation into *Länder,* or their participation in the legislative process.[264]

Concerning the enactment of legislation, there remains doubt whether the NCOP will be able to perform its role as a representative of provincial interests at a national level. Despite the fact that the provincial executives and members of the legislatures are able to express their concerns and needs in the NCOP, the powers of the NCOP are still to some extent unclear. The NCOP has no final veto and therefore it cannot prevent the National Assembly from enacting legislation, even if the disputed law affects the interests of the provinces. The strongest pressure that the NCOP can exert in such a case is to force the National Assembly to pass the Bill with a two-thirds majority. This differs notably from the power of the *Bundesrat* as explained above.

In general, if the views of the provinces are overridden too often, which is at present unlikely, it could place a heavy burden on national-provincial relations and could jeopardise the overall commitment to co-operative government. However, for now, one can assume

convened only 6 times. Over the whole of this period, from 1972 to 1987, the majority in the *Bundesrat* was formed by representatives of the CDU/CSU *Land* Parliaments. Since that time, until 1998 when the SPD came into power at the national level, following a series of elections at *Land* level, the CDU/CSU had lost its majority in the *Bundesrat*, which had led to an increase in the use of the mediation procedure; see http://www.bundesrat.de/Englisch/PDundF/index.html.

263 A statistic about the convocation of the Mediation Committee between 05 September 1949 and 15 September 2000 reveals that in 88, 8% of the cases the Mediation Committee was convoked by the *Bundesrat.* In a small number of cases the Federal Government (8,7 %) or the *Bundestag* (2,5 %) convoked the committee; see http://www.bundesrat.de/Englisch/PDundF/index.html.

264 See article 79 (3) BL.

that conflicts and differences will be resolved in a peaceful manner and in the light of the principle of co-operative governance. Therefore it is likely that consensus between the national government and the provinces will be reached in most instances. Nonetheless, an amendment to the Constitution giving the NCOP an absolute right to veto legislation affecting the provinces, could possibly guarantee the NCOP a substantive voice in the national legislative process.

D. The NCOP and the national legislative process

The procedure followed when Parliament legislates depends on the category of legislative competence exercised by Parliament. For example, if Parliament legislates in an area of concurrent competence, namely in Schedule 4 matters, the directions provided in section 76 must be followed. However, where Parliament exercises its exclusive competence, it must follow the manner and form laid down in section 75 of the Constitution.

The question is: What role does the NCOP play in the national legislative process and to what extent is it able to exercise its responsibility and role within a framework of co-operative government? This inquiry is aided by a review of the German legislative process, upon which the South African system is modelled.

I. Initiating legislation

A number of bodies can initiate legislation under the South African Constitution.

1. The bodies empowered to initiate legislation

Members of the National Assembly[265] or a committee of the National Assembly[266] are empowered to initiate legislation, regarding any issue other than money bills.[267] Similarly, section 85 (2) (b) of the Final Constitution empowers the Executive branch of government to initiate legislation.[268] In addition members or the committee of the NCOP carry this

[265] Section 73 (2) FC, such a bill is called a Private Members Bill.

[266] See the rules of the National Assembly (RNA) sections 238-240.

[267] Section 55 (b) (1) FC generally empowers the National Assembly to initiate legislation.

[268] See section 85 (2) (b) FC, the President and Cabinet is specifically empowered to initiate and prepare national legislation.

right.[269] Yet, this right is limited in so far as it applies only to Bills falling within one of the functional areas listed in Schedule 4 and other matters listed in section 76 (3).

2. *The initiating of legislation under the German Basic Law*

Under the German Basic Law, the Federal Government, the *Bundesrat,* and the members of the *Bundestag* have the right to introduce Bills to be debated by the *Bundestag*.[270] Bills tabled by members of the *Bundestag* must be signed by at least 5 per cent of members or by a parliamentary group.[271] In the case of the Federal Government or the *Bundesrat,* the organ concerned must take a decision to this effect.[272]

The *Bundesrat* seldom makes use of its right to initiate legislation. The Federal Government introduces over two thirds of all bills.[273] But this statistic does not imply that members of the *Bundestag* do not take the initiative to introduce legislation or that it merely accepts what the Federal Government dictates. Rather, it is typical of the parliamentary system of government provided for by the Basic Law. In line with the Basic Law, the majority of the *Bundestag* elects the Federal Chancellor.[274] The Federal President then appoints the Cabinet ministers on the proposal of the Chancellor.[275] Because the Federal Government and the parliamentary majority are identical in political terms, it is appropriate for the Bills to be drafted by the Federal Government. The *Bundestag's* control, therefore, de facto extends to deciding which of these legislative proposals will ultimately be adopted and which of them will be amended.

269 See section 68 (b) FC.

270 See article 76 (1) BL. The article reads as follows:
"Bills are introduced in the House of Representatives [Bundestag] by the Government or by members of the House of Representatives [Bundestag] or by the Senate [Bundesrat]."

271 See paragraph 76 (1) of the *Geschäftsordnung des Bundestages (GeschOBT).*

272 *Pieroth*, in: *Jarass/Pieroth*, Grundgesetz, Art. 76, Rn. 2. In the case of the *Bundesrat* this follows from article 52 (3) BL.

273 *I v. Münch*, Staatsrecht I, p. 302, Rn. 736; from 07 September 1949 till 15 September 2000 draft bills tabled by the *Bundesrat* made up only 7,5 % of all draft bills. Draft bills tabled by the Federal Government in the *Bundesrat* made up 57,1 % while the *Bundestag* itself introduced 35,4 % of all bills; see http://www.bundesrat.de/Englisch/PDundF/index.html.

274 Article 63 (1) BL.

275 Article 64 (1) BL.

3. *Differences between South Africa and Germany regarding the right to initiate legislation*

Like the situation in Germany, the role of the NCOP as an initiator of national legislation has been limited. To date, the NCOP has not initiated any legislation. The executive branch of government initiates almost all bills tabled in Parliament. The NCOP's lack of initiating legislation lies in the responsibility of the Executive branch which is arguably better equipped in terms of expertise and infrastructure to determine the need for new laws.[276] As in Germany, this fact does not necessarily signify that the different bodies are not committed to the principle of co-operative government. As in the case of the Basic Law, Cabinet members can also be members of Parliament in the South African parliamentary system. Because of a system of strict party discipline, the members of the majority party of the National Assembly generally support the Bills proposed by the Cabinet. However, in contrast to the German system it is usually not politically feasible for ordinary members of the majority party in parliament to initiate legislation since they cannot demand the same support like Cabinet members.

Although both two upper houses – the NCOP and the *Bundesrat* – have significant rights concerning the initiation of legislation, in practice, this right does not come into play too often due to the structure of those systems. However, it can be expected that the role of the NCOP as an initiator of legislation will change in the near future. On certain issues the NCOP is better equipped to table a Bill than the Executive branch of government, that is in respect of section 65 (2) legislation or in the area of linguistic and cultural matters pertaining to the provinces.

However, how far does the principle of co-operative government have to be considered by the different bodies in initiating legislation? Neither the Constitution nor the Constitutional Court have pronounced on the issue of how co-operative government plays a role in the process of initiating legislation. In the *Education Policy Judgment* however, the Court mentioned that 'where two legislatures have concurrent powers to make laws in respect of the same functional area, the only reasonable way in which these powers can be implemented is through co-operation'.[277] This statement reveals that not only the 'making of laws' but also the introduction of laws must be implemented in accordance with the principle of co-operative government. It is therefore desirable that the NCOP collaborates with the National Assembly and the Executive branch of government if it wishes to introduce legislation.

276 *Rautenbach / Malherbe*, Constitutional Law, 1999, 3rd ed., p. 169.

277 See *Ex parte Speaker of the National Assembly: In re: Dispute concerning the constitutionality of certain provisions of the National Education Policy Bill No 83 of 1995* 1996 (4) BCLR 518 (CC), 1996 (3) SA 289 (CC) para 34.

II. The Involvement of the NCOP in the Introduction and First Reading of a Bill

Once legislation has been drafted, the relevant party introduces the legislation to the National Assembly by submitting it to the Speaker of Parliament[278] or the Chairperson of the NCOP.[279] It is at this stage of the legislative process that the draft becomes known as a Bill. Five main types of Bills come before Parliament: Section 75 and section 76 Bills, mixed section 75 and 76 Bills, Bills that allocate public money (also called money Bills or section 77 Bills), and Bills amending the Constitution (section 74 Bills).

1. Description of the legislative process under the South African Constitution

Once a proposed Bill has been drafted, the Joint Tagging Mechanism (JTM), a committee consisting of the Speaker and Deputy Speaker of the National Assembly as well as the Chairperson and permanent Deputy Chairperson of the NCOP tags the Bill,[280] i. e. classifying the Bill into one of the above named five different categories. Tagging the Bill into one of the five categories in turn determines the procedures which the Bill must follow to become enacted.[281] Once tagged the Bill is normally introduced by being tabled in the National Assembly.[282] It may also be introduced in the NCOP[283] if the bill concerns the functional areas listed in section 76 (3) (a-f).[284] However, only a member or a committee may introduce a Bill into the NCOP.[285]

A draft of every Bill, together with a memorandum explaining the objects of the Bill, must be submitted to the speaker of the National Assembly and the Chairperson of the NCOP before referral to the relevant portfolio and select committees.[286] This rule enables the committees to plan their activities in advance and to give members of the committees the

278 Section 243 RNA.

279 Rule181 NCOP.

280 The Joint Rules of Parliament (JRP), as approved by the Joint Rules Committee on 24 March 1999, regulate this process, see sections 151-158 JRP.

281 The process of qualifying the bill into one of the four categories is set out in section 160 JRP.

282 See section 73 (1) FC; see also section 244 (2) (b) RNA, section 157 (a) JRP.

283 Section 157 (a) JRP.

284 The exception is money Bills, see Section 73 (3) FC.

285 Section 73 (2) and (4) FC.

286 Section 159 (1) and (2) JRP.

chance to prepare themselves.[287] The rules of the NCOP provide that when a Bill on a matter affecting the provinces is referred to or introduced in the NCOP, copies must be referred to the provincial legislatures for the purpose of conferring mandates on their delegates in the NCOP.[288] Even copies of Bills not affecting the provinces – the so-called section 75 Bills, must be referred to the provincial legislatures for information purposes.[289] After a Bill is introduced in the National Assembly or the NCOP a short debate is held during which the party who initiated the Bill introduces it.[290] During this first reading, one member of each party may also set out briefly their position on the Bill.[291] After this first reading, the Bill is referred to the relevant portfolio committee for detailed consideration.[292]

2. *The Involvement of the* Bundesrat *in the Introduction and First Reading of a Bill*

Under the Basic Law, a Bill that has been drafted by the ministry concerned, is not immediately forwarded to the *Bundestag.* It first has to be introduced to the *Bundesrat* for consideration,[293] giving it the 'first say' in parliamentary proceedings.[294] The so-called first passage in the *Bundesrat* results from its extensive rights to participate in the legislative process. Usually the *Bundesrat* delays the Bill and, in the case of consent bills, even prevents some from ever entering into force.[295] To ensure that the views of the *Bundesrat* and *Länder* become known in good time, the Basic Law entitles the *Bundesrat* to make early comments on the draft law before it is submitted to Parliament.[296] The *Bundesrat* committees examine whether the Bills are compatible with the Basic Law, their subject matter and their financial and political implications.[297] In turn, the Federal Government has an opportunity to take the counterproposals of the *Bundesrat* into consideration and may

287 *Rautenbach / Mahlerbe*, Constitutional Law, 1999, 3rd ed., p. 173.

288 See rule 115, 126, 134 and 165 NCOP. It also applies to certain constitutional amendments (section 74 FC and rule 150 NCOP).

289 Rule 142 NCOP.

290 Section 247 (3) (i) RNA and rule 181 NCOP.

291 Section 247 (3) (ii) FC.

292 See section 247 (5) (a) RNA read with section 248 (1) (a) RNA; if Parliament is in recess, the Speaker must refer the bill to the relevant portfolio committee. The bill is then considered to have been read a first time, see section 248 RNA.

293 Article 76 (2) (1) BL.

294 *Miebach*, Federalism in Germany, p. 18.

295 *I v. Münch*, Staatsrecht I, p. 303, Rn. 740.

296 *I v. Münch*, Staatsrecht I, p. 303, Rn. 739.

297 *Miebach*, Federalism in Germany, p. 18/19.

attach to the draft law a written statement known as a counterstatement.[298] Like the comments of the *Bundesrat*, which the *Bundesrat* has to submit within 6 weeks,[299] this counterstatement is attached to the original Bill. In this way, the experience and knowledge which the *Länder* gain from the implementation of legislation is in this way used in the federal legislative process and ultimately enables the *Länder* to exercise control over the Federal Government via the *Bundesrat.*[300] The documents submitted to the *Bundestag* at the beginning of the legislative process thus already reveal important aspects which may possibly lead to a conflict between the Federation and the *Länder* at a later stage.

[298] *Maunz*, in: *MDHS*, Grundgesetz, Art. 76, Rn. 19.

[299] See article 76 (2) (2) BL.

[300] *Miebach*, Federalism in Germany, p. 19.

3. Comparison between the South African and the German process

The above description illustrates that each constitutional system pays significant attention to the rights of the respective provinces and *Länder*. The process of introduction and first reading of a Bill in terms of the South African Final Constitution closely resembles the process under the German Basic Law. However, the existence of a committee like the JTM is unknown to the German parliamentary system. The JTM provides means by which to avoid possible conflicts regarding the content of legislation at an early stage. Nevertheless, the introduction of the right of 'first say' for the NCOP could be an improvement to the South African legislative process. German experience has shown that this right is able to guarantee the *Bundesrat* a strong voice in the legislative process.

And yet, in the process of initiating and first reading of a bill in an area of concurrent law-making power, the principle of co-operative government plays a significant role. The South African Constitutional Court has pointed out that the vesting of concurrent lawmaking powers in Parliament and the provincial legislatures calls for consultation and co-operation between the national Executive and the provincial Executives.[301] This statement illustrates that the principle is invoked at an early stage in the national legislative process. This observation is substantiated by a practice that has recently been established in Parliament. Namely section 76 legislation is progressively being introduced in the NCOP, practically giving it a right of 'first say'. Thus, the principle of co-operative government is exercised in daily parliamentary affairs without the existence of a legislative framework.

III. The Passing of Bills under the South African Final Constitution

After the Bill has been referred to the relevant Portfolio Committee for detailed consideration, it is debated in their meetings and interested parties, individuals and groups may submit commentary on the Bill to the committee.

1. The work of the Parliamentary Portfolio Committees and the second reading of the bill

The influence of the Parliamentary Portfolio Committees in the legislative process is significant in that they may propose any amendment to the Bill, whether it relates to detail

[301] See *Ex parte Speaker of the National Assembly: In re: Dispute concerning the constitutionality of certain provisions of the National Education Policy Bill No 83 of 1995* 1996 (4) BCLR 518 (CC), 1996 (3) SA 289 (CC) para 27.

or principle.[302] After the portfolio committee has considered the Bill, it is again tabled in the National Assembly or the NCOP together with the Committee's report in which the committee either approves, rejects or proposes amendments to the Bill.[303] Three days must lapse before there can be a debate on the Bill.[304] During the debate which takes place in either the National Assembly or the NCOP depending on where the Bill was introduced, members of the different parliamentary groups are given the opportunity to discuss the Bill's content. It is at this stage that the National Assembly or the NCOP may make amendments to the Bill. Once this is completed, the second reading of the Bill takes place. That is when the Bill is ready to be passed by Parliament. Different procedures follow depending on how the Bill has been tagged. The complexity of these procedures highlights the significant and central theme of co-operative government underlying this process. The input provided by the Portfolio Committees and a second reading of the Bill give prominence to the views of the provincial legislatures, which are considered and substantially influence the law making process.

2. *The Passing of section 75 Legislation*

Section 75 of the Final Constitution describes the procedure to be followed where the introduced Bill is an ordinary Bill which does not affect the provinces. Ordinary Bills include all legislation that does not fall within the functional areas set out in Schedule 4 and 5 of the Constitution.[305] Bills which fall within the scope of section 75 can only be introduced in the National Assembly and it must be passed by a majority of members present.[306] If the National Assembly does not pass the Bill, it lapses,[307] whereas if the National Assembly passes the bill it is referred to the NCOP for consideration.[308]

In respect of section 75 Bills, the members of the NCOP all vote individually and the decision must be taken with a majority of the NCOP's members present.[309] If the NCOP passes the Bill without proposing any amendments it is submitted to the President for his or her

[302] Section 249-251 RNA and rules 186-189 NCOP, see also *Rautenbach / Mahlerbe*, Constitutional Law, 1999, 3rd ed., p. 174.

[303] See section 251 (3) RNA on all the information that the report of the relevant committee has to include.

[304] Section 253 RNA.

[305] See section 75 (1) FC read with section 76 (1) (3) (4) (5) FC.

[306] See section 53 (1) (a) read with (c) FC.

[307] Section 269 (a) RNA, section 181-183 JRP.

[308] Section 75 (1) FC, section 269 (b) RNA, section 181 JRP.

[309] Section 75 (2) FC, one third of the members of the NCOP must be present, see section 75 (2) (b) FC.

consent.[310] If, on the other hand, the NCOP rejects the Bill or passes an amended version of the Bill[311], it must be referred back to the relevant Portfolio Committee in the National Assembly. The Portfolio Committee must then reconsider the Bill by taking into account any amendments proposed by the NCOP.[312] Following its reconsideration, the Committee reports to the National Assembly[313] which either accepts or rejects the amendments and passes the Bill with an ordinary majority of its members.[314] The National Assembly may also decide not to proceed with the Bill at all.[315] Thus, while both houses consider section 75 Bills, the National Assembly is able to override any opposition from the NCOP by a simple majority of its members.

Notwithstanding constitutionally-mandated veto powers given to the National Assembly, due to the current political situation, the NCOP is unlikely to disagree over section 75 legislation. The informal or *de facto* pattern that has evolved regarding section 75 matters is that the delegates in the NCOP meet before their vote is cast to discuss their respective voting behaviour and ultimately vote along party lines. Consequently, because the majority party in 8 of the 9 Councils also holds the majority of seats in the National Assembly, the role of the NCOP is relegated to that of a mere rubberstamp. Although this voting pattern is undesirable, it is an obvious consequence of voting procedures set out in the Constitution. Furthermore, this dilemma cannot be obviated by introducing the more onerous section 76 voting for section 75 legislation as the procedure of conferring a mandate on provincial delegations is time-consuming for provincial legislatures and it would seem impractical for provincial legislatures to consider section 75 matters in as much depth as section 76 issues.

3. The passing of section 76 legislation

Section 76 provides for a special mechanism by which ordinary Bills affecting the provinces and other Bills specified by various provisions of the Constitution are passed. An ordinary Bill will be tagged as affecting the provinces if its provisions fall substantially within the functional areas listed in Schedule 4[316] or if it is a law envisaged by the various sections of the Constitution listed in section 76 (3).[317] In addition, other specific Bills must be passed in terms of section 76. These include legislation contemplated in section 44 (2)

[310] Section 75 (1) (b) FC, see also rule 207 (a) NCOP.

[311] The NCOP is entitled to do so following section 75 (1) (a) (ii) (iii) FC.

[312] Section 75 (1) (c) FC, section 270 RNA, rule 207 (c) NCOP.

[313] Section 271 (1) RNA.

[314] Section 75 (1) (c) (i) FC, section 272 (4) (a-c) RNA.

[315] Section 75 (1) (c) (ii) FC, section 272 (4) (d) RNA.

[316] See section 76 (3) FC.

[317] Section 76 (3) FC lists sections 65 (2), 182, 195 (3) and (4), 196 and 197 FC.

and section 220 (3) as well as legislation envisaged in the general financial provisions of Chapter 13, where the legislation affects the financial interests of the provincial sphere of government.

Most Bills falling within the scope of Schedule 4 or are referred to in section 76 (3) may be introduced in either the National Assembly or the NCOP. Although, as mentioned, these Bills have mainly been introduced in the NCOP. In contrast, the specific Bills passed in terms of section 76 (1) may only be introduced in the National Assembly.[318] This distinction is an important one since the Assembly has no ultimate veto in respect of Bills introduced in the NCOP.

The house that passes the Bill must refer it to the other house which may then either pass it, pass an amended version of it, or reject it. If both houses pass the same version of the Bill, it is submitted to the President for his or her approval.[319] If the second house passes an amended version of the Bill passed by the house in which the Bill originated, the amended version is referred back to that house for its consideration and, if it is passed, is submitted to the President for his or her assent.[320] In all cases where the National Assembly and the NCOP do not agree on a single version of the Bill, the matter is referred to the Mediation Committee.[321]

4. The Passing of Mixed section 75 and 76 Legislation

Mixed section 75 and 76 legislation is legislation that contains provisions which both affect and not affect the interests of the provinces. The Joint Rules of Parliament[322] provide for mixed section 75 and 76 bills to be introduced in the National Assembly.[323] To be able to be tabled in the National Assembly the bill must be of such a nature that a dispute between the two Houses is unlikely to arise.[324] Furthermore, it has to be possible to separate the

[318] Section 76 (4) FC.

[319] Section 76 (1) (b) and 76 (2) (b) FC.

[320] Section 76 (1) (c) and 76 (2) (c) FC.

[321] Section 76 (1) (d) and 76 (2) (d) FC.

[322] See section 191-201 JRP.

[323] Mixed section 75 and 76 Bills introduced in the NCOP are unconstitutional in that they contain section 75 provisions which cannot be introduced in the Council; see Part 7 (1) JRP; see also section 193 JRP.

[324] Section 191 (2) (a) JRP.

Bill, if necessary into a section 75 and section 76 Bill.[325] Finally, other unmanageable procedural complications have to be excluded.[326]

a) Disagreement over mixed section 75 and 76 legislation

Potential problems might arise in determining which procedures to follow where the two houses disagree over the content of a mixed section 75 and 76 bill. The JRP are required to foresee that the Bill could be split into a section 75 and 76 Bill, or amended to such an extent that it may be reclassified as either a section 75 or section 76 bill.[327] The voting procedures in the NCOP differ in respect of mixed section 75 and 76 Bills in that the NCOP must pass mixed Bills in terms of both its voting procedures. It first votes by province and then by individual member.[328] This procedure of separation makes the process of passing mixed section 75 and 76 legislation both complex and difficult and members of the NCOP have expressed that they would prefer this procedure to change.[329] A way to facilitate the enactment of mixed Bills would be to pass them according to the requirements set out for section 76 legislation. Such a procedure would be less time consuming and contribute to the fulfillment of co-operative government. Above all it would guarantee a strong voice for provincial interests. In terms of the current arrangement, these interests are vulnerable to being compromised because of the fact that the NCOP votes also individually in respect of the section 75 part of the Bill. Yet on the other hand, passing mixed Bills according to the requirements set out for section 76 legislation could pose problems, as illustrated in the German practice.

b) The German Practice in respect of mixed Legislation

As mentioned, in Germany, Bills that affect the legal status of the *Länder* or the relationship between the *Länder* and the *Bund* as well as Laws amending the Basic Law require the consent of the *Bundesrat*. Since the *Länder* execute most of the *Bund's* legislation more than half of all legislation belongs to this category.

The question arises as to whether a single administrative clause in a Bill can already make the Bill a 'consent Bill'. The German Constitutional Court has ruled that in effect the administrative nature of a single clause in a Bill will give the *Bundesrat* a veto over the

[325] Section 191 (2) (b) (i) JRP.
[326] Section 191 (2) (c) JRP.
[327] Section 194 (2) (a) (i) (ii) JRP.
[328] Section 197 (1) JRP.
[329] Discussion with Mr. M.E. Surty, Chief Whip of the ANC in the NCOP, on 28 March 2001.

entire Bill.[330] This applies for instance where a federal law prescribes certain competencies, official forms, time limits, administrative fees, arrangements for the service of official documents, or new agencies, which the *Land* authorities have to comply with.[331] The veto powers of the *Bundesrat* have presented problems in cases where political parties have exploited their majorities in the *Bundesrat* to block reforms of their opponents in the *Bundestag*. The Constitutional Court realised that such deadlocks have the potential to weaken the federal structure. The Court recognised that, as more and more Bills became amendments of existing legislation, – over which the *Bundesrat* would be given an absolute veto – the government would not be able to govern without the consent of the opposition unless the same coalition governed both the *Bundestag* and the *Bundesrat.* Consequently, the current practice is that amendments which initially required the consent of the *Bundesrat* require renewed consent of the *Bundesrat* only when they seek a 'systematic shift' in the power relations between the *Bund* and the *Länder*.[332]

Nonetheless, mixed legislation in Germany is not as problematic as it is in South Africa. The mixed nature of a Bill in Germany does not necessarily make the voting process more complex and time-consuming, but it simply adds more weight to the influence of the *Bundesrat.*

5. The Passing of section 77 Legislation (Money Bills)

Money bills are bills that allocate public money for a particular purpose or impose taxes, levies or duties.[333] They may not deal with any other matter except one incidental to the appropriation of money or the imposition of taxes, levies or duties.[334] Only the Minister of Finance may introduce money bills and they may only be introduced in the National Assembly.[335]

The passing of money Bills follows the same procedure as the passing of section 75 legislation and confirms the fragile position of the NCOP. On financial Bills, many of which can quite substantially affect the interests of the provinces, the NCOP can only exercise a rather weak suspensive veto, meaning that resistance by the NCOP to a money Bill can be overridden by a simple majority of the members of the National Assembly.

[330] BVerfGE 8, 274 (294).

[331] *Miebach*, Federalism in Germany, p. 19.

[332] BVerfGE 37, 363 (379).

[333] See section 77 FC; section 77 (1) (a) FC gives a definition of a money bill.

[334] Section 77 (1) FC.

[335] Section 73 (2) FC.

6. *The Passing of Constitutional Amendments (section 74 Bills)*

The Final Constitution distinguishes between at least five different kinds of constitutional amendments and prescribes different procedures for each amendment. Depending on the category, the Constitution requires different organs of state and legislatures to be involved in the amendment process and in some cases requires higher majorities to pass the amendment.

Common to all constitutional amendments is that there is no provision for an override in favour of the National Assembly. Where the NCOP participates in a constitutional amendment, it has a veto power over the adoption of an amendment. Voting on amendments in the NCOP is done by province even when the amendment does not concern provincial interests.[336] The RNA and the JRP refer disputes between the houses on constitutional amendments to the Mediation Committee. The amendment Bill lapses if mediation is unsuccessful.[337] Thus, if provinces are able to develop some real political autonomy from the national parties at the centre, they will have considerable protection through the NCOP against amendments affecting them negatively.

7. *Legal consequences of not observing the correct procedures*

The provisions in the Constitution prescribe how laws are made and changed. They form part of a framework that guarantees the participation of both houses in the exercise of the legislative authority vested in Parliament and also establish machinery for breaking deadlocks.[338] If the correct form and manner is not followed in passing a Bill, the Bill cannot become law.[339]

Problems arise where Parliament applies the incorrect procedure for adopting a law, operating under the misconception that the law is differently categorised. For example – applying section 76 procedure to a law which in fact falls outside the area of provincial competence. In such a case does the law become invalid because section 75 procedure should have been applied to adopt the law?

[336] This follows from the wording of section 74 which refers to a supporting vote of at least six provinces.

[337] See section 266 RNA and sections 177-180 JRP.

[338] See *Ex Parte: Executive Council of the Western Cape Legislature versus the President of the Republic of South Africa* 1995 (10) BCLR 1289 (CC), 1995 (4) SA 877 (CC) para 62.

[339] See *Chaskalson*, Constitutional Law 3-25 (f) (i) footnote 3.

a) The Constitutional Court's opinion

The Constitutional Court advanced an *obiter dictum* statement in the *Liquor Bill Judgment.* While discussing the possible legal consequences of adopting a bill through the more onerous section 76 procedure when it should have been done through the easier section 75 procedure, the Court remarked that it would be formalistic to consider a Bill invalid. If Parliament erred in good faith in assuming that the Bill was required to be dealt with under the section 76 procedure, then the only consequence of Parliament's error would be to give the NCOP more weight and in the event of an intercameral dispute to make the passage of the Bill through the National Assembly more difficult.[340]

However, the problem is not resolved that easily because voting procedures differ in the NCOP depending whether section 75 or section 76 is followed. In a situation where different political parties are in control of the National Assembly and the NCOP the question of which procedure is to be applied becomes crucial. Regarding section 75 legislation the delegates in the NCOP vote individually and therefore along party lines. Nonetheless, despite these fears it can never be assumed that the outcome would be the same, even if the same party controls both houses.[341]

b) Matthew Chaskalson's opinion

In contrast to the *obiter dictum* comments of the Constitutional Court in the *Liquor Bill Judgment,* some scholars are of the opinion that the section 76 procedure is not only more onerous but different in a number of respects. In fact section 75 and 76 are different to the extent that compliance with the one can never amount to compliance with the other. Thus, for Chaskalson, if a Bill is adopted in terms of a procedure that is inconsistent with the Constitution, it is constitutionally invalid.[342]

The correct tagging of the Bill is therefore very important. In turn, if the incorrect procedure is applied to it, the Bill may not in theory become law. However, for all practical purposes and intents, the Bill will become enforceable until it is invalidated by a court of law. In terms of section 172 (1) (a) a court must declare the entire Act invalid to the extent of its inconsistency with correct procedure.

340 See *Ex parte President of the Republic of South Africa in re: The constitutionality of the Liquor Bill* 2000 (1) BCLR 1 (CC) para 26.

341 The Constitutional Court, however, recognised that the question of which procedure is applied could in defined circumstances be determinative of whether the NCOP passes a Bill; see *Ex parte President of the Republic of South Africa in re: The constitutionality of the Liquor Bill* 2000 (1) BCLR 1 (CC) para 26.

342 *Chaskalson*, Constitutional Law 3-26 (f) (i).

8. Comparison with the German legislative process and conclusion

The German legislative process is in many respects similar to the South African legislative process. As noted, the majority of legislative proposals in Germany are Bills tabled by the Federal Government. The Federal Government must submit these Bills to the *Bundesrat* before transmitting them to the *Bundestag*. The *Bundesrat's* involvement after the adoption of the bill by the *Bundestag* serves to underline the federal structure of the Federal Republic and the important role played by the *Länder* in terms of the implementation of legislation and the consideration given to regional disparities. On the other hand, bills originating in the *Bundesrat* make their way to the *Bundestag* by way of the Federal Government. This accounts for the fact why legislation is generally the product of a broad consensus reached by the three institutions.[343]

This is also the case in South Africa. The relatively small number of convocations of the Mediation Committee illustrates the broad consensus that is usually reached when laws are being made. It further illustrates the functioning of co-operative government in the law-making process. Although, the legislative process in South Africa is relatively complex, it was not deliberately intended to be so. Its complexity is simply the result of having to involve so many different bodies in the passage of legislation, of ensuring that often difficult subject matter is examined several times over, and of making available a wide range of information to all those interested in a particular subject. The complexity of the process is ultimately a reflection of the demands of democracy and the rule of law in South Africa.

E. The involvement of the NCOP in conflicts of law

Despite issues pertaining to the legislative competence of the national and provincial legislatures as well as the manner and form in which legislation is passed, the issue of a conflict of law between national and provincial laws can play an important role.

I. The issue of a conflict of law

A Conflict of law occurs where there is inconsistency between laws passed by legislatures in different spheres of government. As mentioned both the national and the provincial legislatures may legislate in the areas of concurrent powers listed in Schedule 4 of the Constitution thereby increasing the likelihood of a conflict. A conflict may also occur when Parliament intervenes in the Schedule 5 areas by making use of section 44 (2). Finally, a conflict may arise between national and provincial law.

[343] *Kommers*, The Constitutional Jurisprudence of the Federal Republic of Germany, 1997 p. 117.

II. General principles for the resolution of conflict

In certain instances it may be difficult to determine if there is a conflict between the laws of two spheres of government. In such a case a court should follow an interpretation of legislation that avoids conflict.[344] In adopting a narrow construction of the statute, the court avoids conflict with another law compared to a broader construction which would raise a conflict.[345] The constitutional provisions relating to a conflict of laws only apply when it is not possible to resolve the conflict through interpretation. The Constitutional Court has developed a test to determine whether there is inconsistency between the national constitution and a provincial constitution. The Court stated that provisions are conflicting when they either cannot stand at the same time, or cannot stand together, or cannot both be obeyed simultaneously. On the other hand, provisions are not inconsistent when it is possible to comply with both without infringing one or the other.[346]

III. The role of the NCOP

In the case of a conflict of law the Constitution foresees an important role for the NCOP. The courts are generally reluctant to become involved in conflicts of law which is consistent with the principle of co-operative government which envisages that these conflicts be resolved at a political level.

The NCOP has to ensure that national and provincial legislative efforts are co-ordinated and the potential of conflicts minimised. The Constitution stipulates that when confronted with disputes between national and provincial laws, a court must consider the views of the NCOP in resolving whether a section 146 (2) (c) override is engaged.[347] The Constitutional Court has supported the provisions of section 146 (4) and indicated that even without the provision it might have read it into the text of the Constitution in any event.[348] The pre-

344 See section 150 FC.

345 See *Ex parte Speaker of the KwaZulu-Natal Provincial Legislature: In re KwaZulu-Natal Amakhosi and Iziphakanysiwa Amendment Bill of 1995; in re Payment of Salaries and Allowances and Other Privileges to the Ingonyama Amendment Bill of 1995* 1996 (4) SA 653 (CC), 1996 (7) BCLR (CC) para 36.

346 *Ex Parte Speaker of the KwaZulu-Natal Legislature: In re Certification of the Constitution of KwaZulu-Natal* 1996 (4) SA 1098 (CC), 1996 (11) BCLR 1419 (CC) para 24.

347 See section 146 (4) FC.

348 See *Chaskalson*, Constitutional Law, 5-8 (b).

sumption can therefore be extended to other categories of override beyond section 146 (2) (c).[349]

Consequently, section 146 (4) strengthens and enhances the idea of co-operative government in that it enjoins the courts to interpret potentially conflicting laws co-operatively and consistently. In turn, in cases where the NCOP is opposed to the national override legislation, the court should be cautious to find in favour of an override.[350] After all, the NCOP's assent affirms that the majority of the provinces agree with the national law.

F. Final Conclusion

An analysis of the role of the NCOP within the framework of co-operative government as expanded in the Constitution reveals that the Council allows the provinces considerable influence on national legislation, especially in areas of concurrent jurisdiction. Yet, despite these powers, the NCOP has been reluctant to maximise the full potential. This occurrence is largely a result of the enormous influence that the ANC national government exerts upon the provinces. Consequently, it is difficult to predict how effectively the NCOP will assert its role as a representative of provincial interests in the future. South Africa's current political climate is uncertain to produce a definitive conclusion. In addition, the NCOP is still a young institution and needs to find its position within the institutional structure of the South African Constitution.

It can be expected, however that its impact on the development on national legislation will increase. Yet is its role going to be as significant as that of the *Bundesrat* in the German constitutional structure? The *Bundesrat* is at the heart of the German federal system. By giving the *Länder* governments a direct voice in the Federal Legislature the Basic Law ensures a central role for the *Länder* in German law-making despite the wide scope of *Bund* legislation.

To date, the NCOP has been less effective as a forum in which provincial interests as opposed to national interests are reflected. As indicated, this is mainly caused by political factors, at the forefront of which is the political configuration of the NCOP. However, the Constitution sets up sufficient structures to ensure that the NCOP enhances the ideals of co-operative government. The fact that a provincial delegation to the NCOP has a single vote

[349] See *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC), 1997 (1) BCLR (CC) para 155.

[350] *Chaskalson,* Constitutional Law, 5-9 (b).

on provincial matters implies that there is room for negotiations aimed at reflection of the provincial interest in contrast to the interest of a political party.

For example, the veto power of the NCOP in matters that affect the provinces could enhance the NCOP's role. This mechanism will promote co-operative government in the national sphere of government to the extent that it would force the National Assembly to negotiate on agreements with the NCOP even on matters where it is disinclined to do so. To conclude, although the NCOP is still in its infancy, it provides a mechanism by which the national government is called to fulfil the constitutional mandate of participatory and co-operative government by giving the provinces a voice in the shaping and enactment of legislation affecting them.

sions vest all the natural resources of the country in the State. The implication of this is that the State has the sole right to receive oil revenue (rents, taxes, and royalties). Prior to 1978, the land tenure system of the southern part of Nigeria (as distinct from the system in the northern part) was based on various systems of customary laws; essentially, families and communities mostly owned land. The result was that while oil is vested in the State, the land from which it was exploited was vested in various families/communities. As a result of this, oil multinational companies, which had obtained appropriate mining license were obliged to approach the owners of the lands involved, in order to gain access into the land. In this way, the customary landowners participated somehow in the exploitation of oil resource as they are usually paid compensation (annual rent) for granting access. Additionally, they received compensation for any damage occasioned to the land as a result of the activities of the oil companies, and this included damage to any crops or other property and also to the land itself.
However, in 1978 a Military Government promulgated a real property law, called the Land Use Act (the law was made, and is still part of the Nigerian constitution). This law (extending the existing position in the northern part of the country) vests 'all land' in the country in the State, thereby divesting the customary owners of their original title. In consequence of this, oil companies no longer approach the families/communities for a right of access to land (which they now get through the State). Moreover, the LUA has been interpreted to deny the families/communities the right to compensation (as indicated above), notwithstanding the amount of damage, which the activities of the oil MNLs cause to them. This article analyses the relevant provisions of the LUA and concludes that its overall impact on the Niger Delta people borders on gross injustice.

The role of the National Council of Provinces within the framework of co-operative government in South Africa
A legal analysis with special regard to the role of the *Bundesrat* in Germany

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Chapter 3 of the 1996 South African Final Constitution deals with the principle of co-operative government. Section 40 (1) of the South African Constitution (FC) states governments at the national, provincial and local spheres of government are distinctive, interdependent and interrelated. The principle of co-operative government enjoins the different spheres, be they national, provincial or local, to co-operate with each other as well as across spheres. In addition to co-operation, the relationship among the spheres is characterised by consultation, co-ordination and mutual support.
On a national level, the role of the National Council of Provinces (NCOP), like second

chambers of parliament in other constitutional systems, is to review national legislation with a view to bringing to bear upon it regional interests and concerns. This is achieved by 'participating in the national legislative process and by providing a national forum for public consideration of issues affecting the provinces'.

As a constitutional body, the NCOP has no direct precedent in the world though it is closely modelled on the *Bundesrat,* that is the German 'Federal Council of provinces'. This article provides an outline of the multi-level system in South Africa. It examines some of the provisions relating to federal governance articulated in the 1996 Constitution and compares them with similar features found in the German Constitution. The main focus is on the role of the NCOP within the framework of co-operative government. The article evaluates the composition and voting procedures of the NCOP, its special functions and its role in the legislative process. It attempts to ascertain whether the NCOP fulfils its functions in a manner consistent with the principle of co-operative government provided in Chapter 3 of the constitution and question whether a change in the provisions relating the NCOP would enhance the principle of co-operative government.

As a basis for comparison, attention will be paid to the model provided for in German federalism and the *Bundesrat*. The German federal experience is valuable not only because of its uniqueness, but also because of the immense influence that it had on the drafting of the South African Constitution. The article further explores why the drafters of the South African Constitution relied so heavily on the German federal experience and illuminates the reasons for the NCOP's deviation from the model provided for by the *Bundesrat*.