THE IMPACT OF POLITICAL STEERING ON THE LEGISLATIVE PROCESS

A Research Dissertation

by

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DECLARATION OF ORIGINALITY

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SUMMARY

Section 43 of the Constitution of the Republic of South Africa, 1996 allocates the national legislative authority to Parliament. The Constitutional Court acknowledged in the Certification of the Constitution of the RSA, 1996 judgment that the South African application of the doctrine will be unique, because there is “no universal model of the separation of powers”.

Each branch of government has a different role to play during the legislative process. Political steering can be defined as “the intentional intervention of political actors in legal subsystems including the legislative system”. Executive political steering can be a useful tool for cooperation, but when taken too far, could infringe on the doctrine of the separation of power.

From the case studies, it was evident that executive political steering can be a two-edged sword. On face value, it may seem as if the executive is intervening, albeit by using the departmental experts and specialists, to ensure that their vision for legislation remains largely intact. When Bills are accepted “as is” from the Executive, and without substantially interrogating each proposal, the Portfolio Committees and Parliament are not exercising their authority to the fullest extent.

However, it is accepted that there is an acute shortage of legislative drafters, and that national departments employ content specialists. Parliamentarians cannot be specialists in all the fields that they have to legislate on, and it is not cost-effective to replicate the national department’s structures in Parliament to provide such expertise to the members.
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1.1 INTRODUCTION AND BACKGROUND

On 24 May 2013, the Mail and Guardian reported the following under the heading of “Parliament not given say on e-tolls”:

“ANC MPs made a dramatic about-turn this week, caving into pressure from members of the executive and withdrawing a bold proposal to give Parliament more say in the determination of road toll fees.

The ANC rescinded its own proposed amendment to the Transport Laws and Related Matters Amendment Bill (e-tolls Bill) on Tuesday, which, if adopted,

1 Makinana (2013) Online
would have obliged Transport Minister Ben Martins to seek parliamentary approval in setting toll prices. Currently, the Minister has sole authority to do so.

ANC sources who did not want to be named said that Martins was unhappy about the proposed amendment and in meetings held with ANC members who sit in the National Council of Provinces (NCOP) committee, as well as through the transport department's legal advisors, he demanded that it be withdrawn.

The Minister’s spokesperson, Tiyani Rikhotso, denied that the department’s legal advisors had met ANC members of the committee.

Rikhotso said that Martins, as an ANC MP, sat in meetings of the caucus and ANC study group every week…”

The situation described above, was not unique. Similarly, in November 2012, the Mail and Guardian reported the following under the heading of “Secrecy Bill: ANC agrees to Cwele's changes”2:

“Cwele notably appeared to have persuaded the ruling party to re-introduce a maximum five-year prison sentence for the disclosure of classified information, and to re-introduce a clause that would have the new law trump any other legislation dealing with such information.

Without explicitly naming the Promotion of Access to Information Act, the new official secrets Act would therefore trump it – as Cwele has asked for, and as commentators have cautioned could render the Bill unconstitutional.

ANC MP Sam Mozisiwe also indicated that the party would water down the protection afforded to whistle-blowers and the media in section 43, more or less along the lines proposed by the minister a fortnight ago.

2 Ferreira (2012) Online
The minister has been widely criticised for putting his views to the department last month, with opposition parties saying he was flouting the separation of powers.

The minister and the party have defended it as a salutatory exchange of views.

‘We have agreed to some of their proposals, which is quite a number of them, and we have also disagreed with some of their proposals,’ said the ANC's Teboho Chaane, the acting chairman of the ad hoc committee finalising the bill in the National Council of Provinces (NCOP)...

These articles raise questions about the part that Ministers (as the Executive) play in the deliberation on and promulgation of legislation by the Legislature. Are these interactions between the Executive and the Legislature an infringement on the separation of powers, or is it part of a robust legislative drafting process?

1.2 RESEARCH PROCESS, RESEARCH PROBLEM, RESEARCH QUESTIONS, AND INVESTIGATIVE QUESTIONS

1.2.1 RESEARCH PROCESS

Remenyi\(^3\) explains the research process as consisting of eight specific phases, namely:

- Reviewing the literature;
- Formalizing the research question;
- Establishing the methodology;
- Collecting evidence;
- Analyzing the evidence;
- Developing conclusions;
- Understanding the limitations of the research; and
- Producing guidelines or recommendations.

\(^3\) Remenyi (2002) 64
In this dissertation the following research process will be followed:

- Determine the “field of study” for the proposed research;
- Identify a specific complex problem within a researchable application area;
- Conduct a holistic survey of the functional area in which the complex problem exists, to determine the impact of the problem on the specific area of application and the value the proposed research may bring;
- Conduct an abbreviated literature review on the subject matter being investigated. The purpose being to not only provide insight into the complexity of the problem, but also to provide insight into the literature pertaining to the field of study of the proposed research;
- Describe and formulate the research problem;
- Describe and formulate the research question and associated investigative questions;
- Select an appropriate research design and methodology, which includes the data collection design and methodology;
- Determine the key research objectives for the proposed research;
- Document the research process, which will be followed for the proposed research and formulate an associated work plan;
- Identify the limitations, which may impact on the proposed research;
- Conduct an in-depth literature review on the subject being researched;
- Collect, analyse and interpret the research data;
- Write up the dissertation; and
- Proofread the dissertation and submit for formal vetting.

1.2.2 RESEARCH PROBLEM

Government authority consists of a legislative, executive and judicial authority.  
Legislative authority is defined as “the power to make, amend and repeal rules of law”; executive authority is “the power to execute and enforce rules of law”; and

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4 Rautenbach and Malherbe (2009) 84-85  
5 Rautenbach and Malherbe (2009) 85  
6 Rautenbach and Malherbe (2009) 85
judicial authority is “the power, in disputes, to determine what the law is and how it should be applied in the dispute”.7

The Constitution of the Republic of South Africa, 1993 (hereafter referred to as “the Interim Constitution”) was adopted to facilitate the political transition in South Africa from a system where the Parliament is supreme, to a system where the Constitution is supreme. The Interim Constitution paved the way for the adoption of the current Constitution, based on the “constitutional principles”8 contained in it. These constitutional principles formed the criteria that the Constitutional Court had to base the certification of the final Constitution on.9

Constitutional Principle VI of the Interim Constitution stated the following:
“There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness”.

This principle was recognised in the Constitution of the Republic of South Africa, 1996 (hereafter referred to as “the Constitution”):
➢ The national legislative authority is vested in Parliament10;
➢ The national executive authority is vested in the President11; and
➢ The judicial authority is vested in the courts12.

Together, these authorities make up the different, but interdependent, branches of government13. Each of these branches has a different constitutional role to play in the development and implementation of policy and legislation.

7 Rautenbach and Malherbe (2009) 85
8 Schedule 4 of the Interim Constitution
9 Section 74 of the Interim Constitution
10 Section 43(a) of the Constitution
11 Section 85(1) of the Constitution
12 Section 165(1) of the Constitution
13 Parliament (S.a a) Online
The Constitutional Court has since 1993 been faced with questions related to the boundaries of the separation of powers\textsuperscript{14}, and defined the principles of the South African model of the doctrine as follows:

“The principle of separation of powers, on the one hand, recognises the functional independence of branches of government. On the other hand, the principle of checks and balances focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another. In this sense it anticipates the necessary or unavoidable intrusion of one branch on the terrain of another.”\textsuperscript{15}

The Court indicated that the overlap between the executive and the legislative, where the members of Cabinet are also members of the legislature, strengthens the accountability of the executive to the legislative authority\textsuperscript{16}. In practice, the overlap has not always occurred in the areas of accountability and oversight, but sometimes during the drafting of legislation when “ANC MPs made a dramatic about-turn this week, caving into pressure from members of the executive and withdrawing a bold proposal to give Parliament more say in the determination of road toll fees\textsuperscript{17}.

Executive political steering may cause the executive branch to infringe on the powers and functions of the legislative branch of government. When Bills are accepted “as is” from the Executive, and without substantially interrogating each

\textsuperscript{14}E.g De Lange v Smuts NO and Others 1998 (7) BCLR 779 (CC); President of the Republic of South Africa and Others v South African Rugby Football Union and Others 1999 (10) BCLR 1059 (CC); South African Association of Personal Injury Lawyers v Heath and Others 2001 (1) BCLR 77 (CC); President of the Republic of South Africa and Others v United Democratic Movement 2002 (11) BCLR 1164 (CC); Doctors for Life International v Speaker of the National Assembly and Others 2006 (12) BCLR 1399 (CC); Glenister v President of the Republic of South Africa and Others 2009 (2) BCLR 136 (CC); International Trade Administration Commission v SCAW South Africa (Pty) Ltd 2010 (5) BCLR 457 (CC). The most recent judgment dealing with the separation of powers doctrine is National Society for the Prevention of Cruelty to Animals v Minister of Agriculture, Forestry and Fisheries and Others 2013 (10) BCLR 1159 (CC).

\textsuperscript{15}In re: Certification of the Constitution of the RSA, 1996 1996 (10) BCLR 1253 (CC) par 109

\textsuperscript{16}In re: Certification of the Constitution of the RSA, 1996 1996 (10) BCLR 1253 (CC) par 111

\textsuperscript{17}Makinana (2013) Online
proposal, the Portfolio Committees and Parliament are not exercising their authority to the fullest extent. However, it is accepted that there is an acute shortage of legislative drafters, and that national departments employ content specialists\(^{18}\). Parliamentarians cannot be specialists in all the fields that they have to legislate on, and it is not cost-effective to replicate the national department’s structures in Parliament to provide such expertise to the members.

The active involvement of the executive (and its representatives) in the legislative process can be examined in the context of “political steering”. The aim of political steering is to manage transformation and reform processes within policy and legislative development and implementation\(^{19}\). Lalla and others\(^{20}\) argue that only through the active political steering that is proposed in the Infrastructure Development Bill\(^{21}\) can the objectives of a developmental country be achieved with regard to infrastructure development.

But whose hands are on the steering wheel of the ship called “South Africa”? Is it the Legislature, or the Executive? How do the Judiciary, Legislature and Executive interact to determine the course of policy and legislation? In South Africa the following assumptions are made regarding the separation of powers:

- The Constitution allocates executive, legislative and judicial authority to different branches of government;
- The doctrine of the separation of power is not absolute in the South African system;
- There are overlaps between the mandates of the different branches of government; and
- It is within the overlaps in the doctrine that political steering is practised.

\(^{18}\) SabinetLaw (2012) c Online

\(^{19}\) Frenken, Jacob, Muller & Stockmayer (2010) 15

\(^{20}\) Lalla and Others (2013) Online

\(^{21}\) Draft Infrastructure Development Bill, 2013
In South Africa, studies have been done on how the law can be used by the government to steer, or influence a society\textsuperscript{22}. In this study, the focus will be on how society’s elected representatives steer the legislative process to achieve certain outcomes within society, and how that steering impacts on the doctrine of the separation of power.

The Constitutional Court has stated that the doctrine of separation is not absolute and that overlaps are to be expected between the different authorities, and that these overlaps can be managed by the built-in checks and balances of the Constitution\textsuperscript{23}. But, where are the boundaries between the different opinions and mandates that each of the authorities have, and how does it impact on the policy and legislative process?

The interdependency and interrelatedness of the responsibility for development, implementation and oversight over government policies make it difficult to draw these boundaries perfectly.

Against the background of the research problem elaborated upon above, the research problem statement for this dissertation reads as follows: \textit{The impact of political steering on the South African legislative process.}

1.2.3 RESEARCH QUESTION

The Constitution lays down the parameters within which legislation must be developed, adopted and implemented. This research will focus on the role-players, policy and legislative processes and the interaction between the different branches of government during these processes. The focus will also not only be on the

\textsuperscript{22} Kok (2010) cited research by Griffiths into anti-discrimination law, the Human Science Research Council’s studies into South African Attitudes in 2003, and Joubert’s research into the interaction between law and people’s daily decisions.

\textsuperscript{23} \textit{In re: Certification of the Constitution of the RSA, 1996} 1996 (10) BCLR 1253 (CC) par 109
interaction between the legislative and the executive during legislative process, but also on the interaction during the policy-making process\textsuperscript{24}.

The two case studies (\textit{Transport Laws and Related Matters Amendment Bill} and the \textit{South African Languages Bill}) were chosen for this research on the basis that they received extensive media coverage, the processes were well documented, and are recent examples of the policy and legislative process that has been followed in South Africa\textsuperscript{25}.

The Constitutional Court has stated that the doctrine of separation is not absolute and that overlaps are to be expected between the different authorities, and that these overlaps can be managed by the built-in checks and balances of the Constitution\textsuperscript{26}. But, where are the boundaries between the different opinions and mandates that each of the authorities have, and how does it impact on the policy and legislative process?

The interdependency and interrelatedness of the responsibility for development, implementation and oversight over government policies make it difficult to draw these boundaries perfectly.

Against the background to the research question elaborated upon above, the research question to be researched in this dissertation reads as follows: \textit{What is the impact of political steering on the South African legislative process?}

\textsuperscript{24} As stated by Cosatu in Parliament (S.a b) Online: “It is self-evident that the earlier an intervention is made in the policy chain, the greater the scope for influence tends to be. By the time a Bill is tabled at parliament there is in general limited opportunity to fundamentally reshape its content. Being able to input into earlier stages of the process should increase the chance to influence the overall direction taken. This approach requires both written submissions, as well as bilaterals with the Ministry or Department.”

\textsuperscript{25} Chapter 5 of the dissertation

\textsuperscript{26} In re: Certification of the Constitution of the RSA, 1996 1996 (10) BCLR 1253 (CC) par 109
1.2.4 INVESTIGATIVE QUESTIONS

The Constitutional Court has stated that the doctrine of separation is not absolute and that overlaps are to be expected between the different authorities, and that these overlaps can be managed by the built-in checks and balances of the Constitution\textsuperscript{27}. But, where are the boundaries between the different opinions and mandates that each of the authorities have, and how does it impact on the policy and legislative process?

The interdependency and interrelatedness of the responsibility for development, implementation and oversight over government policies make it difficult to draw these boundaries perfectly. The dissertation will attempt to provide a process map of the development and implementation of policy and legislation, and indicate the inter-connections between the actions of the executive, legislative and judicial authorities\textsuperscript{28}.

To assist with the process map, the following investigative questions will be researched in support of the research question:

- What is the legislative process?
- What are the roles and responsibilities of the executive vis-à-vis the legislative authorities in the legislative process and the impact of the separation of powers doctrine on the process?
- What is “political steering” and how does it impact on the legislative process?
- What are the implications of political steering for the separation of powers doctrine?

\textsuperscript{27} In re: Certification of the Constitution of the RSA, 1996 1996 (10) BCLR 1253 (CC) par 109

\textsuperscript{28} Chapter 6 of the dissertation
1.3 THE RESEARCH DESIGN AND METHODOLOGY

The research to be conducted in this dissertation will be descriptive socio-legal case study research.

Some of the more salient aspects of case study research described by Yin\(^\text{29}\) are listed below for ease of reference:

- A case study is an empirical enquiry that investigates a contemporary phenomenon within a real-life context;
- Case study research aims not only to explore certain phenomena, but also to understand them in a particular context;
- “How” and “Why” questions are used in case study research;
- The case study as a research strategy comprises an all-encompassing method, thus a comprehensive research strategy;
- Case study research uses multiple methods for collecting data or evidence, which may be both qualitative and quantitative in nature;
- A case study is typically used when contextual conditions are the subject of research.

Case studies are often described as exploratory research used in areas where there are few theories or a deficient body of knowledge. Descriptive case studies are used where the objective is restricted to describing the current practice\(^\text{30}\).

“Law” is the rules by which the government strives to regulate the relationships in a country between the state and institutions, and between the state and citizens\(^\text{31}\). Legislation provides the necessary environment (legal, institutional and social) for government policies to be implemented\(^\text{32}\).

\(^{29}\) As quoted by Watkins (2006)  
\(^{30}\) Hussey & Hussey (1997) 66  
\(^{31}\) Chapter 2 of the dissertation  
\(^{32}\) ETU (2011) Online
Socio-legal studies focus on the interaction between law and society. Cotterrell\textsuperscript{33} states that socio-legal research explores \textit{inter alia} the power of law and “...\textit{how it is structured and organized, its consequences and sources, and the way people and organizations seek to harness it, have differential access to it or find themselves differentially affected by it}”.

Legislative processes are adaptive, complex systems\textsuperscript{34}, and to analyse these systems, and provide the answer to “\textit{how}” and “\textit{why}”, a model called “Cynefin”\textsuperscript{35} will be used. The basis of the framework is the following\textsuperscript{36}:

“The Cynefin framework helps leaders determine the prevailing operative context so that they can make appropriate choices. Each domain requires different actions.

- \textbf{Simple} and \textbf{complicated} contexts assume an ordered universe, where cause-and-effect relationships are perceptible, and right answers can be determined based on the facts.

- \textbf{Complex} and \textbf{chaotic} contexts are unordered—there is no immediately apparent relationship between cause and effect, and the way forward is determined based on emerging patterns.

\textbf{The ordered} world is the world of fact-based management; the \textbf{unordered} world represents pattern based management.

The very nature of the fifth context – \textit{disorder} - makes it particularly difficult to recognize when one is in it. Here, multiple perspectives jostle for prominence, factional leaders argue with one another, and cacophony rules. The way out of this realm is to break down the situation into constituent parts and assign each to

\textsuperscript{33} Cotterrell (2002) 632 at 643
\textsuperscript{34} Cloete (2009) 307
\textsuperscript{35} The Cynefin model is described in more detail in Chapter 5
\textsuperscript{36} Snowden & Boone (2007) 72
one of the other four realms. Leaders can then make decisions and intervene in contextually appropriate ways.”

To be able to analyse complex, adaptive systems, the researcher must identify the emerging trends, and use the trends as a basis of understanding the dynamics of the interaction between the role-players, environment and systems.

In this dissertation, two case studies will be utilized to indicate the interaction between the power of policy and legislation, and how the different branches of government want to harness and interact with it. The process will be described and different role-players identified within the legislative process.

1.4 RESEARCH ASSUMPTIONS

Leedy & Ormrod\textsuperscript{37} provide the following explanation of assumptions:

“Assumptions are what the researcher takes for granted. But taking things for granted may cause much misunderstanding. What we may tacitly assume, others may have never considered. If we act on our assumptions, and if in the final result, such actions make a big difference in the outcome, we may face a situation we are totally unprepared to accept. In research we try to leave nothing to chance in the hope of preventing any misunderstanding. All assumptions that have a material bearing on the problem should be openly and unreservedly set forth. If others know the assumptions a researcher makes, they are better prepared to evaluate the conclusions that result from such assumptions. To discover your own assumptions, ask yourself, what am I taking for granted with respect to the problem? The answer will bring your assumptions into clear view”.

\textsuperscript{37} Leedy & Ormrod (2001) 62
Following the advise given by Leedy & Ormrod in the quotation above, and given the problem statement and research questions defined above, the assumptions underlying this dissertation are as follows:

- The Constitution allocates executive, legislative and judicial authority to different branches of government;
- The doctrine of the separation of power is not absolute in the South African system;
- There are overlaps between the mandates of the different branches of government; and
- It is within the overlaps in the doctrine that political steering is practised.

1.5 RESEARCH CONSTRAINTS

According to Hussey and Hussey\(^{38}\), ‘limitations’ identify weaknesses in the research, while ‘de-limitations’ explain how the scope of the study was focused on only one particular area or entity, as opposed to say a wider or holistic approach.

The research constraints pertaining to this dissertation are as follows:

1.5.1 LIMITATION

In South Africa, studies have been done on how the law can be used by the government to steer, or influence a society\(^{39}\). In this study, the focus will be on how society’s elected representatives steer the legislative process to achieve certain outcomes within society, and how that steering impacts on the doctrine of the separation of power.

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\(^{38}\) Hussey and Hussey (1997) 129

\(^{39}\) Kok (2010) cited research by Griffiths into anti-discrimination law, the Human Science Research Council’s studies into South African Attitudes in 2003, and Joubert’s research into the interaction between law and people’s daily decisions.
1.5.2 DE-LIMITATION

The scope of the study is focused on the South African national legislative process.

1.6. CHAPTER AND CONTENT ANALYSIS

In Chapter 2, the dissertation will examine the concepts and theories of policy development. This Chapter will investigate who is responsible for the development of policy and legislation in South Africa, and how these policies are developed and adopted. The Chapter will also investigate the linkages between policy and legislation.

Chapter 3 will focus on the South African legislative process as prescribed by the South African Constitution. The Chapter will look at the roles of the executive, the legislators and the judiciary during the process, and identify areas of tension between the role-players.

The doctrine of the separation of powers will be the main theme in Chapter 4. The Chapter will investigate how the doctrine is developed and applied in the South African context, with specific reference to the development of policy and legislation.

Chapter 5 will examine the concept of “political steering” with regard to the legislative process, and how it manifests in South Africa. The influence of political steering will be measured during the analysis of two case studies.

In Chapter 6 the effect of the influence of political steering on the legislative process will be evaluated, and the implications for the separation of powers in South Africa will be considered.
The research will be concluded in Chapter 7 when final analyses are drawn and recommendations are made regarding the influence of political steering in the legislative process.

1.7. SIGNIFICANCE OF THE PROPOSED RESEARCH

This research will contribute to the development of the separation of powers doctrine within the national sphere of government. The knowledge gained in applying the recommendations of this research can serve as a basis for practical application in terms of the policy development and management of the legislative process.
CHAPTER 2: THE POLICY-MAKING PROCESS

THE POLICY-MAKING PROCESS

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“By definition, a government has no conscience. Sometimes it has a policy, but nothing more.” (Albert Camus - French Novelist, Essayist and Playwright, 1957 Nobel Prize for Literature, 1913-1960)  

2.1 INTRODUCTION

Public policy is an elusive concept that preoccupies government and government institutions. Government is forever “writing policies” and “implementing policies” and “reviewing policies”, but where do policies originate, and how are they developed, and who develops them? These are some of the questions that will be investigated hereafter.

2.2 DEFINING “PUBLIC POLICY”

Many individuals, even those in government, use the word “policy” and do not grasp the full meaning and context thereof.

The Collins Dictionary \(^{41}\) defines policy as “a plan of action adopted by a person, group, or government”.

Policy can be defined as “a plan of action to achieve a preferred outcome within the overall purposes of government ... (and) provides parameters within which government action can take place” \(^{42}\). Jenkins defines policy as “a set of interrelated decisions taken by a political actor or group of actors with regard to the selection of objectives and the means of achieving them within a specified situation where these decisions should, in principle, be within the power of the actors to achieve” \(^{43}\).

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\(^{40}\) Thinkexist (S.a a) Online  
\(^{41}\) Collins English Dictionary (2009) 610  
\(^{42}\) Venter & Landsberg (2006) 90  
\(^{43}\) Venter & Landsberg (2006) 165
A policy becomes a “public policy” when it “to some degree has been generated or at least processed within the framework of governmental procedures, influences and organisations”.\textsuperscript{44}

Booysen\textsuperscript{45} characterizes public policy as “complex, multifaceted and continuously changing in terms of both participatory influences and substance ... (and) ... closely related to, and intertwined with, political decision-making”.

Cloete and De Coning define public policy as “(a) public sector statement of intent, including sometimes a more detailed program of action, to give effect to selected normative and empirical goals in order to improve or resolve perceived problems and needs in society in a specific way, thereby achieving desired changes in that society”.\textsuperscript{46}

Hill\textsuperscript{47} provides the following clarification on what policy is, and what it is not:

- Policy is normally not a single decision, but rather a string of decisions;
- Policies change because the environment changes;
- Almost all of the time, policy changes are done to existing policies. Hardly any policies are brand new policies, and are therefore focused on amending or removing existing policies;
- The study of policies is also focusing on “non-decisions” or the decision not to act or react;
- A set of actions taken over time, also constitutes a policy, even if these actions are not backed by a formal decision; and
- Policy is normally about what is done, rather than what is said.

Public policy is therefore a formal government statement of intent within the parameters of government actions to improve the quality of society.\textsuperscript{48} In South African jurisprudence the term “public policy” is mostly used in the context of the

\textsuperscript{44} Cloete & De Coning (2011) quoting Hogwood & Gunn 6
\textsuperscript{45} Venter & Landsberg (2006) 163
\textsuperscript{46} Cloete & De Coning (2011) 7
\textsuperscript{47} Venter & Landsberg (2006) 166
\textsuperscript{48} Claassen (1997) 140
legality of contracts where the “concept is now derived from the constitutional principles of human dignity, achievement of equality, advancement of human rights and freedoms, and non-racialism and non-sexism”\textsuperscript{49}. Public policy forms a basis from which a court of law may invalidate the terms of a contract, even though the parties have agreed to it freely and voluntarily\textsuperscript{50}.

2.3 ROLE-PLAYERS IN POLICY-MAKING

The primary function of the government is to “create conditions under which the citizens can live in peace in an orderly way, and can, as far as possible, satisfy their personal needs and expectations for themselves”\textsuperscript{51}. However, public policy is made by a legislative or executive authority with the inputs of members of the society\textsuperscript{52}.

Thornhill\textsuperscript{53} identified the following role-players in public policy-making:

- **Civil Society**: The Constitution demands that the Bill of Rights must be complied with by the legislative and executive authorities\textsuperscript{54}, e.g. access to housing.

- **Individuals**: The most important area of influence for an individual is the right to vote in a general election for a party\textsuperscript{55}. The winning party’s election manifesto becomes the agenda for the new government for the next five years e.g. the African National Congress’s Election Manifesto 2009\textsuperscript{56}.

- **Interest groups**: Due to the insignificance of an individual to influence the formal policy-making process, interest groups, such as trade unions or

\textsuperscript{49} Claassen (1997) 140
\textsuperscript{50} Kruger (2011) 712 citing Eastwood v Shepstone 1902 TS 302, Robinson v Randfontein Estates GM Co Ltd 1925 AD 173, Magna Alloys and Research (SA) (Pty) Ltd v Ellis 1984 (4) SA 874 (A), Sasfin (Pty) Ltd v Beukes 1989 (1) SA 1 (A), Barkhuizen v Napier 2007 (5) SA 323 (CC))
\textsuperscript{51} Thornhill (2012) 39
\textsuperscript{52} Thornhill (2012) 145
\textsuperscript{53} (2012) 145-156
\textsuperscript{54} Chapter 2 of the Constitution
\textsuperscript{55} Section 19 of the Constitution
\textsuperscript{56} ANC (S.a b) Online
professional bodies\textsuperscript{57}, have become the most influential group in non-election times.

- **Legislative institutions**: Parliament has a constitutional obligation to legitimise policies\textsuperscript{58}.
- **Executive institutions**: The administrative component of government is responsible for the research and initial formulation of policies, and is responsible for the implementation of the policies after approval\textsuperscript{59}.
- **Political office-bearers**: The President and Cabinet are the final approvers of any legislative or budget proposals that are submitted to Parliament, and are responsible to translate the election manifesto into programmes for government\textsuperscript{60}.
- **National directive, research and coordinating institutions**: The South African Law Commission\textsuperscript{61} is tasked to investigate areas of the law that require innovation, or amendment. The National Economic, Development and Labour Council (NEDLAC)\textsuperscript{62} assists government and business to discuss policy amendments in business-related fields.
- **Commissions of Enquiry**: The President can formally appoint a commission to investigate an issue, and these commissions publish formal recommendations for policy amendments\textsuperscript{63}.
- **Departmental and interdepartmental committees**: The committees are appointed to deal with cross-cutting issues that require interdepartmental cooperation and inputs\textsuperscript{64}. However, the resolutions of these committees are not open for public scrutiny.
- **International institutions**: International institutions, such as the International Labour Organisation\textsuperscript{65}, prescribe standards with which member states must comply.

\textsuperscript{57} Baldwin (2009) 3-7
\textsuperscript{58} Parliament (S.a c) Online
\textsuperscript{59} Rautenbach & Malherbe (2009) 189; Venter & Landsberg (2006) 183
\textsuperscript{60} South African Government Information (S.a) Online
\textsuperscript{61} South African Law Reform Commission (S.a) Online
\textsuperscript{62} National Economic, Development and Labour Council (S.a) Online
\textsuperscript{63} Department of Justice and Constitutional Development (S.a) Online
\textsuperscript{64} Department of Trade and Industry (S.a) Online
\textsuperscript{65} International Labour Organisation (S.a) Online
Newspapers and media: The media informs the public of policy decisions, and then reports on the response from citizens. If the outcry is considerable, the government would consider postponing the implementation of the policy, or discuss policy alternatives (e.g. the initial opposition to e-tolling led to a postponement of the implementation of the project\textsuperscript{66}).

Other states and international agreements: The government should consider the policy position of the United Nations\textsuperscript{67}, or the Africa Union\textsuperscript{68}, when amending policies.

In South Africa, the ANC is the dominant political party\textsuperscript{69}. The political strength of the ANC can be reflected by the wide gap that exists between the votes cast for the ANC as opposed to the votes cast for the party that came second (official opposition) since 1994:

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>AFRICAN NATIONAL CONGRESS</td>
<td>62.6%</td>
<td>66.4%</td>
<td>69.7%</td>
<td>65.9%</td>
</tr>
<tr>
<td>OFFICIAL OPPOSITION</td>
<td>20.4% (National Party)</td>
<td>9.6% (Democratic Alliance)</td>
<td>12.4% (Democratic Alliance)</td>
<td>16.7%</td>
</tr>
</tbody>
</table>

Table 2.1: South African Election Results (Adapted by author from IEC (Online))

The ANC’s dominance has the following consequences:

- The large election victories have reduced the oppositional parties to fringe players;
- The ANC controls the executive and legislative state institutions; and

\textsuperscript{66} CityPress (2013) Online
\textsuperscript{67} Statistics South Africa (S.a) Online
\textsuperscript{68} Presidency (2010) 16
\textsuperscript{69} Brooks (2004) 122
The ANC can determine the direction and content of government policies without challenges or alternatives proposed by opposition parties\textsuperscript{70}.

Booysen\textsuperscript{71} identified three clusters in the South African policy-making process. These clusters of policy actors are grouped based on the level of influence that they exert on the policy-making process. The clusters between 1994 and 2001 can be represented as follow:

![Clusters of Policymakers in South Africa](image)

Figure 2.1: Clusters of Policymakers in South Africa (Adapted by author from Booysen (2001))

The development of these clusters was a response to the contention of the two competing forces of policy-making in South Africa: the drive for consultation and democracy on the one hand, and on the other hand, the need to coordinate and implement policy with speed and urgency\textsuperscript{72}.

South Africa entered a phase of policy coordination and implementation in 2001 after the preceding phase of policy initiation and review. After 2001, the policy clusters have shifted, and can now be summarized as follows\textsuperscript{73}:

- **Primary Cluster**
  - Presidency;

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\textsuperscript{70} Matlosa & Karume, as quoted by Brooks (2004) 122  
\textsuperscript{71} Booysen (2001) 132-140  
\textsuperscript{72} Booysen (2001) 141  
\textsuperscript{73} Booysen (2006) 739-745
• President;
• Cabinet;
• Cabinet office / Secretariat;
• Special Advisors;
• PCAS (Policy Coordination and Advisory Services in Presidency);
• National Treasury;
• FOSAD;
• Luthuli House (Head Office of the ANC); and
• Presidential Working Groups.

➢ Secondary Cluster
• Alliance and Labour in general;
• Business and International Finance Organisations;
• Parliament;
• ANC Study Groups in Parliament;
• ANC Caucus;
• Constitutional Court; and
• Provinces and Local Government.

➢ Tertiary Cluster
• “Spontaneous” Civil Society;
• Opposition Political Parties; and
• Organised NGO Civil Society.

The consolidation of the policy influence in the primary cluster can be attributed to the optimisation of policy implementation and to assist with implementation challenges with capacity in all three spheres of government74.

2.4 MODELS OF POLICY-MAKING

From the abovementioned definitions of “public policy”, it remains the responsibility of government to create an environment which enables the citizens of a country to live in peace in an orderly way. Through public policy government

74 Booysen (2006) 745
defines the framework according to which society is organized, and within which citizens can, as far as possible, satisfy their personal needs and expectations for themselves.

In South Africa, all government actions and policy must comply with the prescripts of the Constitution as the supreme law. To this end the Preamble of the Constitution, read in conjunction with its founding principles and the Bill of Rights, clearly defines the intent against which all public policy will be measured:

“We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to-

- Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
- Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
- Improve the quality of life of all citizens and free the potential of each person; and
- Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.”

The question that now arises is how “the will of the people” as stated in the Preamble of the Constitution is transformed into a policy of government? Where do government policies, such as the Local Government Turn-Around Strategy and the National Development Plan, to name a few, originate? How can “the will of the people” reconcile with Thornhill’s statement that policy-makers want to satisfy their personal needs and expectations?
Public policy is like jelly, and there are no definitive theories on public policy-making, and the existing models are constantly evolving. These models are all attempts to understand the following dynamics of public policy:

- "Policy processes that normally exist and how they occur;"
- "How to improve policy processes and consequences and why;"
- "Whose interests are best catered for in a specific policy process, that is who benefits the most from a particular policy venture."

Due to this fluidity, different models have emerged to assist with the analysis of the policy-making process. The main theoretical models assist to analyse the content, the policy-making process and stages. The key models are:

- Rational-comprehensive model;
- Rational policy model.

2.4.1. RATIONAL-COMPREHENSIVE MODEL

The rational-comprehensive model premises that the policymaker has a full range of policy options to select a policy. The policymaker then selects the most appropriate policy.

The model can be graphically represented as follow:

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80 Mohariras as quoted by Cloete & De Coning (2011) 33
81 Cloete & De Coning (2011) 33
82 Cloete & De Coning (2011) 33
83 Cloete & De Coning (2011) 32-65 identified different models to analyse the content of policy options, to analyse the main policy makers, and to define policy stages and processes.
84 Cloete & De Coning (2011) 36
85 Hanekom as quoted by Cloete & De Coning (2011) 37
2.4.2 RATIONAL POLICY-MAKING MODEL

The rational model is a process that follows a sequence of steps, where the process is “well defined, starting with setting the agenda and ending with reviewing, monitoring and evaluation”\(^87\).

Booyse, as quoted by Venter & Landsberg\(^88\) summarized the different rational models, as follows:

- Howlett & Ramesh (1995):
  - Agenda-setting – determinants & windows;
  - Formulation – communities & networks;
  - Decision-making;
  - Implementation – design and choice of policy instrument; and
  - Evaluation – analysis and learning.

\(^86\) Cloete & De Coning (2011) 37
\(^87\) Venter & Landsberg (2011) 169
\(^88\) Venter & Landsberg (2011) 170
Jenkins (1978) in Hill (2005):
- Initiation;
- Information;
- Consideration;
- Implementation;
- Evaluation; and
- Termination.

- Deciding to decide;
- Deciding how to decide;
- Issue definition;
- Forecasting;
- Setting objectives, priorities;
- Options analysis;
- Implementation, monitoring and control;
- Evaluation and review; and
- Maintenance, succession & termination.

Anderson (1997):
- Formation – problems, agendas and formulation;
- Adoption;
- Budgeting;
- Implementation; and
- Impact – evaluation & change.

Deleon in Sabatier:
- Initiation;
- Estimation;
- Implementation;
- Evaluation; and
- Termination.
Morse and Struyk, as quoted by Venter & Landsberg\(^{89}\), propose the following steps:

1. Verify, define and establish the problem.
2. Establish evaluation criteria.
3. Identify alternative policies.
4. Evaluate and compare alternative policies.
5. Select the best policy among the alternatives considered.
6. Monitor and evaluate the proposed policy.”

The rational policy-making model has found support in the Constitutional Court judgment of *Poverty Alleviation Network v President of the RSA*\(^{90}\) where the Court stated the following:

“The principle that every law and every exercise should not be arbitrary but rational has been developed by this Court in a series of judgments. This principle sets rationality as a necessary condition for the legal validity that every law or act of organs of state should fulfil”.

Rautenbach\(^{91}\) identified two broad categories where the Constitutional Court applied the rational relationship tests:

- Limitation of rights\(^ {92}\); and
- Exercise of all government power, regardless of whether a right in the Bill of Rights or another constitutional provision was affected. This category includes the exercise of Presidential power (executive and

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\(^{89}\) (2011) 170
\(^ {90}\) 2010 (6) BCLR 520 (CC) par 65
\(^ {91}\) Rautenbach (2010) 768
\(^ {92}\) Rautenbach cited *De Lange v Smuts NO* 1998 (7) BCLR 779 (CC), *Prinsloo v Van der Linde* 1997 (6) BCLR 759 (CC), *Harksen v Lane NO* 1997 (11) BCLR 1489 (CC), *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service*; *First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (7) BCLR 702 (CC), *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (7) BCLR 687 (CC), *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (1) BCLR (CC)
administrative)\textsuperscript{93}, Parliament’s power to pass ordinary legislation\textsuperscript{94} and Parliament’s power to amend the Constitution\textsuperscript{95}.

This model is challenged by theorists because there are too many variables in the process, e.g. capacity and time constraints, external influences on the process, or significance of politics and political power relations\textsuperscript{96}. Thornhill\textsuperscript{97} indicated that the political office-bearer will also demand that their values, as supported by the electorate in the election, be incorporated in the policy, something for which the rational policy-making theory does not provide for.

Because of the challenges levelled against the rational policy-making, some instances aimed to introduce the prescriptive models\textsuperscript{98}. In South Africa, a similar attempt was made by the Presidency\textsuperscript{99} with the introduction of the Regulatory Impact Assessment (“RIA”) Process within the legislative process:

“It is recommended that RIA should be required at three stages of the law-making process for national primary legislation:

(1) At the initial stage, when the decision whether or not to regulate is still being considered (scoping RIA);

(2) Just before the proposed regulation is considered by Cabinet (mid-level RIA); And

(3) At the parliamentary stage, just prior to the tabling of the bill (final RIA). (In the case of subordinate legislation, the third stage would by definition fall away).

\textsuperscript{93} Rautenbach cited President of the RSA v Hugo 1997 (6) BCLR 708 (CC), In re Certification of the Constitution of the RSA 1996 1996 (10) BCLR 1253 (CC), President of the RSA v SARFU 1999 (10) BCLR 1059 (CC), Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council 1998 (12) BCLR 1458 (CC), Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the RSA 2000 (3) BCLR 241 (CC), Maseltha v President of the RSA 2008 (1) BCLR 1 (CC), Abbot v Centre for the Study of Violence and Reconciliation 2010 (5) BCLR 391 (CC)

\textsuperscript{94} Rautenbach cited New National Party of South Africa v Government of the RSA 1999 (5) BCLR 489 (CC)

\textsuperscript{95} Rautenbach cited United Democratic Movement v President of the RSA 2002 (11) BCLR 1179 (CC), Merafong Demarcation Forum v President of the RSA 2008 (10) BCLR 969 (CC), Poverty Alliance Network v President of the RSA 2010 (6) BCLR 520 (CC)

\textsuperscript{96} Venter & Landsberg (2011) 170

\textsuperscript{97} (2012) 141

\textsuperscript{98} Thornhill (2012) 142

\textsuperscript{99} (2005) 26-27
The level of rigour would clearly differ between stages. A scoping RIA would simply state the policy objective, formulate the problem, quantify scale where possible, specify a range of options for consideration and consultation, and indicate whether further RIA was required. A mid-level RIA would engage in detailed analysis of all the options under consideration, looking at the social and economic costs and benefits of each option, and the associated risks, based on information obtained during the initial consultation process and other information-gathering and analytic techniques (including, but not limited to, economic analysis). The final RIA would build on this, and provide greater detail on the recommended option on the basis of further consultation and analysis. It would also set out an implementation plan for the recommended option, enforcement methods and sanctions to be used, and the monitoring and evaluation system to be applied.

A decision will eventually have to be taken on the categories of analysis themselves. RIA attempts to integrate substantive and procedural analysis in order to improve the quality of regulation. The categories are thus not limited to matters of substance (such as social and economic costs and benefits), but also include analysis of procedures, and the formulation of the problem.”

However, this project is still currently in a pilot phase, and Ministers who present draft legislation to Cabinet may decide whether their proposals require a RIA or not.

2.4.3 DESCRIPTIVE MODELS FOR POLICY-MAKING

As an alternative to the rational policy-making model, some theorists have resorted to describing “real-life” policy-making. These models assist with the understanding of the interaction between politics and political processes on the
one hand, and policy development and implementation on the other hand\textsuperscript{100}. The models try to explain the causes and consequences of any policy decision.

Thornhill\textsuperscript{101} summarized the conclusions as follows:

- Policy-makers use an incremental approach to policies, which do not allow for large scale changes in policy\textsuperscript{102};
- Policy-makers are not specific with regard to objectives within the policy to allow for dysfunctional situations;
- A policy is usually a collaborative process and sometimes the product of negotiations and compromise; and
- A policy is in majority of times the result of consensus through negotiations rather than the rational decision by a single political office-bearer.

2.4.4 MIXED-SCAN POLICY-MAKING MODEL

The mixed-scan approach was pioneered by Etzioni in 1967, and does not require a full-scale review of policy alternatives, but rather caters for a broad review of the policy, and incremental analysis of the alternatives\textsuperscript{103}. This model attempts to “marry” the rational policy-making model with the incremental approach of the descriptive policy-making model.

Etzioni\textsuperscript{104} formulated the following description of this model:

“A rationalistic approach to decision-making requires greater resources that decision-makers command. The incremental strategy, which takes into account the limited capacity of actors, fosters decisions which neglect basic societal innovations. Mixed-scanning reduces the unrealistic aspects of rationalism by limiting the details required in fundamental decisions and helps to
overcome the conservative slant on incrementalism by exploring longer-run alternatives. (Incremental decisions tend to imply fundamental ones, anyway.) The mixed-scanning model makes this dualism explicit by combining (a) high-order, fundamental policy-making processes which set basic directions and (b) incremental ones which prepare for fundamental decisions and work them out after they have been reached. Mixed-scanning has two further advantages over incrementalism: It provides a strategy for evaluation and it does not include hidden structural assumptions. The flexibility of the different scanning levels makes mixed-scanning a useful strategy for decision-making in environments of varying stability and by actors with varying control and consensus-building capacities.”

2.4.5 POLITICAL POWER POLICY-MAKING MODEL

The structure of public institutions that play a role in policy-making has a direct link with the policy formulation, implementation and evaluation. The functions of these institutions are affected by the political system within which it operates and the policies of the ruling party.

Leftwich, as quoted by Venter and Landsberg, emphasised the role of politics (and politicians) in the context of developmental states. This is due to the fact that the agenda of the public sector is set by, firstly the election manifesto of the ruling party, and secondly influenced by politicians and their interactions. The political system and election results determine who makes the policy decisions as it is the grantor of political power.

105 Maselesele (2011) 106
106 Maselesele (2011) 106
107 (2011) 172
108 Venter & Landsberg (2011) 172
109 Maselesele (2011) 117
2.4.6 SYSTEMS APPROACH TO POLICY-MAKING

The systems approach attempts to link the policy process with a political system, and focus on the response of the political system to the needs of communities\textsuperscript{110}. The systems approach allows for the influence of the political party process and the policy-making environment within which the policy is made\textsuperscript{111}.

Fox, Schella and Wissink, as quoted by Maselesele\textsuperscript{112}, identified the following elements in the systems approach to policy-making:

- Policy inputs (demands from interested groups, resources that should be utilized to address the issue, and support required);
- Policy conversion (consideration and decision-making);
- Policy outputs (policy statements and documents); and
- Policy feedback (monitoring of the output and evaluation of the impact of the output).

Within systems theory, the concept of complex theory finds a niche. Normally, government systems are considered to be complex systems\textsuperscript{113}, as opposed to simple\textsuperscript{114} or complicated systems\textsuperscript{115,116}.

\begin{itemize}
  \item \textsuperscript{110} Maselesele (2011) 116 \item \textsuperscript{111} Maselesele (2011) 117 \item \textsuperscript{112} (2011) 116 \item \textsuperscript{113} “Complex systems” consist of “many variables in an open system with non-linear relationships that cannot be described, explained or predicted with great accuracy” (Cilliers, as quoted by Cloete (2009) 305). An example of a complex system would be a family, although the relationship between the members can be described based on hierarchy (e.g. mother or sister), the inter-personal relations between members and associated members (such as in-laws, or distant relatives) cannot be fully described, explained or predicted with great accuracy.
  \item \textsuperscript{114} “Simple systems” consist of “a few variables with linear relationships that can be described, explained and predicted with great accuracy” (Cilliers, as quoted by Cloete (2009) 304). An example of a simple system would be a bicycle, that consist of a few parts, which can be taken apart, studied, re-assembled and will ride (behave) as before and as predicted.
  \item \textsuperscript{115} “Complicated systems” consists of “many variables in a closed system with linear and non-linear relationships that can be described, explained and predicted with great accuracy” (Cilliers, as quoted by Cloete (2009) 305). An example of a complicated system would be a Formula 1 racing car, which consists of many parts, that can be taken apart, studied, re-assembled and should ride (behave) as before, and as predicted.
  \item \textsuperscript{116} Cloete (2009) 304
\end{itemize}
Van Tonder\textsuperscript{117} defines “complexity” as follows:

“\textit{t}he measure of sizable variables, a high degree of interdependence, as well as a high degree of interaction among these variables. In organisational terms, complexity commences when three or more variables are interdependent and interact on a consistent basis (i.e. a variation in one results in variations in the other).”

Cilliers, as quoted by Cloete\textsuperscript{118}, summarises the characteristics of complex systems as follows:

- “it contains many elements that defy full understanding of the system;
- a dynamic interaction of elements, transferring information (self-organisation);
- the nature of the interaction of elements of the system in rich and multi-dimensional;
- interactions are non-linear and short-range: small actions can cause large reactions (non-local causation);
- recurrent positive or negative feed-back loops exist in the system, providing opportunities for maintaining identity but learning lessons to improve the identity – autopoiesis, dissipative structures and self-organisation);
- complex systems are normally open systems influenced by their environments and observers (framing);
- they operate as far-from-equilibrium systems with constant energy flow inputs in order to survive (equilibrium means stagnation and death);
- history is important, complex systems do not exist in isolation; and

\textsuperscript{117} (2006) 230-231
\textsuperscript{118} Cloete (2009) 305
The elements of the system are normally simple; the complex nature of the system is as a result of the nature of the interactions of its elements."

The complexity of policy processes is described by Van Buuren and Gerrits119 as follows:

“(e)very decision can be regarded as a temporary stable state of equilibrium in which streams of negotiation, deliberation and fact-finding are connected stepping stones in an ongoing policy process which at the same time is influenced by parallel policy processes competing for the same resources (attention, money, legitimacy, support). Decisions that are made persist until a sufficient amount of system pressure (internal or (external)) destabilises the policy system towards a new state of equilibrium.”

The “behaviour” of a complex system can be summarized as follows120:

- “Complex policy systems are not easily regulated by simple legal and managerial devices, but have a complex evolving, self-regulatory control mechanism that is related to the interaction and feedback within the system. This self-regulation in policy systems may evolve around dominant logics and values (attractors) that are constantly being reinterpreted and redefined.

- Complex policy systems are always trying to reinterpret historical and current data in the light of emerging events and this forms part of the feedback and interactive process within the system.

- Complex systems comprise interplay between instability and stability. Instability can lead to exponential changes that result from small initial changes. But not all change in a complex system is unstable.”

119 As quoted by Cloete (2009) 306
120 Cloete (2009) 306 quoting Heynes
A policy system can be regarded as a complex adaptive system\textsuperscript{121}, because it is an open system where many role-players and ideas converge, and its results cannot be always understood or predicted.

2.4.7 INTEGRATED STREAM OF POLICY-MAKING

The integrated stream of policy-making has been developed to explain the South African experience in policy-making by Booyse and Erasmus\textsuperscript{122}. The model assesses the “contextualised, cumulative and integrated ‘stream’ of actions that combine to deliver policies, directives for their implementation, and continuous midstream adaptations of the policy to achieve the policy objectives.”\textsuperscript{123}

The integrated stream of “policy action”\textsuperscript{124} (or “streams of decisions and interactions”\textsuperscript{125}) is open to influences, where new actors and influences join the stream and affect the flow of the stream, or the “substance of policy”\textsuperscript{126}. The integrated stream is one stream that can be analysed, at any point in the process, with regard to policy actors\textsuperscript{127}, clearing-houses\textsuperscript{128} and documentary stages.

2.4.7.1 Policy Actors in South Africa

Venter and Landsberg\textsuperscript{129} identify the most powerful policy-generating cluster as the structures of the African National Congress (ANC), Presidency and the Cabinet.

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\textsuperscript{121} Cloete (2009) 307
\textsuperscript{122} Venter & Landsberg (2006) 175
\textsuperscript{123} Venter & Landsberg (2006) 175
\textsuperscript{124} Venter & Landsberg (2006) 175
\textsuperscript{125} Heidenheimer, as quoted by Venter & Landsberg (2006) 175
\textsuperscript{126} Venter & Landsberg (2006) 175
\textsuperscript{127} “Policy actors” can be defined as “relatively small groups of participants who organise themselves into policy communities with interests in a specific set of issues that concerns central government” (Adapted from Venter & Landsberg (2006) 176)
\textsuperscript{128} “Policy clearing houses” can be defined as “landmark points, along which draft policies are channelled” (Adapted from Venter & Landsberg (2006) 176)
\textsuperscript{129} Venter & Landsberg (2006) 178
2.4.7.1.1  Decision-making structures of the ANC

The ANC has the following national structures\(^{130}\):

- The highest organ of the ANC is the National Executive Committee (NEC), and is elected every five years at the National Conference. The NEC leads the organisation within the parameters of the ANC Constitution;
- The NEC elects a National Working Committee (NWC) from its elected members to coordinate the day-to-day operations of the ANC;
- The National Conference is the highest decision-making body of the ANC, and is held every five years.
- A National General Council (NGC) evaluates all the programmes of the ANC and is held between National Conferences.

2.4.7.1.2  Presidency

The Presidency’s key role revolves around the following\(^{131}\):

"The Presidency's key role in the executive management and co-ordination of Government lies in its responsibility to organize governance. In this regard, a key aim is the facilitation of an integrated and co-ordinated approach to governance. This is being achieved through creative, cross-sectoral thinking on policy issues and the enhancement of the alignment of sectoral priorities with the national strategic policy framework and other Government priorities."

The Presidency is the guardian for the National Development Plan, and the National Evaluation Policy Framework.

The National Development Plan\(^{132}\) was developed by the National Planning Commission, which is chaired by the Minister in The Presidency for National

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\(^{130}\) ANC (S.a a) Online

\(^{131}\) Presidency (S.a) Online

\(^{132}\) ANC (S.a a) Online
Planning. The Commission is tasked with the responsibility to develop a long term vision and strategic plan for the country.

The purpose of the National Evaluation Policy Framework is to “ensure that credible and objective evidence from evaluation is used in planning, budgeting, organisational improvement, policy review, as well as on-going programme and project management, to improve performance”\(^{134}\). The framework links policy evaluation directly to planning and budgeting within the policy-making and management process and is overseen by the Minister for Performance Monitoring and Evaluation.

2.4.7.3 Cabinet

The Cabinet of South Africa consists of the President, the Deputy President and the Ministers\(^{135}\). The Cabinet is responsible to exercise the executive authority granted by the Constitution that includes, \textit{inter alia}, the development and implementation of national policy\(^{136}\) and the preparation and initiation of legislation\(^{137}\). As such it thus, \textit{inter alia}, acts as a policy clearing-house in the South African system.

Policy clearing-houses are “bends” in the policy stream that direct the policy-stream from initiation, past adoption, implementation through to evaluation and review\(^{138}\).

Venter and Landsberg\(^{139}\) identified the following major institutions in the process of policy-making in South Africa:

- National government departments;

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132 NPC (2013)  
133 NPC (S.a) Online  
134 Presidency (2011) iii  
135 Section 91(1) of the Constitution  
136 Section 85(2)(b) of the Constitution  
137 Section 85(2)(d) of the Constitution  
138 Venter & Landsberg (2006) 183  
139 (2006) 184

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- Fosad (Forum of South African Directors-General);
- Provincial government departments;
- Presidency[^140];
- Cabinet and Cabinet Committees;
- National Assembly and Portfolio Committees;
- National Council of Provinces and Select Committees;
- Parliament and Joint Committees;
- Provincial government institutions;
- Local government institutions;
- Constitutional Court; and
- Intergovernmental institutions (MinMEC)

Of all the above-mentioned institutions, the Constitutional Court is the highest ranked clearing-house of all. The position is derived from the supremacy of the Constitution in all policy and legislative matters[^141]. The Constitutional Court not only decides on the constitutionality of all legislation, but also on the constitutionality of government policy[^142].

### 2.4.7.3 Documentary stages

Green Papers (Policy Deliberation Phase), White Papers, Bills and Legislation (Policy Adoption Phase) and Secondary Legislation and Departmental Directives (Policy Implementation Phase) are the documentary evidence that a policy phase has been concluded[^143]. The inclusion of legislation in policy documentation is contrary to Roux’s[^144] argument that legislation “would contain policy, but is not a policy document by definition”.

[^140]: Policy Coordination and Advisory Services (“PCAS”) in the Presidency was relocated to the Minister for National Planning and the Minister for Performance Monitoring and Evaluation; both Ministers are in the Presidency.

[^141]: Section 1(c) of the Constitution

[^142]: Government of the RSA v Grootboom 2000 (11) BCLR 1169 (CC)

[^143]: Booysen, as quoted by Venter & Landsberg (2006) 177

[^144]: Roux (2002) 424
The integrated stream of policy-making in South Africa can be represented as follows\textsuperscript{145}:

\textsuperscript{145} Booysen, as quoted by Venter & Landsberg (2006) 177
<table>
<thead>
<tr>
<th>POLICY PHASE</th>
<th>PROBLEM IDENTIFICATION</th>
<th>AGENDA SETTING</th>
<th>POLICY DELIBERATION</th>
<th>POLICY ADOPTION</th>
<th>POLICY IMPLEMENTATION</th>
<th>POLICY MONITORING &amp; EVALUATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>POLICY ACTORS AND COMMUNITY INFLUENCES</td>
<td>Community leaders, Members of Parliament, political party leaders, Communities speaking out, social movement action, government awareness</td>
<td>Political partners, interest organisations, Cabinet, Cabinet committees, Party conferences, delegations to government</td>
<td>Cabinet members, Cabinet committees</td>
<td>MP’s, Cabinet, Provincial governments</td>
<td>Public servants and Ministers</td>
<td>Departments, Cabinet, Presidency</td>
</tr>
<tr>
<td>POLICY CLEARING HOUSES</td>
<td>Local forums, ward committees, consultative forums</td>
<td>Departmental task groups, ruling party, NEC, Cabinet Lekgotla</td>
<td>Parliament, parliamentary committees, MinMec</td>
<td>Cabinet, National Assembly, NCOP, Constitutional Court</td>
<td>State departments, provincial and local governments</td>
<td>Imbizo, GCIS survey actions</td>
</tr>
<tr>
<td>DOCUMENTARY</td>
<td>Memoranda, informal communications</td>
<td>Petitions, commissioned research reports</td>
<td>Green Papers</td>
<td>White Papers, Bills, Legislation</td>
<td>Secondary legislation, departmental directives</td>
<td>Departmental evaluation reports, consultant reports</td>
</tr>
</tbody>
</table>

Table 2.2: Integrated stream of policy-making on national issues
The integrated stream is in contradiction with the policy stream theory of Kingdon, whose streams are “problems, policies and politics”\textsuperscript{146}. Public policy emerges when these three streams converse (“policy window”)\textsuperscript{147}.

2.4.8 GENERIC PROCESS MODEL

The generic process model combines elements of existing process models to create a generic model that can be used to assist with comprehensive or generic policy processes\textsuperscript{148}. This model includes a statutory phase that focuses on legislation\textsuperscript{149}.

Cloete and De Coning\textsuperscript{150} provided the following schematic model of policy-making in South Africa:

\begin{itemize}
\item \textsuperscript{146} Schenk (2007) 3
\item \textsuperscript{147} Schenk (2007) 3
\item \textsuperscript{148} Cloete & De Coning (2011) 47
\item \textsuperscript{149} Cloete & De Coning (2011) 48
\item \textsuperscript{150} Cloete & De Coning (2011) 49
\end{itemize}
2.5 LEGISLATIVE ASPECTS OF POLICY-MAKING

With the inclusion of the Statutory Phase in the Cloete and De Coning model (above), additional weight is given to the argument that legislation is included within the ambit of policy. Hanekom\textsuperscript{151} concurs with this approach in his argument that “public policy is therefore a formally articulated goal that the legislator (my emphasis) intends pursuing with society or with a societal group”.

\textsuperscript{151} Hanekom (1987) 7

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If a policy is “a declaration of intent to perform an action or actions or to have specific institutions or functionaries undertake an action or actions in a prescribed manner”\textsuperscript{152}, what is a “law”?

The Free Online Dictionary defines “law” as follows:

“1. law \textit{n}
\begin{quote}
(Law) a rule or set of rules, enforceable by the courts, regulating the government of a state, the relationship between the organs of government and the subjects of the state, and the relationship or conduct of subjects towards each other\textsuperscript{153}.
\end{quote}

Burger\textsuperscript{154} defines “law” as follows:

“Law is the manifestation of an objective: it is the vehicle used by the state to regulate the behaviour of its subjects. It provides a means to achieve social, economic, cultural and political policies. It enables a government to involve itself in vested rights and interests. It is used to obtain revenue and establish its dominion over society.”

The Dictionary of Legal Words\textsuperscript{155} defines “law” \textit{inter alia} as “… a command which obliges a person or persons (.) (b)ut, as contra-distinguished or opposed to an occasional or particular command, a law is a command which obliges a person or persons and obliges generally to acts or forbearance of a class”.

“Law” is then the rules by which the government strives to regulate the relationships in a country between the state and institutions, and between the state and citizens. Legislation provides the necessary environment (legal, institutional and social) for government policies to be implemented\textsuperscript{156}.

\textsuperscript{152} Thornhill (2012) 125
\textsuperscript{153} Free Online Dictionary (2011) Online
\textsuperscript{154} Burger (2002) 6
\textsuperscript{155} Claassen (1997) L-8
\textsuperscript{156} ETU (2011) Online

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From the definitions of “policy”, and “law”, it becomes clear that these concepts are intimately related and intertwined, but distinct. Thornhill states that “policymaking and lawmaking are parts of the same process”\(^{157}\). This means that not all outcomes of lawmaking are Acts of Parliament, or regulations, but sometimes administrative rulings and decisions of law courts\(^{158}\).

Cloete and De Coning\(^{159}\) provide the following hierarchy of authoritative policy instruments:

- “Constitution;
- Parliamentary Acts;
- Subordinate legislation (proclamations, regulations and official notices);
- Policy White and Green Papers;
- Strategic plan / framework;
- Business, project, operational, implementation, media plans / strategies;
- Administrative circulars; and
- Procedural guidelines.”

The differentiation of these policy instruments lies in the areas of legal enforcement and ease of change (who has the final decision-making power to approve or not to approve the amendment). This can be illustrated by the following table:

<table>
<thead>
<tr>
<th>POLICY INSTRUMENT</th>
<th>LEGAL ENFORCEMENT</th>
<th>EASE OF AMENDMENTS</th>
</tr>
</thead>
<tbody>
<tr>
<td>CONSTITUTION</td>
<td>Supreme law of the Republic (Section 2 of the Constitution)</td>
<td>Very difficult: Requires consent of 75% of the members of the National</td>
</tr>
<tr>
<td>POLICY INSTRUMENT</td>
<td>LEGAL ENFORCEMENT</td>
<td>EASE OF AMENDMENTS</td>
</tr>
<tr>
<td>------------------</td>
<td>-------------------</td>
<td>-------------------</td>
</tr>
<tr>
<td>SUBORDINATE LEGISLATION (PROCLAMATIONS, REGULATIONS AND OFFICIAL NOTICES)</td>
<td>Executive authority (Section 85(2) of the Constitution)</td>
<td>Moderate: The subordinate legislation may be initiated, amended or revoked under the authority granted by each Act of Parliament that mandates the subordinate legislation&lt;sup&gt;162&lt;/sup&gt;.</td>
</tr>
<tr>
<td>POLICY WHITE AND GREEN PAPERS</td>
<td>Executive authority</td>
<td>Moderate: Green and White Papers are a statement of the intent of the executive on a particular area of responsibility&lt;sup&gt;163&lt;/sup&gt;.</td>
</tr>
<tr>
<td>STRATEGIC PLAN / FRAMEWORK</td>
<td>Executive authority</td>
<td>Moderate: Strategic plans are prepared for the Medium Term</td>
</tr>
</tbody>
</table>

<sup>160</sup> Section 74 of the Constitution  
<sup>161</sup> Sections 75 - 78 of the Constitution  
<sup>162</sup> Rautenbach & Malherbe (2009) 89  
<sup>163</sup> Sabinet (S.a) Online
<table>
<thead>
<tr>
<th>POLICY INSTRUMENT</th>
<th>LEGAL ENFORCEMENT</th>
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<tbody>
<tr>
<td>Expenditure Framework, which will normally cover a three (3) year term(^\text{164}).</td>
<td></td>
<td></td>
</tr>
<tr>
<td>BUSINESS, PROJECT, OPERATIONAL, IMPLEMENTATION, MEDIA PLANS / STRATEGIES</td>
<td>Director-General and administration</td>
<td>Moderately easy: The plans are linked to the Strategic Plan and must be reviewed annually and sometimes quarterly(^\text{165}).</td>
</tr>
<tr>
<td>ADMINISTRATIVE CIRCULARS</td>
<td>Director-General and administration</td>
<td>Easy: The administrative circulars are issued by the Director-General on internal departmental administrative issues, e.g. process to forward memorandums to the Director-General(^\text{166}).</td>
</tr>
<tr>
<td>PROCEDURAL GUIDELINES</td>
<td>Director-General and administration</td>
<td>Very easy: The procedural guidelines are issued by the Director-General on internal matters that require standard operating procedures, e.g. Information Technology</td>
</tr>
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\(^{164}\) Public Finance Management Act, 1999 (Act No. 1 of 1999) and Treasury Regulations
\(^{165}\) Public Finance Management Act, 1999 (Act No. 1 of 1999) and Treasury Regulations
\(^{166}\) DCoG (2013 a) Online
Table 2.3: Level of Enforcement and Ease of Amendment of Policy Instruments (Adapted by author)

<table>
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<tr>
<td></td>
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<td>support availability after hours</td>
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However, in a legal environment, the words “policy” and “legislation” convey different meanings and have different consequences attached to them.

Steytler defines “policy” as “… an internally binding document ... (that) binds the (executive) in the exercise of its executive authority ... (and) as a legal instrument has no binding force on third parties”\(^\text{168}\). The same author states that “(i)f the rights or interests of third parties are to be limited or infringed, then it must be done in terms of a law”\(^\text{169}\). The principle difference between policy and legislation is therefore that a policy is not binding on third parties, whilst a law is.

This argument has found support in the jurisprudence, where the Supreme Court of Appeals stated the following:

“…(L)aws, regulations and rules are legislative instruments whereas policy determinations are not. As a matter of sound government, in order to bind the public, policy should normally be reflected in such documents. Policy determination cannot override, amend or be in conflict with laws (including subordinate legislations). Otherwise the separation between legislature and executive will disappear”\(^\text{170}\).

---

\(^\text{167}\) DCoG (2013 b) Online
\(^\text{168}\) (2011) 485-486
\(^\text{169}\) (2011) 486
\(^\text{170}\) Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd (2001) 4 All SA 68 (A) par 7
In contradiction, the Constitutional Court attached constitutional weight to
government policies in the *Grootboom* judgment:

“The state is required to take reasonable legislative and other
measures. Legislative measures by themselves are not likely to
constitute constitutional compliance. Mere legislation is not
enough. The state is obliged to act to achieve the intended result,
and the legislative measures will invariably have to be supported
by appropriate, well-directed policies and programmes
implemented by the executive. These policies and programmes must
be reasonable both in their conception and their implementation.
The formulation of a programme is only the first stage in meeting
the state’s obligations. The programme must also be reasonably
implemented. An otherwise reasonable programme that is not
implemented reasonably will not constitute compliance with the
state’s obligations.”

Steytler reached the following conclusion:

“… (T)he mere fact that an instrument is called a policy is not
determinative of its legal consequences. Depending on the
legislative intent, a policy may well be regarded as being
legislative in effect. The question is thus whether the instrument
called …policy in the … (legislation) was intended to have
legislative effect similar to that of a (law).”

Therefore, whenever the legislative effect of a policy instrument has to be
decided, the benchmark will be the legislative intent of the legislator.

171 Government of the RSA v Grootboom 2000 11 BCLR 1169 (CC)

172 Steyler used this argument in relation to an investigation whether the municipal tariff
rates policy, as required by the Local Government: Municipal Systems Act, 2000 (Act No.
32 of 2000), can be considered a legally binding instrument as opposed to municipal
bylaws. However, this conclusion can be carried forward into the discussion whether
legislative instruments should include public policy.

173 (2011) 489
2.6 CONCLUSION

Public policy is the mechanism through which government attempts to achieve certain constitutional, political and societal objectives. These policies are influenced by various role-players within and outside the government, and are created in different ways. Some of these policies are formed into legislation, and in the next chapter, the South African legislative process will be discussed.
# CHAPTER 3: LEGISLATIVE PROCESS

## THE LEGISLATIVE PROCESS

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“One of the greatest delusions in the world is the hope that the evils in this world are to be cured by legislation” (Thomas Brackett Reed - American Politician, 1839-1902)\(^{174}\)

### 3.1 INTRODUCTION

The Constitution is the cornerstone of the South African democracy since 1994. It is the starting point of the legislative process, the definer of the role-players and the parameters of laws. No legislation can survive outside of the Constitution, so it is fitting to start any analysis of the legislative process at the source, the Constitution.

### 3.2 DEFINING THE LEGISLATIVE PROCESS

#### 3.2.1 CONSTITUTIONAL RESPONSIBILITY OF LEGISLATIVE AUTHORITY

The national legislative authority vests in Parliament, subject to the Constitution\(^{175}\). Parliament consists of the National Assembly and the National

\(^{174}\) Thinkexist (S.a b) Online

\(^{175}\)
Council of Provinces (hereafter referred to as the “NCOP”)\(^{176,177}\). The Constitution empowers the Parliament to initiate, consider, pass, amend and reject legislation\(^{178}\).

Section 44(1)(a) of the Constitution gives Parliament the following powers:

\[\text{(i)}\text{ to amend the Constitution;}\]

\[\text{(ii)}\text{ to pass legislation with regard to any matter, including a matter within a functional area listed in Schedule 4, but excluding, subject to subsection (2), a matter within a functional area listed in Schedule 5; and}\]

\[\text{(iii)}\text{ to assign any of its legislative powers, except the power to amend the Constitution, to any legislative body in another sphere of government”}.\]

Schedule 4, Part A of the Constitution deals with the functional areas of concurrent national and provincial legislative competence. These areas include animal control and diseases, disaster management, housing, population development, regional planning and development, tourism and trade. Schedule 4, Part B of the Constitution lists the areas where local government enjoys executive and legislative authority\(^{179}\), which include building regulations, fire-fighting services, municipal planning and trading regulations.

\(^{175}\text{Section 44(4) of the Constitution}\)

\(^{176}\text{Section 42(1) of the Constitution}\)

\(^{177}\text{The principle that the National Assembly and the National Council of Provinces are both responsible for legislation was confirmed by the Constitutional Court: “In terms of section 42(1) of the Constitution, Parliament consists of the National Assembly and the NCOP. The national legislative authority vests in Parliament. These democratic institutions represent different interests in the law-making process. The National Assembly represents “the people . . . to ensure government by the people”. The NCOP “represents the provinces to ensure that provincial interests are taken into account” in the legislative process. Both must therefore participate in the law-making process and act together in making law to ensure that the interests they represent are taken into consideration in the law-making process. If either of these democratic institutions fails to fulfil its constitutional obligation in relation to a bill, the result is that Parliament has failed to fulfil its obligation” (Doctors for Life International v Speaker of the National Assembly and Others 2006 (12) BCLR 1399 (CC) par 29).}\)

\(^{178}\text{Sections 55 and 68 of the Constitution}\)

\(^{179}\text{Section 156(1) and (2) of the Constitution}\)
Schedule 5, Part A of the Constitution grants provinces exclusive legislative authority over certain functional areas, such as abattoirs, liquor licences and provincial planning. Schedule 5, Part B gives executive and legislative authority to local government\(^{180}\) over functional areas such as beaches and amusement parks, licencing of dogs, markets, public places and street trading.

Similarly, the Constitution gives the NCOP the following powers:

“(i) to participate in amending the Constitution in accordance with section 74;
(ii) to pass, in accordance with section 76, legislation with regard to any matter within a functional area listed in Schedule 4 and any other matter required by the Constitution to be passed in accordance with section 76; and
(iii) to consider, in accordance with section 75, any other legislation passed by the National Assembly”\(^{181}\).

The Constitution provides that Parliament may adopt legislation on a Schedule 4 matter, if it is reasonably necessary for, or incidental to, the effective exercise of a concurrent legislative function\(^{182}\), e.g. disaster management. The Constitution does not provide any definitions for the functions listed in Schedules 4 and 5.

A provincial legislature has full legislative authority over the matters indicated in Schedule 5, Part A of the Constitution and can adopt laws in that regard. In the *City of Johannesburg v Gauteng Development Tribunal*\(^{183}\) judgment, the Constitutional Court found that the functional areas that are allocated to the various spheres of government are not contained in hermetically sealed compartments, but they remain distinct from one another. The distinctiveness lies in the level at which a particular power is exercised. Therefore, a province may adopt its own legislation on a matter under its authority, or may continue to

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\(^{180}\) Section 156(1) and (2) of the Constitution  
\(^{181}\) Section 44(1)(b) of the Constitution  
\(^{182}\) Section 44(3) of the Constitution  
\(^{183}\) *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 (9) BCLR 859 (CC) par 11

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administer the applicable national law, if and insofar as that law has been assigned to that province.

Both spheres of government may freely make laws in respect of the concurrent functional areas. Section 146 of the Constitution provides which law will prevail in the case of conflict:

“146. Conflicts between national and provincial legislation

1. This section applies to a conflict between national legislation and provincial legislation falling within a functional area listed in Schedule 4.

2. National legislation that applies uniformly with regard to the country as a whole prevails over provincial legislation if any of the following conditions is met:

(a) The national legislation deals with a matter that cannot be regulated effectively by legislation enacted by the respective provinces individually.

(b) The national legislation deals with a matter that, to be dealt with effectively, requires uniformity across the nation, and the national legislation provides that uniformity by establishing

(i) norms and standards;
(ii) frameworks; or
(iii) national policies.

(c) The national legislation is necessary for

(i) the maintenance of national security;
(ii) the maintenance of economic unity;
(iii) the protection of the common market in respect of the mobility of goods, services, capital and labour;
(iv) the promotion of economic activities across provincial boundaries;
(v) the promotion of equal opportunity or equal access to government services; or
(vi) the protection of the environment.
3. National legislation prevails over provincial legislation if the national legislation is aimed at preventing unreasonable action by a province that
   (a) is prejudicial to the economic, health or security interests of another province or the country as a whole; or
   (b) impedes the implementation of national economic policy.

...  
5. Provincial legislation prevails over national legislation if subsection (2) or (3) does not apply...”

Therefore, national government may not exclude the legislative power of a province over concurrent matters.

3.2.2 SCOPE OF LEGISLATIVE AUTHORITY

The Constitution uses the word “authority” when defining the responsibilities of the various role-players with regard to the legislature, executive and judiciary. Authority can be defined as the “power to act in a coercive way”\(^\text{184}\) and “legislative authority” is “the power to enact, amend or repeal rules of law”\(^\text{185}\).

The legislative authority of Parliament is bound by the Constitution, as the supreme law of the country\(^\text{186}\). The Courts are given the mandate in the Constitution to test the constitutional validity of any legislation adopted by Parliament\(^\text{187}\).

3.2.3 PURPOSE OF LAWS

“Law” is the rules by which the government strives to regulate the relationships in a country between the state and institutions, and between the state and citizens. Legislation provides the necessary environment (legal, institutional and social) for

\(^{184}\) Rautenbach & Malherbe (2009) 3
\(^{185}\) Rautenbach & Malherbe (2009) 3
\(^{186}\) Section 2 and 44(4) of the Constitution
\(^{187}\) Section 172(1)(a) of the Constitution
government policies to be implemented\textsuperscript{188}. These environments are created by means of the legislative process, as set down in the Constitution. The Constitution places an emphasis on the supremacy of the Constitution and the rule of law\textsuperscript{189}.

Therefore, any product of the legislative process must pass constitutional muster before it can be implemented.

Rautenbach and Malherbe\textsuperscript{190} refer to the summary of Mathews regarding the principles of the rule of law, which states:

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“(i) in a decent society the idea that a state should wield arbitrary power over the individual is unthinkable; (ii) all persons, including government officials, are equally responsible to the law; (iii) effective judicial remedies afford the individual greater protection than constitutional declarations”.
```

3.2.4 PARTICIPATORY ORGANS OF STATE IN THE LEGISLATIVE PROCESS IN THE NATIONAL SPHERE

The Constitution determines that the following stakeholders are involved in the legislative process:

- Parliament which comprises of the National Assembly and NCOP\textsuperscript{191};
- The President\textsuperscript{192};
- The President and Cabinet\textsuperscript{193}; and
- The Constitutional Court\textsuperscript{194}, the Supreme Court of Appeal\textsuperscript{195} and the High Court of South Africa\textsuperscript{196}.

\textsuperscript{188} ETU (2011) Online
\textsuperscript{189} Section 1(c) of the Constitution
\textsuperscript{190} (2009) 10
\textsuperscript{191} Section 42 of the Constitution
\textsuperscript{192} Section 84(2)(a)-(c) of the Constitution
\textsuperscript{193} Section 85(2)(d) of the Constitution
\textsuperscript{194} Section 167(5) of the Constitution
\textsuperscript{195} Section 168(2) of the Constitution

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The Constitution differentiates between the roles of the National Assembly and the NCOP as follows:

- The National Assembly may “pass legislation”\(^{197}\) in the following manner:
  - “amend the Constitution”\(^{198}\);
  - “pass legislation with regard to any matter, including a matter within a functional area listed in Schedule 4, but excluding, subject to subsection (2), a matter within a functional area listed in Schedule 5”\(^{199}\);
  - “consider, pass, amend or reject any legislation before the Assembly”\(^{200}\); and
  - “initiate or prepare legislation, except money Bills”\(^{201}\).

- The NCOPs “participate(s) in the national legislative process”\(^{202}\) by:
  - “amending the Constitution in accordance with section 74”\(^{203}\);
  - “pass, in accordance with section 76, legislation with regard to any matter within a functional area listed in Schedule 4 and any other matter required by the Constitution to be passed in accordance with section 76”\(^{204}\);
  - “consider, in accordance with section 75, any other legislation passed by the National Assembly”\(^{205}\);
  - “consider, pass, amend, propose amendments to or reject any legislation before the Council (NCOP)”, in accordance with Chapter 4 of the Constitution\(^{206}\); and

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**Notes:**

196 Section 169(9) of the Constitution
197 Section 42(3) of the Constitution. In legislative parlance, a bill or resolution is said to pass when it is agreed to or enacted by the house, or when the body has sanctioned its adoption by the requisite majority of votes; in the same circumstances, the body is said to pass the bill or motion (Legal Dictionary (S.a) Online).
198 Section 44(1)(a)(i) of the Constitution
199 Section 44(1)(a)(ii) of the Constitution
200 Section 55(1)(a) of the Constitution
201 Section 55(1)(b) of the Constitution
202 Section 42(4) of the Constitution
203 Section 44(1)(b)(i) of the Constitution
204 Section 44(1)(b)(ii) of the Constitution
205 Section 44(1)(b)(iii) of the Constitution
206 Section 68(a) of the Constitution
“initiate or prepare legislation falling within a functional area listed in Schedule 4 or other legislation referred to in section 76 (3), but may not initiate or prepare money Bills.”

The Constitution allows Parliament to “assign any of its legislative powers, except the power to amend the Constitution, to any legislative body in another sphere of government.” The delegation of Parliament’s legislative authority has been tested in the Constitutional Court, and found to be in alignment with the Constitution:

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

The President and Cabinet are responsible to initiate and implement legislation, whilst the Courts are responsible to measure compliance with legislation, and to verify the constitutionality of all legislation.

207 Section 68(b) of the Constitution
208 Section 44(1)(a)(iii) of the Constitution
209 Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others 1995 (10) BCLR 1289 par 51
210 Section 85(2)(d) of the Constitution
211 Section 167(5) of the Constitution
3.3 LEGISLATIVE PROCESS

The Constitution grants the legislative authority to Parliament. But how is this authority exercised?

Rautenbach & Malherbe define the “legislative process” as follows:

“The legislative process is the series of actions by which a proposal for a law is formulated and considered, refined, and approved according to the prescribed procedures by competent government institutions and functionaries in order for it to have the force of law.”

The legislative process can thus be illustrated as follows:

![Legislative process diagram](image)

Figure 3.1: Legislative process (adapted by author)

3.3.1 GREEN AND WHITE PAPERS

The content of some Bills are initiated in a so-called “Green Paper” when a Ministry or Department dealing with a specific matter, compiles and publishes a discussion document stating the current political and administrative thinking and intentions. Green Papers are subjected to a comprehensive public participation

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212 Rautenbach & Malherbe (2009) 160
process during which any interested party can give comments, suggestions and ideas\textsuperscript{213}.

Between 1995 and 2012, thirty-four (34) Green Papers were published\textsuperscript{214}. It is interesting to note that between 2000 and 2012 only nine Green Papers were published.

After the public participation process, including sessions with the relevant Parliamentary Committee, a Green Paper is sometimes refined by a Ministry or Department into a so-called “White Paper”. The White Paper is considered to be a broad statement of government policy\textsuperscript{215}. A White Paper is a prelude to the final policy document. Flowing from the Green Paper and inputs received during the public participation process, it contains the policy proposals for the specific policy area it attempts to address\textsuperscript{216}. Depending on the subject matter of a White Paper its policy proposals are converted into Bills which are tabled in Parliament for consideration and approval.

Between 1994 and 2010, eighty-three (83) White Papers were published\textsuperscript{217}. It is noteworthy that between March 2005 and August 2010, no White Papers were published.

The transformation of the system of local government can serve as an example of the progression from Green Paper to different Acts. The transformation of local government originated when the Green Paper on Local Government was published for public comments in October 1997 by the Minister for Provincial Affairs and Constitutional Development. The Green Paper was followed by a White Paper that the Minister published in March 1998. Thereafter different Bills were presented to Parliament, Acts adopted and promulgated by the President,

### 3.3.2 PREPARING DRAFT LEGISLATION

Bills are normally prepared by Departments, under the political leadership of the Minister or Deputy Minister, and extensive consultations take place within the Department and with other sector departments\(^{221}\). If the Minister is satisfied with the draft Bill, it is submitted to Office of the Chief State Law Advisor (“OCSLA”) for “pre-certification” to ensure that the draft is aligned to the Constitution and existing law\(^{222}\).

When the OCSLA approves the draft Bill, it is submitted to the relevant Cabinet Cluster and Cabinet for comments and approval\(^{223}\).

Within Government, the cluster system was established to “*foster an integrated approach to governance that is aimed at improving government planning, decision making and service delivery. The main objective is to ensure proper coordination of all government programmes at national and provincial levels*”\(^{224}\).

The following clusters have been established\(^{225}\):

- **Infrastructure Development Cluster:**
  - Chair: Transport;
  - Deputy Chair: Public Enterprises;
  - Communications;

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\(^{218}\) Act No. 27 of 1998  
\(^{219}\) Act No. 117 of 1998  
\(^{220}\) Act No. 32 of 2000  
\(^{221}\) Own experience as a legislative drafter in National Government  
\(^{222}\) Own experience as a legislative drafter in National Government  
\(^{223}\) DoJ (S.a.) Online  
\(^{224}\) GCIS (S.a c) Online  
\(^{225}\) GCIS (S.a c) Online
• Cooperative Governance and Traditional Affairs;
• Economic Development;
• Energy;
• Finance;
• Human Settlements;
• Public Works;
• The Presidency: National Planning Commission; and
• Water and Environmental Affairs.

➢ Economic Sectors and Employment Cluster:
• Chair: Rural Development and Land Reform;
• Deputy Chair: Science and Technology;
• Agriculture, Forestry and Fisheries;
• Communications;
• Economic Development;
• Finance;
• Higher Education and Training;
• Labour;
• Mineral Resources;
• Public Enterprises;
• Science and Technology;
• Tourism; and
• Trade and Industry.

➢ Governance and Administration Cluster:
• Chair: Home Affairs;
• Deputy Chair: Public Service and Administration;
• Cooperative Governance and Traditional Affairs;
• Finance;
• Justice and Constitutional Development; and
• The Presidency: Performance Monitoring and Evaluation and Administration.
Human Development Cluster:

- Chair: Basic Education;
- Deputy Chair: Health;
- Arts and Culture;
- Higher Education and Training;
- Labour;
- Science and Technology; and
- Sport and Recreation.

Social Protection and Community Development Cluster:

- Chair: Social Development;
- Deputy Chair: Public Works;
- Cooperative Governance and Traditional Affairs;
- Environmental and Water Affairs;
- Human Settlements;
- Labour;
- Rural Development and Land Reform;
- Transport; and
- Women, Youth, Children and People with Disabilities.

International Cooperation, Trade and Security Cluster:

- Chair: Defence and Military Veterans;
- Deputy Chair: International Relations and Cooperation;
- Finance;
- Rural Development and Land Reform;
- Tourism;
- Trade and Industry; and
- Water and Environmental Affairs.

Justice, Crime Prevention and Security Cluster:

- Chair: Justice and Constitutional Development;
- Deputy Chair: Police;
- Correctional Services;
• Defence and Military Veterans;
• Home Affairs; and
• State Security.

The approved draft Bill is published for public comments, normally for 30 days\textsuperscript{226}.

After the comment period closes, the Department consolidates all the comments received, and prepares a response to each one of them. If need be, the draft Bill is amended accordingly\textsuperscript{227}.

If the amendments are substantial, the draft Bill is resubmitted to Cabinet\textsuperscript{228}. Otherwise, the draft Bill is submitted to the OCSLA for a final certification.

The process can be illustrated as follows:

\begin{itemize}
\item E.g. Licencing of Businesses Bill 2013, published by the Department of Trade and Industry (Government Notice No. 231 of 2013, Government Gazette No. 36265, published on 18 March 2013).
\item Own experience as a legislative drafter in National Government
\item Own experience as a legislative drafter in National Government
\end{itemize}
Figure 3.2: Legislative process prior to submission of Bills to Parliament (Adapted by author from Presidency\textsuperscript{229})

3.3.3 INTRODUCTION OF BILLS AND PARLIAMENTARY PROCESS

The Constitution, read together with the Rules of Parliament (National Assembly, NCOP and Joint Rules) determines the manner in which Bills are created and initiated, as well as the procedures for the consideration, approval and final promulgation\textsuperscript{230,231}.

\textsuperscript{229} Presidency (2005) 17
\textsuperscript{230} Bekink (2008) 292
The Constitution stipulates different processes for introduction of Bills, depending on the classification of the Bill, namely:

- Bills amending the Constitution;
- Ordinary Bills not affecting the provinces;
- Ordinary Bills affecting the provinces;
- Mixed Bills where some clauses affect the provinces and some do not;
- or
- Money Bills.

All Bills, except money Bills, are introduced by a Minister, Deputy Minister or member of a Committee of the National Assembly. A money Bill and a Bill dealing with the equitable share and allocation of revenue must be introduced by the Minister of Finance.

For purposes of this dissertation, the prescribed process followed during the submission of Bills initiated by Cabinet Members and Deputy Ministers will be discussed.

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231 In the Doctors for Life International case, the Constitutional Court identified three stages in the legislative process: “first, the deliberative stage, when Parliament is deliberating on a bill before passing it; second, the Presidential stage, that is, after the bill has been passed by Parliament but while it is under consideration by the President; and third, the period after the President has signed the bill into law but before the enacted law comes into force” on par 40

232 Between 1997 – June 2013, 982 Bills were submitted to Parliament (GCIS (S.a d) Online).

233 Section 74 of the Constitution

234 Section 75 of the Constitution

235 Section 76 of the Constitution

236 Section 76 of the Constitution, read together with Rule 163 of the Joint Rules of Parliament

237 Section 77 of the Constitution

238 Section 73(2) of the Constitution

239 Section 73(2) of the Constitution

240 Bills initiated by Assembly Members, the Assembly or Assembly Committees have additional requirements before submission to the Speaker for introduction into the National Assembly (Rules 234-240 of the Rules of the National Assembly)
3.3.3.1 Introduction of a Bill amending the Constitution (Section 74 Bill)

3.3.3.1.1 Prior to Introduction of the Bill

A Minister (or Deputy Minister), must present all Bills to Cabinet for approval, before submission to the National Assembly\(^{241}\).

At least 30 days before a Bill amending the Constitution is submitted to Parliament by a Minister, Deputy Minister, member or committee of the National Assembly\(^ {242}\), the submitter must\(^ {243}\):

- Publish the proposed amendment in the Government Gazette for public comments;
- Forward the proposed amendment to the provincial legislatures for comments; and
- Submit the proposed amendment to the NCOP for public debate, if the amendment does not require the NCOP to pass it.

3.3.3.1.2 Introduction of Bill, First Reading in the National Assembly

After the 30 day period has passed, the Minister, Deputy Minister, member or committee of the National Assembly, must submit the following documentation to the Speaker\(^ {244}\):

- A copy of the Bill as published in the Government Gazette;
- A supporting memorandum stating that the Bill is introduced as a constitution amendment bill, the objects of the proposed constitutional amendments, the financial implications of the proposed constitutional amendment, stakeholders consulted and if the Bill is introduced by a

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\(^{241}\) Rule 159 of the Joint Rules of Parliament. During this process, the Bill is developed, preliminary certified by the Office of the State Law Advisor as constitutional and submitted to the Cabinet Committees and to Cabinet.

\(^{242}\) Section 73(2) of the Constitution

\(^{243}\) Section 73(5) of the Constitution

\(^{244}\) Rule 260 of the Rules of the National Assembly
Minister or Deputy Minister, a legal opinion by the State Law Advisor or legal advisor of the department concerned dealing with the classification of the Bill and adherence to legislative drafting conventions; and

- Any written comments received from the public and provincial legislatures\(^{245}\). The Chairperson of the NCOP also has an obligation to table all the public comments received as per section 74 (6)(b) of the Constitution, in the Council\(^{246}\).

After submission of the Bill to the Speaker and Chairperson, the Bill is referred to the Joint Tagging Mechanism\(^{247}\) ("JTM"). The committee consists of the Speaker and Deputy Speaker of the National Assembly, and the Chairperson and Permanent Deputy Chairperson of the NCOP and advised by the Parliamentary Law Advisor. Decisions of this committee are made by consensus\(^{248}\). The committee will make a finding if the Bill is a constitution amendment Bill or not\(^{249}\). Once the determination has been made that the Bill is indeed a constitution amendment Bill, the JMT also makes a finding on the following\(^{250}\):

- In terms of Section 74 of the Constitution, if the Bill must be passed by both Houses or only the National Assembly;
- The required percentage of supporting vote that is needed in the National Assembly\(^{251}\);
- The provinces required to approve the Bill before it is passed in the National Assembly; and
- The constitutional and procedural correctness of the Bill.

\(^{245}\) Section 74(6) of the Constitution
\(^{246}\) Rule 215 of the Rules of the National Council of Provinces
\(^{247}\) Rule 160 of the Joint Rules of Parliament
\(^{248}\) Rule 153(2) of the Joint Rules of Parliament
\(^{249}\) Rule 160(2) of the Joint Rules of Parliament
\(^{250}\) Rule 160(2) of the Joint Rules of Parliament
\(^{251}\) A Bill amending Chapter 1 or Section 74(1) of the Constitution requires a 75% majority of votes (Section 74(1) of the Constitution), amendments to Chapter 2 or the remainder of the Constitution require a 2/3 majority, and all other Bills require a majority of votes (Section 53(1) of the Constitution).
The Speaker (in the case of the National Assembly) will, depending on the findings of the JTM, refer the Bill to the relevant Portfolio Committee and the Chairperson (in the case of the NCOP) will refer the Bill to the relevant Select Committee and provincial legislatures to:

- Plan their work;
- Study the Bill; and
- Prepare their positions on the Bill.\(^{252}\)

When the amendment bill is introduced in the National Assembly, the submitter must submit to the Secretary of the National Assembly, a notice of the First Reading of the Bill, whereafter it will be placed on the Order Paper for the First Reading.\(^{253}\) During the First Reading, the Speaker will table the amendment bill, the supporting memorandum and explanatory summary (if one was provided).\(^{254}\)

If the amendment bill deals with the proposed amendment of Section 1 (Republic of South Africa), Chapter 2 (Bill of Rights) or Section 74(1) of the Constitution, the bill must be referred to either an Assembly committee or the joint committee on constitutional matters.\(^{255}\) In addition, if the amendment bill deals with a matter related to the NCOP; alters provincial boundaries, powers, functions or institutions; or amends a provision specifically dealing with a provincial matter, the bill must also be referred to either an Assembly committee or the joint committee on constitutional matters.\(^{256}\)

### 3.3.3.1.3 First and Second Reading in the National Council of Provinces

Constitutional amendments that deal with matters related to the NCOP; alters provincial boundaries, powers, functions or institutions; or amends a provision

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\(^{252}\) Rule 159(2) of the Joint Rules of Parliament

\(^{253}\) Rule 247 of the Rules of the National Assembly

\(^{254}\) Rule 247 of the Rules of the National Assembly

\(^{255}\) Rule 261 of the Rules of the National Assembly read together with Section 75 of the Constitution. See also *Minister of Justice v Ntuli* 1997 (6) BCLR 677 (CC) on par 32

\(^{256}\) Rule 261 of the Rules of the National Assembly read together with Section 75 of the Constitution
specifically dealing with a provincial matter\textsuperscript{257}, it must be approved by the provincial legislature of all the provinces concerned\textsuperscript{258,259} and submitted to the Chairperson of the NCOP\textsuperscript{260}. If the whole amendment bill is refused by the provinces concerned, the bill will lapse\textsuperscript{261}. However, if only a part of the amendment bill requires provincial approval and that approval is refused by the province concerned, that part of the Bill lapses, but the remainder may proceed, subject to such amendments needed to remove the lapsed part of the bill\textsuperscript{262}.

During the deliberation process in the NCOP, the Chairperson may refer the amendment bill to the appropriate select committee for deliberation\textsuperscript{263} and a public consultation process\textsuperscript{264}. If the Chairperson does not refer the amendment bill to the select committee, the matter must be placed on the Order Paper of the NCOP for deliberation\textsuperscript{265} and possible amendment\textsuperscript{266}. The amendment bill is passed if at least six (6) provinces support the bill\textsuperscript{267}.

3.3.3.1.4 Mediation Committee

If the NCOP rejects a constitutional amendment bill that was passed by the Assembly, or the NCOP amended the bill and the Assembly rejects the amended version, the bill must be referred to the Mediation Committee\textsuperscript{268}. The Mediation Committee comprises of nine (9) members of the National Assembly and a

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{257} Section 74(3)(b) of the Constitution
\item \textsuperscript{258} Section 74(8) of the Constitution
\item \textsuperscript{259} If any part of a Bill affects a specific provinces, regardless of the general applicability of the Bill, the provisions of Section 78(8) of the Constitution is applicable (\textit{Matatiele Municipality and Others v President of the Republic of South Africa and Others} 2007 (1) BCLR 47 (CC) par 21). Also, in par 85, the Constitutional Court found that if a provincial boundary is amended, both provinces must comply with Section 78(8) of the Constitution.
\item \textsuperscript{260} Rule 215 of the Rules of the National Council of Provinces
\item \textsuperscript{261} Rule 174(2) of the Joint Rules of Parliament
\item \textsuperscript{262} Rule 174(3) of the Joint Rules of Parliament
\item \textsuperscript{263} Rule 217 of the Rules of the National Council of Provinces
\item \textsuperscript{264} Rule 220 of the Rules of the National Council of Provinces
\item \textsuperscript{265} Rule 218(1) of the Rules of the National Council of Provinces
\item \textsuperscript{266} Rule 225 of the Rules of the National Council of Provinces
\item \textsuperscript{267} Rule 218(2) of the Rules of the National Council of Provinces. See also \textit{Matatiele Municipality and Others v President of the Republic of South Africa and Others} 2007 (1) BCLR 47 (CC) par 42
\item \textsuperscript{268} Rule 177 of the Joint Rules of Parliament
\end{enumerate}
\end{footnotesize}
representative of each of the provincial delegation in the NCOP\textsuperscript{269}. The Secretary will provide the Mediation Committee with a copy of the rejected Bill, as well as every version of the bill that was considered by the Assembly or NCOP\textsuperscript{270}.

The Mediation Committee will deliberate and either agree on a version of the Bill, or in the event of disagreement, inform the Speaker and the Chairperson of the NCOP of the result\textsuperscript{271}. If the mediation was successful, the following process is followed\textsuperscript{272}:

- Where the Committee agrees on the Bill as approved by the Assembly, the Secretary will submit the approved version to the Chairperson for reconsideration by the NCOP. If the NCOP passes the approved version, the Secretary must present the approved version to the President for assent\textsuperscript{273};

- Where the NCOP agrees on the Bill as amended by the NCOP, the Secretary will submit the amended version to the Speaker for reconsideration by the National Assembly. If the National Assembly passes the amended version, the Secretary must present the approved version to the President for assent\textsuperscript{274}; or

- Where the Mediation Committee agrees on another version of the Bill, the Secretary will submit the new version to the Speaker and the Chairperson of the NCOP for reconsideration by both Houses. If both Houses pass the new version, the Secretary must present the approved version to the President for assent\textsuperscript{275}.

\footnotesize{\textsuperscript{269} Section 78 of the Constitution
\textsuperscript{270} Rule 177 of the Joint Rules of Parliament
\textsuperscript{271} Rule 178 of the Joint Rules of Parliament
\textsuperscript{272} Rule 179 of the Joint Rules of Parliament
\textsuperscript{273} Rule 179 of the Joint Rules of Parliament
\textsuperscript{274} Rule 179 of the Joint Rules of Parliament
\textsuperscript{275} Rule 179 of the Joint Rules of Parliament}
If the Mediation Committee cannot agree on a version within 30 days of the Bill’s referral, or any of the Houses of Parliament rejects the version submitted by the Mediation Committee, the constitutional amendment bill lapses.

### 3.3.3.1.5 Second Reading in the National Assembly

If the mediated bill has been already passed by the National Assembly, the bill must be referred back, where the Assembly can either pass or reject the bill during the Second Reading.

### 3.3.3.1.6 Assent by President

If the National Assembly approves the Second Reading of the amendment bill, the following process is initiated:

- The Secretary must submit the Bill to the President for assent, in those instances where it is not a Section 74 Bill that requires NCOP approval; or
- In the instances where it is a Section 74 Bill that requires NCOP approval the amendment bill is referred to the Chairperson of the Council.

### 3.3.3.1.7 Summary of process

The following graphic depicts the process that is followed for constitutional amendments that affect provinces:

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276 Rule 180 of the Joint Rules of Parliament
277 Rule 174(4) of the Joint Rules of Parliament
278 Rule 176 of the Joint Rules of Parliament
279 Rule 173 of the Joint Rules of Parliament
Figure 3.3: Legislative amendment process for constitutional amendments involving provincial matters (Adapted by the author)
The following graphic depicts the process followed during the Mediation Committee deliberations:

Figure 3.4: Mediation process during Section 74 Constitutional Amendment Bills (Adapted by the author)
3.3.3.2 Introduction of an ordinary Bill not affecting the provinces (Section 75 Bill)

3.3.3.2.1 Prior to Introduction of Bill

A Minister (or Deputy Minister), must present all Bills to Cabinet for approval, before submission to the National Assembly\(^{280}\).

When an ordinary Bill is introduced in the National Assembly by a Minister, Deputy Minister, member of the Assembly or a committee, the following documents must be presented to the Speaker\(^{281}\):

- A copy of the Bill, or a copy of the Government Gazette where the Bill was published;
- An explanatory memorandum if the Bill was not published; and
- A supporting memorandum detailing the type of Bill, the objects, the financial implications, stakeholders consulted and a legal opinion from the State Law Advisor (or the legal advisor of the Department concerned) regarding the classification of the Bill and adherence to legislative drafting conventions.

On submission of a Bill to the National Assembly, the Bill is classified into one of the categories referred to above by the JTM\(^{282}\). The committee consists of the Speaker and Deputy Speaker of the National Assembly, and the Chairperson and Permanent Deputy Chairperson of the NCOP, and is advised by the Parliamentary Law Advisor. Decisions of this committee are made by consensus\(^{283}\). The JTM will also make findings on the following matters\(^{284}\):

- Confirmation that the Bill is a Section 75 Bill;

\(^{280}\) Rule 159 of the Joint Rules of Parliament

\(^{281}\) Rule 243 of the Rules of the National Assembly

\(^{282}\) Rule 153 of the Joint Rules of Parliament

\(^{283}\) Rule 153(2) of the Joint Rules of Parliament

\(^{284}\) Rule 160(3) of the Joint Rules of Parliament
Any provision that is regulated by Section 76 of the Constitution, either by submission of the Bill to the National Assembly or to the NCOP;

The constitutional and procedural correctness of the Bill.

3.3.3.2.2 Introduction of Bill and First Reading

When the Bill is introduced in the National Assembly, the submitter must submit to the Secretary of the National Assembly, a notice of the First Reading of the Bill, whereafter it will be placed on the Order Paper for the First Reading\textsuperscript{285}. During the First Reading, the Speaker will table the amendment bill, the supporting memorandum and explanatory summary (if one was provided)\textsuperscript{286}.

After the First Reading, the Speaker will then direct the Bill, unless the contents are disclosed prematurely and will result in prejudice to the state or the general public, to the relevant Portfolio Committee, committee or the National Assembly, or a joint committee of Parliament\textsuperscript{287}. The Assembly Committee will deliberate on the Bill, request public comments\textsuperscript{288} and present a report to the National Assembly\textsuperscript{289}.

3.3.3.2.3 Second Reading

During the Second Reading\textsuperscript{290}, the Bill is debated, and if the Assembly approves the Second Reading, the Bill is passed\textsuperscript{291} and forwarded to the NCOP\textsuperscript{292}.

\textsuperscript{285} Rule 247 of the Rules of the National Assembly
\textsuperscript{286} Rule 247 of the Rules of the National Assembly
\textsuperscript{287} Rule 247(5) of the Rules of the National Assembly
\textsuperscript{288} Rule 249 of the Rules of the National Assembly
\textsuperscript{289} Rule 251 of the Rules of the National Assembly
\textsuperscript{290} Rule 253 of the Rules of the National Assembly
\textsuperscript{291} Rule 253(4) of the Rules of the National Assembly
\textsuperscript{292} Rule 207 of the Rules of the National Council of Provinces.
3.3.3.2.4 Referral to National Council of Provinces

The NCOP will either refer it to a committee or place it on an Order Paper for consideration\textsuperscript{293}. The Bill is passed if the NCOP agrees to the Bill, as per section 75(2) of the Constitution\textsuperscript{294}. The NCOP will then refer the Bill to the President for assent\textsuperscript{295}.

However, should the Select Committee or the NCOP propose any amendments to the Bill, the NCOP must first decide on the amendment proposals, and thereafter on the Bill as a whole\textsuperscript{296}. If the NCOP accepts the proposed amendments or rejects the Bill, it must be referred back to the National Assembly\textsuperscript{297}.

The National Assembly must reconsider the Bill and may either approve the Bill (with or without the amendments proposed by the NCOP) or decide not to proceed with the Bill\textsuperscript{298}.

3.3.3.2.5 Assent of President

If the National Assembly approves the Bill, it must be forwarded by the Secretary to the President for assent\textsuperscript{299}.

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\textsuperscript{293} Rule 208 of the Rules of the National Council of Provinces
\textsuperscript{294} Rule 209 of the Rules of the National Council of Provinces
\textsuperscript{295} Rule 214(a) of the Rules of the National Council of Provinces
\textsuperscript{296} Rule 213 of the Rules of the National Council of Provinces
\textsuperscript{297} Rule 214 of the Rules of the National Council of Provinces
\textsuperscript{298} Rule 183 of the Joint Rules of Parliament
\textsuperscript{299} Rule 183 of the Joint Rules of Parliament
3.3.3.2.6  Summary of process

This process can be graphically represented as follows:

Figure 3.5: Legislative process for Section 75 Bills not affecting provinces (adapted by the author)
3.3.3.3 Introduction of a Bill affecting provinces (Section 76 Bills)

3.3.3.3.1 Prior to Introduction of Bill

A Minister (or Deputy Minister), must present all Bills to Cabinet for approval, before submission to the National Assembly. When a Section 76 Bill is introduced in the National Assembly by a Minister, Deputy Minister, member of the Assembly or a committee, the following documents must be presented to the Speaker:

- A copy of the Bill, or a copy of the Government Gazette where the Bill was published;
- An explanatory memorandum if the Bill was not published; and
- A supporting memorandum detailing the type of Bill, the objects, the financial implications, stakeholders consulted and a legal opinion from the State Law Advisor (or the legal advisor of the Department concerned) regarding the classification of the Bill and adherence to legislative drafting conventions.

On submission of a Bill to the National Assembly, the Bill is classified into one of the categories referred to above by the JTM.

A Section 76 Bill deals with the following issues:

- A functional area listed in Schedule 4 of the Constitution

- Administration of indigenous forests;
- Agriculture;
- Airports other than international and national airports;

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300 Rule 159 of the Joint Rules of Parliament
301 Rule 243 of the Rules of the National Assembly
302 Rule 153 of the Joint Rules of Parliament
303 Section 76(3) of the Constitution
304 Ex Parte President of the Republic of South Africa In Re: Constitutionality of the Liquor Bill 2000 (1) BCLR (1) CC par 27

© University of Pretoria
- Animal control and diseases;
- Casinos, racing, gambling and wagering, excluding lotteries and sports pools;
- Consumer protection;
- Cultural matters;
- Disaster management;
- Education at all levels, excluding tertiary education;
- Environment;
- Health services;
- Housing;
- Indigenous law and customary law, subject to Chapter 12 of the Constitution;
- Industrial promotion;
- Language policy and the regulation of official languages to the extent that the provisions of section 6 of the Constitution expressly confer upon the provincial legislatures legislative competence;
- Media services directly controlled or provided by the provincial government, subject to section 192;
- Nature conservation, excluding national parks, national botanical gardens and marine resources;
- Police to the extent that the provisions of Chapter 11 of the Constitution confer upon the provincial legislatures legislative competence;
- Pollution control;
- Population development;
- Property transfer fees;
- Provincial public enterprises in respect of the functional areas in this Schedule and Schedule 5;
- Public transport;
- Public works only in respect of the needs of provincial government departments in the discharge of their responsibilities to administer
functions specifically assigned to them in terms of the Constitution or any other law;

- Regional planning and development;
- Road traffic regulation;
- Soil conservation;
- Tourism;
- Trade;
- Traditional leadership, subject to Chapter 12 of the Constitution;
- Urban and rural development;
- Vehicle licensing;
- Welfare services;

- Section 65(2): Decisions by delegations of the NCOP;
- Section 163: Organised local government;
- Section 182: Public Protector;
- Section 195(3) and (4): Promotion of the values and principles of public administration;
- Section 196: Public Service Commission;
- Section 197: Public Service;
- Section 44(2): Legislative process of NA and NCOP;
- Section 220(3): Financial and Fiscal Commission;
- Chapter 13 that includes any provision affecting the financial interests of the province;
- Section 42(6): Seat of Parliament.

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305 Section 76(3)(a) of the Constitution
306 Section 76(3)(b) of the Constitution
307 Section 76(3)(c) of the Constitution
308 Section 76(3)(d) of the Constitution
309 Section 76(3)(e) of the Constitution
310 Section 76(3)(f) of the Constitution
311 Section 76(4)(a) of the Constitution
312 Section 76(4)(a) of the Constitution
313 Section 76(4)(b) of the Constitution
314 Section 42(6) of the Constitution
In the Constitutional Court judgment of *Ex parte the President: In re Constitutionality of the Liquor Bill*315 (hereafter referred to as the “Liquor Bill case”), the Court laid down the “substantial measure” test for tagging of Bills:

“…section 76(3)…requires that a Bill must be dealt with under the procedure established by either section 76(1) or section 76(2) amongst others, “if it falls within a functional area listed in Schedule 4”. It must be borne in mind, moreover, that section 76 is headed “Ordinary Bills affecting provinces”. This is in my view a strong textual indication that section 76(3) must be understood as requiring that any Bill whose provisions in substantial measure fall within a functional area listed in Schedule 4 be dealt with under section 76”316.

The “substantial measure” test was reinforced by the same Court in *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others*317 (hereafter referred to as the “Tongoane case”):

“What matters for the purposes of tagging is not the substance or the true purpose and effect of the Bill, rather, what matters is whether the provisions of the Bill “in substantial measure fall within a functional area listed in Schedule 4”. This statement refers to the test to be adopted when tagging Bills. This test for classification or tagging is different from that used by this Court to characterise a Bill in order to determine legislative competence. This “involves the determination of the subject-matter or the substance of the legislation, its essence, or true purpose and effect, that is, what the [legislation] is about”318.

315 2000 (1) BCLR 1 (CC)
316 Par 27
317 2010 (8) BCLR 741 (CC)
318 Par 58
Further, the Court ruled:

“The tagging of Bills before Parliament must be informed by the need to ensure that provinces fully and effectively exercise their appropriate role in the process of considering national legislation that substantially affects them. Paying less attention to the provisions of a Bill once its substance, or purpose and effect, has been identified undermines the role that provinces should play in the enactment of national legislation affecting them. ... To apply the “pith and substance” test to the tagging question, therefore undermines the constitutional role of the provinces in legislation in which they should have a meaningful say, and disregards the breadth of the legislative provisions that section 76(3) requires to be enacted in accordance with the section 76 procedure”\textsuperscript{319}.

In the \textit{Liquor Bill} case, the Constitutional Court determined that the principal differences between Section 75 and Section 76 Bills procedures are\textsuperscript{320}:

- Section 76 Bills give more weight to the position of the NCOP. This occurs chiefly through the invocation of the Mediation Committee. If one House rejects a Bill passed by the other, or if one House refuses to accept a Bill as amended by the other, the legislation must be referred to the Mediation Committee, which consists of nine members of the National Assembly and one delegate from each provincial delegation in the NCOP;

- If the NCOP raises objections to a version of the Bill approved by the Mediation Committee in circumstances where the Bill was introduced in the National Assembly, the Bill lapses unless the National Assembly passes it again with a two-thirds majority; and

- When the NCOP votes on a question under Section 75, the provisions of Section 65 (each province has a single vote in the NCOP “\textit{cast on behalf of the province by the head of its delegation}”, and in terms of which questions before the NCOP are “\textit{agreed when at least five provinces vote...}"

\textsuperscript{319} Par 59-60
\textsuperscript{320} Par 25
in favour of the question”) do not apply. Instead, in terms of Section 75(2), each delegate in a provincial delegation has one vote and the question is decided by a majority of the votes cast (the presiding delegate having a casting vote), subject to a quorum of one-third of the delegates.

A Bill that has been tagged wrongly and adopted wrongly, will be judged as not complying with the provisions of the Constitutional Court, and will be declared unconstitutional.321

If a Bill deals with the following areas, it must be presented to the National Assembly as per subsection (1) of the Constitution:322

- Intervention by Parliament in a Schedule 5 functional area in certain circumstances;323
- Functions of the Fiscal and Financial Commission;324 and
- Financial matters.325

3.3.3.3.2 Introduction of Bill and First Reading

When the Bill is introduced in the National Assembly, the submitter must submit to the Secretary of the National Assembly, a notice of the First Reading of the Bill, whereafter it will be placed on the Order Paper for the First Reading.326 During the First Reading, the Speaker will table the amendment bill, the supporting memorandum and explanatory summary (if one was provided).327

After the First Reading, the Speaker will then direct the Bill, unless if the contents are disclosed prematurely and will result in prejudice to the state or the general public, to the relevant Portfolio Committee, committee or the National Assembly,

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321 Liquor Bill case; Tongoane case
322 Section 76(4) of the Constitution
323 Section 44(2) of the Constitution
324 Section 220(3) of the Constitution
325 Chapter 13 of the Constitution
326 Rule 247 of the Rules of the National Assembly
327 Rule 247 of the Rules of the National Assembly
or a joint committee of Parliament\textsuperscript{328}. The Assembly Committee will deliberate on the Bill, request public comments\textsuperscript{329} and present a report to the National Assembly\textsuperscript{330}.

3.3.3.3.3 Second Reading

During the Second Reading\textsuperscript{331}, the Bill is debated, and if the Assembly approves the Second Reading, the Bill is passed\textsuperscript{332} and forwarded to the NCOP\textsuperscript{333}.

3.3.3.3.4 Referral to National Council of Provinces

The NCOP will either refer it to a committee or place it on an Order Paper for consideration\textsuperscript{334}. The Bill is passed if the NCOP agrees to the Bill, as per section 75(2) of the Constitution\textsuperscript{335}. The NCOP will then refer the Bill to the President for assent\textsuperscript{336}.

However, should the Select Committee or the NCOP propose any amendments to the Bill, the NCOP must first decide on the amendment proposals, and thereafter on the Bill as a whole\textsuperscript{337}. If the NCOP accepts the proposed amendments or rejects the Bill, it must be referred back to the National Assembly\textsuperscript{338}.

The National Assembly must reconsider the Bill and may either approve the Bill (with or without the amendments proposed by the NCOP) or decide not to proceed with the Bill\textsuperscript{339}.

\begin{itemize}
\item[328] Rule 247(5) of the Rules of the National Assembly
\item[329] Rule 249 of the Rules of the National Assembly
\item[330] Rule 251 of the Rules of the National Assembly
\item[331] Rule 253 of the Rules of the National Assembly
\item[332] Rule 253(4) of the Rules of the National Assembly
\item[333] Rule 207 of the Rules of the National Council of Provinces.
\item[334] Rule 208 of the Rules of the National Council of Provinces
\item[335] Rule 209 of the Rules of the National Council of Provinces
\item[336] Rule 214(a) of the Rules of the National Council of Provinces
\item[337] Rule 213 of the Rules of the National Council of Provinces
\item[338] Rule 214 of the Rules of the National Council of Provinces
\item[339] Rule 183 of the Joint Rules of Parliament
\end{itemize}
3.3.3.5 Assent of President

If the National Assembly approves the Bill, it must be forwarded by the Secretary to the President for assent\textsuperscript{340}.

3.3.3.6 Summary of process

This process can be graphically represented as follows:

\textsuperscript{340} Rule 183 of the Joint Rules of Parliament
Figure 3.6: Legislative process for a Section 76 Bill (adapted by author)
3.3.2.4 Introduction of a Mixed Section 75/76 Bill where some clauses affect the provinces and others do not

A Minister (or Deputy Minister), must present all Bills to Cabinet for approval, before submission to the National Assembly.\(^{341}\)

A Mixed Section 75/76 Bill contains some sections that would ordinarily be considered dealing with Section 75 issues, and others that would fall within the scope of Section 76. The Constitution does not provide for "mixed bills".\(^{342}\)

If a Bill introduced in the Assembly is classified or reclassified by the JTM as a mixed section 75/76 Bill, the JTM must decide whether the Bill may be proceeded with or ruled out of order.\(^{343}\) A mixed section 75/76 Bill must be ruled out of order unless —

- the Bill is of such a nature that a dispute between the Houses is unlikely to arise;
- the Bill is drafted in such a way that it would be possible to isolate the provisions in the Bill to which section 75 and section 76, respectively, apply should it become necessary during the proceedings —
  - to split the Bill into two separate section 75 and section 76 Bills;\(^{344}\)
  - or
  - to amend the Bill in order that it becomes either a section 75 or a section 76 Bill; or

\(^{341}\) Rule 159 of the Joint Rules of Parliament

An attempt was made to amend the Constitution to deal with mixed bills with the introduction of Section 76A of the Constitution of the Republic of South Africa Fifth Amendment Bill, 1998 [B142-98], but that section of the Amendment Bill was not approved and promulgated.

\(^{342}\) Rule 191(1)(a) of the Joint Rules of Parliament

\(^{343}\) The Children’s Bill was considered to be a “mixed bill” and the Deputy Speaker requested the Executive to split the consolidated Bill into a Section 75 Bill and a Section 76 Bill. The Constitution does not provide for “mixed bills”, but “mixed acts” are permissible (Children’s Act, 2005 (Act No 38 of 2005) was passed by Parliament in terms of Section 75 of the Constitution, and the Children’s Amendment Act, 2007 (Act No. 41 of 2007) was passed by Parliament, and operates as a single Act)
the Bill is for any other reason unlikely to lead to unmanageable procedural complications\textsuperscript{345}.

If the JTM cannot agree whether the Bill should be proceeded with or ruled out of order, the Bill must be regarded as being out of order\textsuperscript{346}.

3.3.3.5 Introduction of Money Bills (Section 77 Bills)

3.3.3.5.1 Prior to Introduction of Bill

A Money Bill can only be introduced in the National Assembly by the Minister of Finance, unless the Bill deals with the appropriation of money for postal and telecommunications services or if the Minister of Finance designates another Minister\textsuperscript{347}.

When a Money Bill is introduced in the National Assembly the following documents must be presented to the Speaker\textsuperscript{348}:

\begin{itemize}
  \item A copy of the Bill, or a copy of the Government Gazette where the Bill was published;
  \item An explanatory memorandum if the Bill was not published; and
  \item A supporting memorandum detailing the type of Bill, the objects, the financial implications, stakeholders consulted and a legal opinion from the State Law Advisor (or the legal advisor of the Department concerned) regarding the classification of the Bill and adherence to legislative drafting conventions.
\end{itemize}

On submission of a Bill to the National Assembly, the Bill is classified into one of the categories referred to by the JTM\textsuperscript{349}. The JTM will also make a finding to confirm if the Bill is a Money Bill\textsuperscript{350}.

\textsuperscript{345} Rule 191(2) of the Joint Rules of Parliament
\textsuperscript{346} Rule 191(3) of the Joint Rules of Parliament
\textsuperscript{347} Rule 285 of the Rules of the National Assembly
\textsuperscript{348} Rule 243 of the Rules of the National Assembly
\textsuperscript{349} Rule 77(4) of the Rules of the National Assembly
\textsuperscript{350} Rule 77(4) of the Rules of the National Assembly
3.3.3.5.2 Introduction of Bill and First Reading

When the Minister of Finance introduces a Money Bill, the Minister must consult the Speaker when determining whether to introduce the Bill in accordance with the ordinary procedure of Rule 243 or the special procedure of Rule 287(2). If the Bill deals with the appropriation of money for normal government services, or the imposition of tax, levies or duties for normal government services, the special procedure is mandatory.

The Minister of Finance must deliver an introductory speech in the National Assembly and introduce the main Appropriations Bill by tabling the Bill in the National Assembly, whereafter the Speaker will place the Bill on the Order Paper for First Reading.

The Speaker will refer the Bill, schedules and introductory speech to the Portfolio Committee on Public Finance for consideration. The Portfolio Committee will consider the Bill, schedules and papers. During the deliberations, the Committee may consult with the relevant Select Committee of the NCOP. The Committee will prepare a report that must be presented to the National Assembly.

The National Assembly will consider the report and the appropriations Bill during the First Reading. After approval of the appropriations Bill, the votes in the schedule must be considered.

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349 Rule 153 of the Joint Rules of Parliament
350 Rule 160(6) of the Joint Rules of Parliament
351 Rule 286(2) of the Rules of the National Assembly
352 Rule 286(2) of the Rules of the National Assembly
353 Rule 288 of the Rules of the National Assembly
354 Rule 289(1) of the Rules of the National Assembly
355 Rule 290 of the Rules of the National Assembly
356 Rule 290 of the Rules of the National Assembly
357 Rule 290(2) of the Rules of the National Assembly
358 Rule 290(5) of the Rules of the National Assembly
359 "Votes" are the schedules of funding that individual government departments will receive from the Appropriations Bill to fulfil their ordinary functions.

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3.3.3.5.3 Second Reading

When the schedule of the appropriations Bill has been approved, the Speaker will place the Bill on the Order Paper for the Second Reading. During the debate, the National Assembly must consider any amendments proposed by the NCOP.

3.3.3.5.4 Assent of President

If the National Assembly approves the Bill, it must be forwarded by the Secretary to the President for assent.

3.4. PRESIDENTIAL ASSENT TO BILLS

3.4.1 PRESIDENT’S DUTIES WHEN RECEIVING A BILL

Once a Bill has been approved by the relevant house of Parliament, the Bill is forwarded to the President for assent. The President must do the following:

- Assent to and sign the Bill into an Act; or
- If the President has reservations about the constitutionality of a Bill, refer it back to the National Assembly for reconsideration.

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360 Rule 294 of the Rules of the National Assembly
361 Rule 295 of the Rules of the National Assembly
362 Rule 183 of the Joint Rules of Parliament
363 Rules 173 and 183 of the Joint Rules of Parliament
364 Section 79(1) of the Constitution
3.4.2 PRESIDENTIAL RESERVATIONS

3.4.2.1 Referral to National Assembly

3.4.2.1.1 Deliberations in the Portfolio Committee

If the President has reservations about the constitutionality of a Bill, the remitted Bill is submitted to the Speaker. The Speaker must refer the remitted Bill, together with the President’s reservations to the relevant Portfolio Committee. During the Portfolio Committee’s deliberation they may only focus on the President’s reservations, and must present a report on their findings to the National Assembly.

During the reconsideration process, the Portfolio Committee must involve the NCOP in the following instances:

- If the President has reservations about the constitutionality of the Bill relating to a procedural NCOP matter; or
- If sections 74(1), (2), (3)(b) or 76 was applied during the approval of the Bill; or
- If the Bill is a Mixed Section 75/76 Bill.

If the Portfolio Committee agrees with the President’s reservations, the committee must do any of the following:

- If the reservation relates to a procedural matter, the Committee must recommend how the matter can be rectified; or
- If the reservation relates to a content issue, the Committee must propose an amended Bill that will rectify any constitutional defect in the Bill; or

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365 Ex Parte Minister of Safety and Security and Others: In Re: S v Walters and Another 2002 (7) BCLR 663 (CC) par 69
366 Rule 203(1) of the Joint Rules of Parliament
367 Rule 203(2) of the Joint Rules of Parliament
368 Section 79(3) of the Constitution
369 Rule 203(2)(ii) of the Joint Rules of Parliament
370 Rules 203(3) of the Joint Rules of Parliament
If the Bill is procedurally or substantively so defect that no rectifications are possible, the Committee must recommend that the National Assembly revoke their approval of the Bill and reject the Bill.

3.4.2.1.2 Order Paper in the National Assembly

The Speaker must place the President’s reservation together with the recommendations of the Portfolio Committee, as well as the amended Bill (if amended by the Portfolio Committee) on the Order Paper of the National Assembly. The National Assembly debate is restricted to the President’s reservations, the Portfolio Committee’s report, and any amendments proposed by the Portfolio Committee. However, if needed, the National Assembly may refer the matter back to the Portfolio Committee before making a final decision.

3.4.2.1.3 Rectification of procedural or substantive defects

If the Bill is procedurally defective according to the President, the Bill will be returned to the President after the National Assembly took the following corrective measures:

- Rejected the President’s reservations; or
- Accepted the President’s reservations, and in instances where the National Assembly could, without involving the NCOP, rectify the defect.
- Referred the matter to the NCOP if the National Assembly agreed with the President’s reservation and the matter required the NCOP’s involvement or rectification.

If the Presidential reservation deals with substantive defects, the Bill will be returned to the President if the National Assembly rejected the reservation.

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371 Rule 204(1) of the Joint Rules of Parliament
372 Rule 204(2) of the Joint Rules of Parliament
373 Rule 204(5) of the Joint Rules of Parliament
374 Rule 205 of the Joint Rules of Parliament
375 Rule 206(1) of the Joint Rules of Parliament
However, if the National Assembly accepts the President’s reservations and passes an amended Bill, the amended Bill must be submitted:

- Either to the President for assent, if the Bill is a constitutional amendment that may be approved by the National Assembly alone, or is a Section 75 Bill\(^{376}\); or
- Referred to the NCOP if Section 74 requires NCOP approval, or is a Section 76 Bill, or a Mixed Section 75/76 Bill\(^{377}\).

### 3.4.2.2 Referral to National Council of Provinces

#### 3.4.2.2.1 Deliberations in the Select Committee

The Chairperson of the NCOP, once the remitted or amended Bill is received from the National Assembly, must refer the Presidential reservation and the Bill to the relevant Select Committee\(^{378}\). The Select Committee must deliberate on the President’s reservations, may consult with the Portfolio Committee and must report on the reservations and Bill\(^{379}\). If the Select Committee agrees with the President’s reservation, the Committee has one of the following responsibilities\(^{380}\):

- If the reservation deals with a procedural defect, the Committee must recommend how the defect will be corrected; or
- If the National Assembly has passed the Bill:
  - Recommend that the approved Bill be accepted; or
  - Recommend that the Bill be rejected.

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\(^{376}\) Rule 206(2)(a) of the Joint Rules of Parliament
\(^{377}\) Rule 206(2)(b) of the Joint Rules of Parliament
\(^{378}\) Rule 209(1) of the Joint Rules of Parliament
\(^{379}\) Rule 209(2) of the Joint Rules of Parliament
\(^{380}\) Rule 209(3) of the Joint Rules of Parliament
3.4.2.2 Order Paper in the National Council of Provinces

After receiving the report of the Select Committee, the Chairperson of the NCOP must place the President’s reservations and the report on the Order Paper of the NCOP.\(^{381}\)

3.4.2.2.3 Rectification of procedural or substantive defects

If the President’s reservation dealt with a procedural defect, the Bill is returned to the President if the NCOP rejects the reservation, or corrects the defect.\(^{382}\) If the defect is substantive, and the NCOP has rectified the defect, the Bill is referred to the President for assent.\(^{383}\)

However, if the National Assembly proposed an amended Bill, and the NCOP rejects the amended Bill, the matter is referred to the Mediation Committee for finalization, as per Section 74 or 76 of the Constitution.\(^{384}\)

3.4.2.2.4 Final Referral to President for Assent

If, after reconsideration of the President’s reservation, the National Assembly and NCOP accept the reservations, rectify the defect and present the amended Bill to the President, the President must assent to and sign the Bill.\(^{385}\)

3.4.2.2.5 President’s referral to the Constitutional Court for a decision on the constitutionality of a Bill

However, if the President’s reservation is not accepted, the President must either assent to and sign the Bill, or refer the matter to the Constitutional Court for a decision on the constitutionality of a Bill.\(^{386}\)

\(^{381}\) Rule 210(1) of the Joint Rules of Parliament
\(^{382}\) Rule 211(1) of the Joint Rules of Parliament
\(^{383}\) Rule 212(1) of the Joint Rules of Parliament
\(^{384}\) Rule 212(3) of the Joint Rules of Parliament
\(^{385}\) Section 79(4) of the Constitution
decision. This referral will be invoked if Parliament does not accommodate the President’s reservations during their deliberations.

The President, as defender of the Constitution, may refer a Bill either on substantive or procedural grounds. Challenges to the constitutionality of a Bill by the public or interest groups must await the finalization of the legislative process, i.e. the signing of the Bill into an Act.

The President may refer a Bill if there is a reservation about a single provision. The jurisdiction of the Constitutional Court to consider the constitutionality of a Bill is limited to reservations of the President.

The Constitutional Court’s deliberation is limited to a “decision regarding the Bill’s constitutionality only in relation to the President’s reservations,” but the decision by the Constitutional Court will encompass all the provisions as the Bill is not yet an Act, and therefore all provisions must pass constitutional muster.

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386 Section 79(4) of the Constitution
387 Ex Parte President of the Republic of South Africa In Re: Constitutionality of the Liquor Bill 2000 (1) BCLR 1 (CC) par 12
388 Doctors for Life International v Speaker of the National Assembly and Others 2006 (12) BCLR 1399 (CC) par 55
389 Doctors for Life International v Speaker of the National Assembly and Others 2006 (12) BCLR 1399 (CC) par 29. The Constitutional Court also stated that “a complaint relating to failure by Parliament to facilitate public involvement in its legislative processes after Parliament has passed the bill will invariably require a court to consider the validity of the resulting bill. If the Court should find that Parliament has not fulfilled its obligation to facilitate public involvement in its legislative processes, the Court will be obliged under section 172(1)(a) to declare that the conduct of Parliament is inconsistent with the Constitution and therefore invalid. This would have an impact on the constitutionality of the bill that is a product of that process” on par 46.
390 Doctors for Life International v Speaker of the National Assembly and Others 2006 (12) BCLR 1399 (CC) par 54.
391 Ex Parte President of the Republic of South Africa In Re: Constitutionality of the Liquor Bill 2000 (1) BCLR 1 (CC) par 17
392 President of the RSA and Others v United Democratic Movement and Others 2002 (11) BCLR 1164 (CC) par 26, Doctors for Life International v Speaker of the National Assembly and Others 2006 (12) BCLR 1399 (CC) par 56, Van Straaten v President of the Republic of South Africa and Others 2009 (5) BCLR 480 (CC) par 4
393 Ex Parte President of the Republic of South Africa In Re: Constitutionality of the Liquor Bill 2000 (1) BCLR 1 (CC) par 14
394 Ex Parte President of the Republic of South Africa In Re: Constitutionality of the Liquor Bill 2000 (1) BCLR 1 (CC) par 18
However, the Constitutional Court may only consider issues raised by the President in compliance with the Constitution. The Court will apply an objective test to determine constitutionality, namely:

- Rational linkage between the mischief the legislation tries to rectify and the achievement of a legitimate government objective;
- Reasonable infringement on basic human rights of the individual;
- Evaluation of the legislative consequences when the Act in implemented; and
- All the circumstances when the Act is implemented.

If, after deliberation, the Constitutional Court finds that the Bill does comply with the Constitution, the President must assent to and sign the Bill.

3.5 DECLARATION OF CONSTITUTIONALITY OF AN ACT ON APPLICATION BY MEMBERS OF THE NATIONAL ASSEMBLY

Members of the National Assembly may apply directly to the Constitutional Court for a declaration that an Act (parts of the Act, or the whole Act) is unconstitutional. The application must be brought on the grounds of “interest of justice” and a “reasonable prospect of success”. The onus of proving the
alleged unconstitutionality rests on the applicants\textsuperscript{402}. The Constitutional Court therefore has exclusive jurisdiction to grant interim relief\textsuperscript{403}.

The application must be supported by at least one-third of the members of the National Assembly and be lodged with the Court within 30 days of the Presidential assent and signing of the Act\textsuperscript{404,405}.

The Constitutional Court may delay the implementation of an Act until the Court has made a finding regarding the constitutionality of the Act\textsuperscript{406}.

3.6 PUBLICATION AND SAFEKEEPING OF ACTS

As soon as a Bill has been assented to and signed by the President, the Act must be published\textsuperscript{407,408} in the Government Gazette. The Act may come into operation on the day of publication, or a future date determined by the President\textsuperscript{409}.

The signed copy of an Act is handed over to the Constitutional Court for safekeeping\textsuperscript{410}.

\textsuperscript{402} “An objector who challenges the electoral scheme on these grounds bears the onus of establishing the absence of a legitimate government purpose, or the absence of a rational relationship between the measure and that purpose” New National Party of South Africa v Government of the RSA and Others 1999 (5) BCLR 489 (CC) par 19.

\textsuperscript{403} National Gambling Board v Premier of KwaZulu-Natal and Others 2002 (2) BCLR 156 (CC) par 51

\textsuperscript{404} Section 80(2) of the Constitution

\textsuperscript{405} Doctors for Life International v Speaker of the National Assembly and Others 2006 (12) BCLR 1399 (CC) par 60-65. Also see Khosa and Others v Minister of Social Development and Others 2004 (6) SA 505 (CC) par 91; Mahlaule and Others v Minister of Social Development and Others 2004 (6) BCLR 569 (CC)

\textsuperscript{406} Section 80(3) of the Constitution

\textsuperscript{407} Section 81 of the Constitution. See also Ex Parte Minister of Safety and Security and Others: In re: S v Walters and Another 2002 (7) BCLR 663 (CC) par 70-71

\textsuperscript{408} Between 1994 – June 2013, 1168 Acts were promulgated (GCIS (S.a e) Online).

\textsuperscript{409} Section 81 of the Constitution. See also Kruger v The President of the Republic of South Africa and Others 2009 (3) BCLR 268 (CC) par 9.

\textsuperscript{410} Section 82 of the Constitution
3.7 CONCLUSION

The legislative process is, as seen from the aforementioned, a highly regulated environment. The environment is carefully monitored by various role-players such as the members of Parliament, the Constitutional Court and the public.

The questions remain as to how does policy “translate” into legislation, and what is the interaction and parameters of interaction between Ministers and Parliament during the process? This process will be the focal point of the next chapter of the dissertation.
# CHAPTER 4: DOCTRINE OF THE SEPARATION OF POWERS

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“Beyond the common law, separation of powers is an even more vital tenet of our constitutional democracy.” (Moseneke DCJ, Constitutional Court, 2012)

4.1 INTRODUCTION

The Constitution was adopted to facilitate the political transition in South Africa from a system where the Parliament is supreme to a system where the Constitution is supreme. One of the key mechanisms to achieve the transformation was the enhancement of the doctrine of the separation of powers within the Constitution.

4.2 DEFINING “SEPARATION OF POWERS”

4.2.1 ORIGIN OF DOCTRINE OF THE SEPARATION OF POWERS

One of the first concrete examples of the separation of powers can be found in the Roman Republic of 600 BC, where the Constitution of the Roman Republic mixed elements of a democracy, aristocracy and a monarchy to create
three separate branches of government. Within these three branches, the Republic’s Constitution created checks and balances between the different elements.

Aristotle (384 BC – 322 BC) argued for a “government of laws and not of men”, where all the rulers were subject to the laws, and he stated:

“All forms of constitutions ... have three factors in reference to which the good lawgiver has to consider what is expedient for each constitution; and if these factors are well-ordered the constitution must of necessity be well-ordered, and the superiority of one constitution over another necessarily consists in the superiority of each of these factors. Of these three factors one is, what is to be the body that deliberates about the common interests, second the one connected with the magistracies, that is, what there are to be and what matters they are to control, and what is to be the method of their election, and a third is, what is to be the judiciary.”

Legal scholars credit Montesquieu with the development of the doctrine of the separation of powers in 1748, based on the following passage from his famous book “The Spirit of Laws”:

“6. Of the Constitution of England. In every government there are three sorts of power: the legislative; the executive in respect to things dependent on the law of nations; and the executive in regard to matters that depend on the civil law.

By virtue of the first, the prince or magistrate enacts temporary or perpetual laws, and amends or abrogates those that have been...
already enacted. By the second, he makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions. By the third, he punishes criminals, or determines the disputes that arise between individuals. The latter we shall call the judiciary power, and the other simply the executive power of the state.”

John Adams422 carried these ideas forward in the Constitution of Massachusetts in 1780, where Article XXX stated:

“In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.”

James Madison and the rest of the “founding Fathers” drafted the first United States Constitution in 1787 during the Constitutional Convention423. Madison’s vision included a government of separate institutions with different powers, so that no-one institution had too much power over the other424. Each of the branches of government that was created by the Constitution had certain powers425, and these powers were limited and “checked” by the other branches in a system called

422 As quoted by Steward (2004) 189
423 US Constitution (S.a a) Online
424 US Constitution (S.a a) Online
425 US Constitution (S.a b) Online states the following: Article. I, Section. 1: “All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.” Article. II, Section. 1: “The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected…” Article III, Section. 1: “The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”
“Checks and Balances”\textsuperscript{426}. The checks and balances were designed to prevent one branch from gaining too much power and ruling the other with an iron fist\textsuperscript{427}. The doctrine of the separation of powers has subsequently been included in almost all constitutions in the world\textsuperscript{428}.

On the opposite spectrum, Jennings\textsuperscript{429} viewed the idea of the separation of powers not as a constitutional principle, but as a policy concept:

\begin{quote}
\textit{The existence of an elected legislature necessarily implies a separation of powers, not because it is possible to distinguish functions of government into three classes, but simply because an assembly is not a suitable body to control detailed administration or to decide whether the laws have been broken or not.}
\end{quote}

Regardless of the origin of the doctrine, Rautenbach and Malherbe\textsuperscript{430} state that this doctrine has formally become the most important feature of all constitutional systems, and that worldwide almost all constitutions make the distinction between powers formally. This doctrine was also accepted in the Constitution\textsuperscript{431}, although the actual words “\textit{separation of powers}” is not contained in the text.

4.2.2 DEFINITION OF “SEPARATION OF POWERS”

The doctrine of the separation of powers can be defined as follows:

\begin{quote}
\textit{The doctrine of the separation of powers entails that the freedom of the citizens of a state can be ensured only if a concentration of power, which can lead to abuse, is prevented by a division of}
\end{quote}

\textsuperscript{426} US Constitution (S.a c) Online
\textsuperscript{427} US Constitution (S.a c) Online
\textsuperscript{428} Rautenbach & Malherbe (2009) 85
\textsuperscript{429} As quoted by Steward (2004) 189
\textsuperscript{430} Rautenbach & Malherbe (2009) 85
\textsuperscript{431} In re: Certification of the Constitution of the RSA, 1996 1996 (10) BCLR 1253 (CC)
government authority into legislative, executive and judicial authority, and its exercise by different government bodies.”

Seedorf and Sibanda also include the allocation of specific functions, duties and responsibilities (public functions) to specific institutional bodies with definitive areas of competence and jurisdiction within the above definition. The authors state that the purposes of the doctrine are to prevent human rights abuses, and ensure the specialisation and efficiency of state resources.

4.3 APPLICATION OF THE DOCTRINE OF THE SEPARATION OF POWERS IN SOUTH AFRICA

4.3.1 INTERIM CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1994

The Interim Constitution paved the way for the adoption of the current Constitution, based on principle IV of the “constitutional principles”. These constitutional principles formed the foundation on which the final Constitution had to be built and the criteria that the Constitutional Court had to use to certify the final Constitution.

One of the primary principles was to ensure the separation of powers between branches of the government. Constitutional Principle VI of the Interim Constitution definitely stated the following:

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432 Rautenbach & Malherbe (2009) 84
433 Seedorf & Sibanda (S.a) Ch12-p1
434 Seedorf & Sibanda (S.a) Ch12-p2
435 Schedule 4 of the Interim Constitution. Constitutional principle IV reads as follows: “The Constitution shall be the supreme law of the land. It shall be binding on all organs of state at all levels of government.”
436 Section 74 of the Interim Constitution
437 The words “separation of power” cannot be found in the text of the Interim Constitution, but only in the Constitutional Principles
“There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness”.

Seedorf and Sibanda argue that the drafters of the Interim Constitution considered the doctrine as a vehicle to ensure democracy and good governance.

4.3.2 CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996

The Constitutional Principle did not prescribe the manner and form that the application of the doctrine was to be adopted in the Constitution, but rather gave the drafters a “large degree of latitude in shaping the independence and interdependence of government branches”.

The Constitutional Court quoted Tribe’s argument on the interpretation thereof in the context of the US Constitution:

“We must therefore seek an understanding of the Constitution's separation of powers not primarily in what the Framers thought, nor in what Enlightenment political philosophers wrote, but in what the Constitution itself says and does. What counts is not any abstract theory of separation of powers, but the actual separation of powers 'operationally defined by the Constitution.' Therefore, where the constitutional text is informative with respect to a separation of powers issue, it is important not to leap over that text in favour of abstract principles that one might wish to see embodied in our regime of separated powers, but that might not in fact have found their way into our Constitution's structure.”

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438 Seedorf & Sibanda (S.a) Ch12-p18
439 In re: Certification of the Constitution of the RSA, 1996 1996 10 BCLR 1253 (CC) on par 112
440 As quoted by Seedorf & Sibanda (S.a) Ch12-p21; S v Dodo 2001 (5) BCLR 423 (CC) par 17; Van Rooyen & Others v State and Others (General Council of the Bar of South Africa Intervening) 2002 (8) BCLR 810 (CC) par 34
Therefore, any analysis of the application of the doctrine of the separation of powers as found in the Constitution, must be based on the actual text of the Constitution, and not on a theoretical assumption of what the doctrine should be.

The Constitutional Court acknowledged that the South African application of the doctrine will be unique, because there is “no universal model of separation of powers”\(^\text{441}\). The Court ascribed the Constitution’s uniqueness to the fact that the Constitution reflects the historical circumstances of South Africa’s constitutional development\(^\text{442}\).

Although the adoption of the Interim and Final Constitutions is very important to ensure that South Africa developed as a constitutional state\(^\text{443}\), it was the government structures that were established that was pivotal in the development of the country\(^\text{444}\). It is the doctrine of the separation of power that enables the division of institutional\(^\text{445}\), procedural\(^\text{446}\) and structural\(^\text{447}\) powers within the constitutional dispensation\(^\text{448}\).

4.3.2.1 Division of institutional power by the Constitution

The Constitution distributes institutional authority (legislative, executive and judicial) between the branches of government as follows:

- The national legislative authority is vested in Parliament\(^\text{449}\).

\(^{441}\) In re: Certification of the Constitution of the RSA, 1996 1996 (10) BCLR 1253 (CC) on par 109

\(^{442}\) In re: Certification of the Constitution of the RSA, 1996 1996 (10) BCLR 1253 (CC) on par 112

\(^{443}\) Seedorf & Sibanda (S.a) Ch12-p1 define “constitutional state” as “a state in which political power is restricted in various ways and in which the Constitution serves as the standard for the legitimate exercise of public power”.

\(^{444}\) Seedorf & Sibanda (S.a) Ch12-p1

\(^{445}\) Legislature, executive and judiciary (Seedorf & Sibanda (S.a) Ch12-p2)

\(^{446}\) Making of law, law application and dispute resolution (Seedorf & Sibanda (S.a) Ch12-p2)

\(^{447}\) Functions and structure of various organs of state and their independence and interdependence (Seedorf & Sibanda (S.a) Ch12-p21)

\(^{448}\) Seedorf & Sibanda (S.a) Ch12-p1

\(^{449}\) Section 43(a) of the Constitution
The national executive authority is vested in the President\textsuperscript{450}; and

The judicial authority is vested in the courts\textsuperscript{451}.

Legislative authority is defined as “the power to make, amend and repeal rules of law”\textsuperscript{452}; executive authority is “the power to execute and enforce rules of law”\textsuperscript{453}; and judicial authority is “the power, in disputes, to determine what the law is and how it should be applied in the dispute”\textsuperscript{454}.

Parliament\textsuperscript{455} defines “the separation of powers” to mean that “… the power of the state is divided between three different but interdependent components or arms, namely the executive (Cabinet), the legislature (Parliament) and the judiciary (Courts of law)”. The interesting component of this definition is the reference to “different but interdependent” branches of government, which echoes the principles of Chapter 3 of the Constitution that deals with cooperative government between spheres of government\textsuperscript{456}.

The Constitution divides legislative and executive authority between the different spheres of government as follows\textsuperscript{457,458}.

\textsuperscript{450} Section 85(1) of the Constitution
\textsuperscript{451} Section 165(1) of the Constitution
\textsuperscript{452} Rautenbach and Malherbe (2009) 85
\textsuperscript{453} Rautenbach and Malherbe (2009) 85
\textsuperscript{454} Rautenbach and Malherbe (2009) 85
\textsuperscript{455} Parliament (S.a a) Online
\textsuperscript{456} Section 40(1) of the Constitution states that “government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated”
\textsuperscript{457} Section 40(1) of the Constitution: “In the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated.”
\textsuperscript{458} In \textit{S v Makwanyane} 1995 (6) BCLR (CC) par 15, the Court stated that the Constitution “defines the powers of the different organs of State, including Parliament, the executive, and the courts.”
### Table 4.1: Division of authority between spheres of government

<table>
<thead>
<tr>
<th>SPHERE</th>
<th>LEGISLATIVE AUTHORITY</th>
<th>EXECUTIVE AUTHORITY</th>
</tr>
</thead>
<tbody>
<tr>
<td>NATIONAL SPHERE</td>
<td>Parliament(^{459})</td>
<td>President(^{460})</td>
</tr>
<tr>
<td>PROVINCIAL SPHERE</td>
<td>Provincial Legislature(^{461})</td>
<td>Premier(^{462})</td>
</tr>
<tr>
<td>LOCAL SPHERE</td>
<td>Municipal Council(^{463})</td>
<td>Municipal Council(^{464})</td>
</tr>
</tbody>
</table>

In the matter of City of Johannesburg v Gauteng Development Tribunal\(^ {465}\), the Constitutional Court stated that the functional areas allocated to the various spheres of government are not contained in hermetically sealed compartments. But that notwithstanding, they remain distinct from one another. The distinctiveness lies in the level at which a particular power is exercised.

It is interesting to note that there is no division of judicial authority between the spheres of government\(^ {466}\). Section 166 of the Constitution\(^ {467}\) states that the Courts of the country are:

"\(a\) the Constitutional Court;
\(b\) the Supreme Court of Appeal;
\(c\) the High Court of South Africa, and including any high court of appeal that may be established by an Act of Parliament to hear appeals from any court with a status similar to the High Court of South Africa;
\(d\) the Magistrates' Courts; and"

\(^{459}\) Section 43(a) of the Constitution
\(^{460}\) Section 85(1) of the Constitution
\(^{461}\) Section 104 of the Constitution
\(^{462}\) Section 125 of the Constitution
\(^{463}\) Section 151 of the Constitution
\(^{464}\) Section 151 of the Constitution
\(^{465}\) 2010 (9) BCLR 859 (CC)
\(^{466}\) This is unlike the United States where there is a two court system, flowing from the federal state model that is laid down in the Constitution of the United States (United States Courts (S.a) Online)
\(^{467}\) As amended by the Constitution Seventeenth Amendment Act, 2012

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any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Court of South Africa or the Magistrates' Courts.”

The uniqueness of the South African application of the doctrine of the separation of powers is evident in this allocation of institutional power:

- Legislative authority is allocated to a collective (Parliament or Provincial Legislature);
- Executive authority is allocated to a position (President or Premier), although the Constitution allows for the delegation of this power to Cabinet or the members of the Executive Council;
- The President is a member of the National Assembly on the date of the presidential election, but ceases to be a member of the National Assembly when elected. The Deputy President and all but two of the Ministers, must be members of the National Assembly, and retain their membership of the National Assembly after their appointment to the Cabinet. The “dual” membership of the Cabinet and National Assembly was adjudicated by the Constitutional Court as not encroaching on the doctrine of the separation of powers.
- The President can summon Parliament to an extraordinary sitting at any time to conduct special business.
- In the local sphere, the municipal council, as a collective, exercises both legislative and executive authority.

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468 Section 85(2) of the Constitution
469 Section 125(2) of the Constitution
470 Section 86(1) of the Constitution
471 Section 87 of the Constitution
472 Section 91 of the Constitution
473 In re: Certification of the Constitution of the RSA, 1996 1996 (10) BCLR 1253 (CC) on par 111: “It can thus not be said that a failure in the (New Text) to separate completely the functionaries of the executive and legislature is destructive of the doctrine. Indeed, the overlap provides a singularly important check and balance on the exercise of executive power. It makes the executive more directly answerable to the elected legislature.”
474 Section 42(5) of the Constitution

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The system of cooperative governance is another unique aspect of the South African application of the doctrine of the separation of powers. The framework for the management of intergovernmental relations is the *Intergovernmental Relations Framework Act, 2005*[^476]. The Constitutional Court has stressed that each government sphere is given autonomy within its sphere, subject to the requirements of co-operative governance, and the limits imposed by the Constitution, or national and provincial legislation[^477].

One of the key elements of the intergovernmental relations is that the spheres are interrelated and interdependent, as stated by the Constitutional Court[^478]:

> “All the spheres are interdependent and interrelated in the sense that the functional areas allocated to each sphere cannot be seen in isolation of each other. They are all interrelated. None of these spheres of government, nor any of the governments within each sphere have any independence from each other. Their interrelatedness and interdependence is such that they must ensure that while they do not tread on each others toes, they understand that all of them perform governmental functions for the benefit of the people of the country as a whole.”

[^475]: Section 157 of the Constitution define the “municipal council” as: “(1) A Municipal Council consists of-
(a) members elected in accordance with subsections (2) and (3); or 
(b) if provided for by national legislation-
(i) members appointed by other Municipal Councils to represent those other Councils; or 
(ii) both members elected in accordance with paragraph (a) and members appointed in accordance with subparagraph (i) of this paragraph.”

[^476]: Act No. 13 of 2005


[^478]: Independent Electoral Commission v Langeberg Municipality (Case CCT 49/00) on par 26
Another element is that intergovernmental disputes between spheres of government, or an organ of state within a sphere, must be resolved amicably between the parties before a court is approached for relief\textsuperscript{479}.

### 4.3.2.2 Division of procedural power by the Constitution

The Constitution distributes the making of law, law application and dispute resolution between the different branches of government. This distribution is not absolute, and some overlaps occur, particularly during the legislative process. These overlaps can be graphically represented as follows:

![Simplified Legislative Process](image)

**Figure 4.1:** Overlaps in simplified legislative process (Adapted by author)

The Constitution makes the members of the Executive, collectively and individually, accountable to the Legislature for the exercise of their powers\textsuperscript{480}, performance of their functions and the implementation of legislation\textsuperscript{481}. The members of Cabinet must provide regular reports to Parliament on matters under their control\textsuperscript{482}.

\textsuperscript{479} Section 41(2) of the Constitution

\textsuperscript{480} Section 92(2) of the Constitution

\textsuperscript{481} Section 55(2) of the Constitution

\textsuperscript{482} Section 92(3)(b) of the Constitution
The different roles of the Executive and the Legislature were recognised by the Constitutional Court:\(^{483}\):

“Under our constitutional scheme it is the responsibility of the executive to develop and implement policy. It is also the responsibility of the executive to initiate legislation in order to implement policy. And it is the responsibility of Parliament to make laws. When making laws Parliament will exercise its judgment as to the appropriate policy to address the situation. This judgment is political and may not always coincide with views of social scientists or other experts\(^{484}\). As has been said, — [i]t is not for the court to disturb political judgments, much less to substitute the opinions of experts.”

The differences between the Executive and Judicial branches of the government were also clarified by the Court\(^{485}\) in the following manner:

- The core competencies that are required from a judicial officer include “skills and quantities such as independence, the weighing up of information, the forming of an opinion based on the information, and the giving of a decision on the basis of a consideration of relevant information.”\(^{486}\)

- In contrast, the executive officer has to “act in a partisan, interest-driven way, not to be independent but to follow the political views of the democratically elected government and to act accordingly – of course within the limits set by the Constitution.”\(^{487}\)

\(^{483}\) Glenister v President of the Republic of South Africa and Others 2011 (7) BCLR 651 (CC) par 67
\(^{484}\) Constitutional Court relied on S v Lawrence; S v Negal; S v Solberg 1997 (10) BCLR 1348 (CC) par 42, quoting with approval Professor Hogg.
\(^{485}\) South African Association of Personal Injury Lawyers v Heath and Others 2001 (1) BCLR 77 (CC)
\(^{486}\) South African Association of Personal Injury Lawyers v Heath and Others 2001 (1) BCLR 77 (CC) par 34
\(^{487}\) Seedorf & Sibanda (S.a) Ch12-p43
The Constitution makes both the Executive, as a collective, and the Legislature (with some restrictions on the type of legislation, i.e. money Bills) responsible for the initiation of legislation. The Constitutional Court defined “initiation” as follow:

“Initiation, on the one hand, contemplates the making of a decision or taking of action by an individual, which kick-starts the process of having legislation passed by the Assembly. It implies the conceptualisation, envisioning and incubation of legislation. Preparation, on the other, envisages progressively working on a legislative proposal to bring it into a suitable state for some future action; the concretisation or giving shape and life to a legislative idea. This is the process of drafting legislation, for the purpose of getting it ready to be placed before the Assembly as a Bill, in terms of section 73(2).”

The Constitution allocates the judicial authority to the Courts that must be “independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice”. This authority must serve as an important check and balance to the executive and legislature. However, this check and balance is only limited to the “(determination) of the constitutionality of laws made by the legislature that the executive is required to...

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488 Section 85(2)(d) of the Constitution. Seedorf and Sibanda (S.a) Ch12-p24 argue that the rationale for the Executive’s dominance as primary initiator, drafter and implementer of policy and legislation can be attributed to the Executive’s control of government departments, who are staffed with specialists and experts in different fields.

489 Oriani-Ambrosini, MP v Sisulu, MP Speaker of the National Assembly 2013 (1) BCLR 14 (CC) par 32: “the executive power to initiate and prepare legislation is not one that is to be exercised by a single member of Cabinet. It is a power vested in the President ‘together with’ other members of Cabinet and is, therefore, a responsibility to be discharged collectively. This means that although a Cabinet member is in terms of section 73(2) entitled to introduce a Bill in the Assembly, she does not have the individual power to initiate or prepare legislation and introduce a Bill without prior consultation with and approval of Cabinet.”

490 Section 55(1) of the Constitution

491 Oriani-Ambrosini, MP v Sisulu, MP Speaker of the National Assembly 2013 (1) BCLR 14 (CC) par 30

492 Section 165(2) of the Constitution

493 Seedorf and Sibanda (S.a) Ch12-p26
enforce, and the Minister of Justice and Constitutional Development reported in May 2013 that only 17 provisions of different Acts of Parliament were declared unconstitutional by the Constitutional Court.

4.3.2.3 Division of structural power by the Constitution

The Legislature, Executive and Judiciary together with the institutions that support the constitutional democracy and related institutions provide the overall governance framework of South Africa’s democracy. Structural power is divided amongst the functions and structure of various institutions of the state to protect their independence and interdependence. In the Interim Constitution, Constitutional Principle XXIX demanded that the Constitution recognise the independence and impartiality of a Public Service Commission, Reserve Bank, Auditor-General and a Public Protector.

The Constitution created constitutional bodies that are independent from the other branches of government. These institutions are not only the State Institutions Supporting Constitutional Democracy, but also other institutions where the Constitution grants them express independence. These are constitutionally enabled to monitor, regulate, advise and assist the legislature in conducting oversight. The independent institutions form a counterweight to the power of the executive, legislature and judiciary, without overbalancing the scales of the doctrine of the separation of powers. As a counterweight, they serve as guardians of the Constitution, and a reminder to other branches of government that they have to abide by the Constitution.

494 Seedorf and Sibanda (S.a) Ch12-p26
495 SA Government News Agency (2013) Online
496 Parliament (2012) Online
497 Seedorf & Sibanda (S.a) Ch12-p21
498 “The independence and impartiality of a Public Service Commission, a Reserve Bank, an Auditor-General and a Public Protector shall be provided for and safeguarded by the Constitution in the interests of the maintenance of effective public finance and administration and a high standard of professional ethics in the public service.”
499 Chapter 9 of the Constitution
500 Parliament (2012) Online
The State Institutions Supporting Constitutional Democracy are:

- **The Public Protector**\(^{501}\): The *Public Protector Act*, 1994\(^{502}\) established the office of the Public Protector. The Public Protector investigates any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice; reports on that conduct; and takes appropriate remedial action.

- **The South African Human Rights Commission**\(^{503}\) (“SAHRC”): The SAHRC was established by the *Human Rights Commission Act*, 1994\(^{504}\) to promote respect for human rights and a culture of human rights; promote the protection, development and attainment of human rights; and monitor and assess the observance of human rights in the Republic.

- **The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities**\(^{505}\): The *Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act*, 2002\(^{506}\) established the Commission. The primary objects of the Commission are to promote respect for the rights of cultural, religious and linguistic communities; to promote and develop peace, friendship, humanity, tolerance and national unity among cultural, religious and linguistic communities, on the basis of equality, non-discrimination and free association; and to recommend the establishment or recognition, in accordance with national legislation, of a cultural or other council or councils for a community or communities in South Africa.

- **The Commission for Gender Equality**\(^{507}\): The Commission must promote respect for gender equality and the protection, development and attainment of gender equality.

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\(^{501}\) Section 182(1) of the Constitution

\(^{502}\) Act No. 23 of 1994

\(^{503}\) Section 184(1) of the Constitution

\(^{504}\) Act No. 54 of 1994

\(^{505}\) Section 185(1) of the Constitution

\(^{506}\) Act No. 19 of 2002

\(^{507}\) Section 187(1) of the Constitution
The Auditor-General\textsuperscript{508}. The functions of the Auditor-General are regulated by the Constitution, and further regulated in the \textit{Public Audit Act}, 2004\textsuperscript{509}. The Auditor-General must audit and report on the accounts, financial statements and financial management of all national and provincial state departments and administrations; all municipalities; and any other institution or accounting entity required by national or provincial legislation to be audited by the Auditor-General.

The Electoral Commission\textsuperscript{510}. The Independent Electoral Commission’s functions are mandated by the Constitution and the \textit{Electoral Commission Act}, 1996\textsuperscript{511}. The Commission must manage elections of national, provincial and municipal legislative bodies in accordance with national legislation; ensure that those elections are free and fair; and declare the results of those elections within a period that must be prescribed by national legislation and that is as short as reasonably possible.

Independent Authority to Regulate Broadcasting\textsuperscript{512}: The Independent Communications Authority of South Africa (ICASA) is the independent regulator for the South African electronic communications, broadcasting services and the postal sector. It was established in July 2000 in terms of the \textit{Independent Communications Authority of South Africa Act}\textsuperscript{513}. It took over the functions of two previous regulators, the South African Telecommunications Regulatory Authority (SATRA) and the Independent Broadcasting Authority (IBA). The two bodies were merged into ICASA. The Authority must regulate broadcasting in the public interest, and ensure fairness and a diversity of views broadly representing South African society.

\begin{itemize}
\item \textsuperscript{508}Section 188(1) of the Constitution
\item \textsuperscript{509}Act No. 25 of 2004
\item \textsuperscript{510}Section 190(1) of the Constitution
\item \textsuperscript{511}Act 51 of 1996
\item \textsuperscript{512}Section 191 of the Constitution
\item \textsuperscript{513}Act No.13 of 2000
\end{itemize}
The Constitution states that these institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice\(^{514}\). Other organs of state must assist and protect the “\textit{independence, impartiality, dignity and effectiveness}” of the institutions\(^ {515}\) and no person or organ of state may interfere with their functions\(^ {516}\). However, the independence is not unfettered, as these institutions are accountable to the National Assembly\(^ {517}\).

The Chapter 9 institutions also do not function within the national sphere of government\(^ {518}\), although they are organs of the state\(^ {519}\).

Other institutions that the Constitution grants independence to are:

- **The Municipal Demarcation Board**\(^ {520}\): The Board was established in terms of the \textit{Local Government: Municipal Demarcation Act}, 1998\(^ {521}\). The \textit{Local Government: Municipal Structures Act}, 1998\(^ {522}\) empowers the Board to assess the capacity of municipalities, and to delimit wards for local government elections.

\(^{514}\) Section 181(2) of the Constitution
\(^{515}\) Section 181(3) of the Constitution
\(^{516}\) Section 181(4) of the Constitution
\(^{517}\) Section 181(5) of the Constitution
\(^{518}\) Constitutional Court determined in \textit{Independent Electoral Commission v Langeberg Municipality} on par 22 that the national sphere of government comprises at least Parliament, the President and the Cabinet (and government departments) all of which must exercise national legislative and executive authority within the functional areas of Chapter 4 and 5 to which the national sphere of government is limited
\(^{519}\) Constitutional Court determined in \textit{Independent Electoral Commission v Langeberg Municipality} on par 25 that the IEC is an organ of state because it “exercises public powers and performs public functions in terms of the Constitution” and therefore falls within the definition of Section 239 of the Constitution.
\(^{520}\) Section 155(3)(b) of the Constitution states: “\textit{National legislation must ... establish criteria and procedures for the determination of municipal boundaries by an independent authority.}”
\(^{521}\) Act No. 27 of 1998
\(^{522}\) Act No. 117 of 1998
Public Service Commission\textsuperscript{523}: The Commission was established in terms of the \textit{Public Service Commission Act}, 1997\textsuperscript{524}. The Public Service Commission’s ("PSC") functions are, amongst others, investigate, monitor, and evaluate the organisation and administration of the Public Service, the evaluation of achievements, or lack thereof, of Government programmes. The PSC also has an obligation to promote measures that would ensure effective and efficient performance within the Public Service and to promote values and principles of public administration as set out in the Constitution, throughout the Public Service\textsuperscript{525}.

Independent Police Complaints Institution\textsuperscript{526}: The aim of the Independent Police Investigative Directorate is to ensure independent oversight over the South African Police Service (SAPS) and the Municipal Police Services (MPS), and to conduct independent and impartial investigations of identified criminal offences allegedly committed by members of the SAPS and the MPS, and make appropriate recommendations\textsuperscript{527}.

Financial and Fiscal Commission\textsuperscript{528}: The Financial and Fiscal Commission ("FFC") was established in terms of the \textit{Financial and Fiscal Commission Act}, 1997\textsuperscript{529}. The FFC has the responsibility to advise and make recommendations to Parliament, provincial legislatures, organised local government and other organs of State on financial and fiscal matters. Its primary role is to ensure the creation and maintenance of an effective,

\begin{footnotesize}
\begin{itemize}
\item Section 196(2) of the Constitution states: "(2) The Commission is independent (my emphasis) and must be impartial, and must exercise its powers and perform its functions without fear, favour or prejudice in the interest of the maintenance of effective and efficient public administration and a high standard of professional ethics in the public service. The Commission must be regulated by national legislation."
\item Act No. 46 of 1997
\item PSC (S.a) Online
\item Section 206(6) of the Constitution states: "(6) On receipt of a complaint lodged by a provincial executive, an independent (my emphasis) police complaints body established by national legislation must investigate any alleged misconduct of, or offence committed by, a member of the police service in the province."
\item IPID (S.a) Online
\item Section 220(2) of the Constitution states: "(2) The Commission is independent (my emphasis) and subject only to the Constitution and the law, and must be impartial."
\item Act No. 99 of 1997
\end{itemize}
\end{footnotesize}
equitable and sustainable system of intergovernmental fiscal relations in South Africa\textsuperscript{530}.

\textbf{South African Reserve Bank}\textsuperscript{531}: The South African Reserve Bank is the central bank of the Republic of South Africa and was established in 1921 in terms of a special Act of Parliament, the \textit{Currency and Banking Act} of 1920\textsuperscript{532}.

Seedorf and Sibanda\textsuperscript{533} argue that the Judicial Service Commission\textsuperscript{534} and the National Prosecuting Authority\textsuperscript{535} ("NPA") have to exercise their functions with "a degree of impartiality", even though independent status is not expressly granted to them by the Constitution.

But what does "independent" mean?

These institutions’ independence is protected constitutionally. To remove the "independence" of these institutions would require the amendment of Section 181 of the Constitution. Such an amendment would be dependent on the approval vote of two-thirds or more of the members of the National Assembly and six or more provinces in the National Council of Provinces\textsuperscript{536}. Furthermore, an amendment of the current establishment Act, i.e. \textit{Local Government: Municipal Demarcation Act}, 1998, would be required.

\textsuperscript{530} FFC (S.a) Online
\textsuperscript{531} Section 224(2) of the Constitution states: "(2) The South African Reserve Bank, in pursuit of its primary object, must perform its functions \textit{independently} (my emphasis) and without fear, favour or prejudice, but there must be regular consultation between the Bank and the Cabinet member responsible for national financial matters."
\textsuperscript{532} SARB (S.a) Online
\textsuperscript{533} (S.a) Ch12-p31
\textsuperscript{534} Section 178(4) of the Constitution states: "(4) The Judicial Service Commission has the powers and functions assigned to it in the Constitution and national legislation."
\textsuperscript{535} Section 179(4) of the Constitution states: "(4) National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice". Subsequently the \textit{National Prosecuting Authority Act}, 1998 (Act No. 32 of 1998) was promulgated.
\textsuperscript{536} Section 74 of the Constitution
The scope of independence is not unlimited, as these institutions are still subject to the Constitution and the law, e.g. prescripts of the Public Finance Management Act, 1999\(^{537}\) and the Public Audit Act, 2004\(^{538}\), on financial matters. Also, all actions taken by the Commission or administration of the institution must be in compliance with the prescripts of the establishment Act, e.g. appointment of Commissioners.

In the matter of Glenister v President of the Republic of South Africa and Others\(^{539}\) the Constitutional Court deliberated on the level of “independence” that is required by these institutions. The Court stated that “the question, therefore, is not whether the DPCI is fully independent, but whether it enjoys an adequate level of structural and operational autonomy that is secured through institutional and legal mechanisms designed to ensure that it ‘discharges its responsibilities effectively’, as required by the Constitution”.

### 4.4 CONSTITUTIONAL CHECKS AND BALANCES WITHIN THE DOCTRINE OF THE SEPARATION OF POWERS

As referred to above, the Constitutional Court acknowledged that the South African application of the doctrine will be unique, because there is “no universal model of separation of powers”\(^{540}\). However, the Court went further to state the following in the same judgment:

“The model adopted reflects the historical circumstances of our constitutional development. We find in the (Constitution) checks and balances that evidence a concern for both the over-concentration of power and the requirement of an energetic and effective, yet answerable, executive. A strict separation of powers has not always been maintained; but there is nothing to suggest

\(^{537}\) Act No. 1 of 1999  
\(^{538}\) Act No. 25 of 2004  
\(^{539}\) 2011 (7) BCLR 651 (CC) par 125  
\(^{540}\) In re: Certification of the Constitution of the RSA, 1996 1996 (10) BCLR 1253 (CC) on par 109
that the (Constitutional Principles) imposed upon the (Constitutional Assembly) an obligation to adopt a particular form of strict separation, such as that found in the United States of America, France or the Netherlands.”

The separation of powers doctrine that was adopted in the Constitution can be termed as a “partial separation” as opposed to a “full separation” or “pure form”, because a democracy places checks and balances on the exercise of a government branch’s powers.

In order to understand what a “partial separation” entails, it is important to understand that the “pure form” separation demands the strictest compliance with the following three principles:

- “the division of governmental power into the three branches: legislative, executive and judicial, with no control or interference by one on the other;
- the separation of functions; and
- the separation of personnel.”

The ratio for a “pure form” of separation is that if decision-making bodies are independent with defined functions, they will be a barrier against the concentration and abuse of power. However, the limitations of the theory of “pure form”, such as the inability to prevent one branch from encroaching on another branch’s functions, lead to the development of a system of checks and balances within the doctrine.

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541 In re: Certification of the Constitution of the RSA, 1996 1996 (10) BCLR 1253 (CC) on par 112
542 In re: Certification of the Constitution of the RSA, 1996 1996 (10) BCLR 1253 (CC) on par 109 the Constitutional Court stated: “No constitutional scheme can reflect a complete separation of powers: the scheme is always one of partial separation.”
543 Seedorf and Sibanda (S.a) Ch12-p10
544 Seedorf and Sibanda (S.a) Ch12-p10
545 Seedorf and Sibanda (S.a) Ch12-p10
546 Seedorf and Sibanda (S.a) Ch12-p11
547 Seedorf and Sibanda (S.a) Ch12-p11
The system of checks and balances provide for some interaction between the different branches, but the Court has to decide whether the interaction is an “unwarranted intrusion into the domain and independent functioning of one branch of government or another constitutional body, or if such interference constitutes an institutional safeguard designed to prevent the abuse of power”\textsuperscript{548}.

Similar to the interpretation of the doctrine of separation of power that was based in the actual text of the Constitution, the trends emerging from the Constitutional Court in the application of the doctrine should be based on the actual judgments of the Court.

4.4.1 APPLICATION OF THE DOCTRINE IN THE RELATIONSHIP BETWEEN THE JUDICIARY AND THE EXECUTIVE

The Constitutional Court has the responsibility to hold executive action up for scrutiny against the Constitution\textsuperscript{549}. The Court is not the strongest of the three branches, and does not have access to a constituency, funding or soldiers, and must rely on moral authority in being the watchdog over the Constitution and the Bill of Rights\textsuperscript{550}.

The Constitutional Court has made the following judgments regarding the separation between the judiciary and the executive:

- Judicial officers can curb possible abuses of prosecutorial powers only if there is a clear separation between the two functions\textsuperscript{551}.
- Executive power cannot be exercised by a judicial official, because then the judicial official becomes accountable to the executive, and the perception of dependence is created\textsuperscript{552,553,554}.

\textsuperscript{548} Seedorf and Sibanda (S.a) Ch12-p47
\textsuperscript{549} Pharmaceutical Manufacturers Association of SA in re: the Ex Parte Application of the President of the RSA & Others 2000 (3) BCLR 241 (CC)
\textsuperscript{550} S v Mamabolo (ETV & Others Intervening) 2001 (5) BCLR 449 (CC) par 16
\textsuperscript{551} De Lange v Smuts NO and Others 1998 (7) BCLR 779 (CC)
\textsuperscript{552} South African Association of Personal Injury Lawyers v Heath and Others 2001 (1) BCLR 77 (CC)
Judges are allowed to chair commissions, sit on Boards such as the Legal Aid Board, or serve in Inspectorates, as long as these entities are almost exclusively judicial in nature\textsuperscript{555}.

Judicial independence is not threatened if the executive participates in the appointment process of judicial officers\textsuperscript{556,557}.

The Court has to consider whether the executive, in formulating and implementing public policy, has given effect to its constitutional obligations\textsuperscript{558}.

4.4.2 APPLICATION OF THE DOCTRINE IN THE RELATIONSHIP BETWEEN THE EXECUTIVE AND THE LEGISLATURE

The Court has to balance the competing interests of ensuring that the other branches of government act constitutionally, but still respect the doctrine on the separation of powers\textsuperscript{559}. This requirement for balance was echoed by the Constitutional Court\textsuperscript{560}:

“(T)his Court may frequently find itself faced with complex problems as to what properly belongs to the discretionary sphere which the Constitution allocates to the legislature and the executive, and what falls squarely to be determined by the judiciary … The search for an appropriate accommodation in this frontier territory accordingly imposes a particularly heavy responsibility on the courts to be sensitive to considerations of institutional competence and the separation of powers.”

\begin{itemize}
  \item \textsuperscript{553} Geuking v President of the Republic of South Africa & Others 2004 (9) BCLR 895 (CC)
  \item \textsuperscript{554} National Society for the Prevention of Cruelty to Animals v Minister of Agriculture, Forestry and Fisheries and Others 2013 (10) BCLR 1159 (CC)
  \item \textsuperscript{555} Seedorf and Sibanda (S.a) Ch12-p46
  \item \textsuperscript{556} In re: Certification of the Constitution of the RSA, 1996 1996 (10) BCLR 1253 (CC) on par 123
  \item \textsuperscript{557} Van Rooyen & Others v S & Others (General Council of the Bar of South Africa Intervening) 2002 (8) BCLR 810 (CC)
  \item \textsuperscript{558} Minister of Health v Treatment Action Campaign 2002 (10) BCLR 1075 (CC)
  \item \textsuperscript{559} Seedorf and Sibanda (S.a) Ch12-p56
  \item \textsuperscript{560} Prince v President, Cape Law Society & Others 2002 (2) BCLR 231 (CC) par 155-156
\end{itemize}
In the areas of socio-economic rights, the Court has transformed the executive and legislative branches’ obligations into the duty to act reasonably. The Constitutional Court stated that “(a) court will be slow to interfere with rational decisions taken in good faith by the political organs and (administration) whose responsibility it is to deal with such matters”. In the Grootboom-judgment the Court concluded that the content of policy is primarily a matter for the legislature and the executive, as long as it is reasonable, and it is not the Court’s function to consider if a more desirable measure could have been adopted, or if the public funds could have been spent better.

The exercise of legislative power is subject to the prescripts of the Constitution, which requires that there must be rational connection between proposed legislation and the achievement of a legitimate government purpose. The Constitutional Court has stated that laws and Acts that are not rationally related to a legitimate purpose are unconstitutional because arbitrariness is inconsistent with the Constitution, even if the Act does not affect fundamental rights.

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561 Seedorf and Sibanda (S.a) Ch12-p62
562 Soobramoney v Minister of Health, KwaZulu-Natal 1997 (12) BCLR 1696 (CC) par 29
563 Grootboom v Government of the Republic of South Africa & Others 2000 (11) BCLR 1169 (CC) par 41
564 A similar conclusion was reached by the Constitutional Court in the matter of National Treasury v Opposition to Urban Tolling Alliance 2012 (11) BCLR 1148 (CC)
565 Affordable Medicines Trust & Other v Minister of Health 2005 (6) BCLR 529 (CC) par 74; S v Lawrence, S v Nega, S v Solberg 1997 (10) BCLR 1348 (CC) par 44
566 Fedsure & Other v Greater Johannesburg Metropolitan Council 1998 (12) BCLR 1458 (CC)
567 New National Party of SA v Government of the RSA & Others 1999 (5) BCLR 489 (CC) par 19
568 President of the Republic of South Africa and Others v United Democratic Movement 2002 (11) BCLR 1164 (CC) par 55
4.4.3 APPLICATION OF THE DOCTRINE IN THE RELATIONSHIP BETWEEN THE LEGISLATURE AND THE JUDICIARY

One of the primary functions of the Court is to determine the constitutionality of legislation\textsuperscript{569}. However, in the Certification of the Constitution judgment, the Court stated the following:

“First and foremost it must be emphasised that the Court has a judicial and not a political mandate. Its function is clearly spelt out in (Interim Constitution) 71(2): to certify whether all the provisions of the (New Text) comply with the (Constitutional Principles). That is a judicial function, a legal exercise. Admittedly a constitution, by its very nature, deals with the extent, limitations and exercise of political power as also with the relationship between political entities and with the relationship between the state and persons.”

The Court has developed certain boundaries that are defined by the functions of the Legislature, where it will not interfere:

- Parliament’s control over its internal arrangements, proceedings and procedures are protected to enable the Legislature to legislate\textsuperscript{570}. This does however not prevent the Court to examine if Parliament complied with its own rules when legislating\textsuperscript{571}.
- A limitation on the court’s discretion could be regarded as justifiable, because both the judiciary and the legislature have a “legitimate interest, role and duty” as long as it did not infringe on the court’s authority\textsuperscript{572}.
- The Court will not decide whether the Legislature should regulate an aspect of society or not\textsuperscript{573}.

\textsuperscript{569} Section 167(5) of the Constitution
\textsuperscript{570} Doctors for Life International v Speaker of the National Assembly and Others 2006 (12) BCLR 1399 (CC)
\textsuperscript{571} Matatiele Municipality and Others v President of the Republic of South Africa and Others 2007 (1) BCLR 47 (CC)
\textsuperscript{572} S v Dodo 2001 (5) BCLR 423 (CC) par 33
\textsuperscript{573} Ferreira v Levin NO & Others; Vreyenhoek & Others v Powell NO & Others 1996 (1) BCLR 1 (CC) par 180
Laws that are enacted must be consistent with the constitutional mandate of that sphere of government.\textsuperscript{574}

When exercising the legislative power, the Constitutional Court\textsuperscript{575} has laid down some constraints: “But like all exercise of public power, there are constitutional constraints that are placed on Parliament. One of these constraints is that —there must be a rational relationship between the scheme which it adopts and the achievement of a legitimate governmental purpose.\textsuperscript{576} Nor can Parliament act capriciously or arbitrarily.\textsuperscript{577} The onus of establishing the absence of a legitimate governmental purpose, or of a rational relationship between the law and the purpose, falls on the objector. To survive rationality review, legislation need not be reasonable or appropriate.\textsuperscript{578}"

The Judiciary cannot review Acts of Parliament on the grounds that they are unreasonable; the Court can only review legislation if they are satisfied that the legislation is not rationally connected to a legitimate government purpose.\textsuperscript{579}

4.5 CONSEQUENCES OF ENCROACHMENT ON THE DOCTRINE OF THE SEPARATION OF POWERS

The final responsibility to measure any legislation against the benchmark of the Constitution rests with the Constitutional Court. Section 167(5) of the Constitution provides the following:

\begin{footnotesize}
\textsuperscript{574} Mashavha v The President of the Republic of SA & Others 2004 (12) BCLR 1243 (CC)  
\textsuperscript{575} Glenister v President of the Republic of South Africa and Others 2011 (7) BCLR 651 (CC) par 55  
\textsuperscript{576} Constitutional Court relied on New National Party of South Africa v Government of the Republic of South Africa and Others 1999 (5) BCLR 489 (CC) at par 19.  
\textsuperscript{577} Constitutional Court relied on New National Party of South Africa v Government of the Republic of South Africa and Others 1999 (5) BCLR 489 (CC) at par 19.  
\textsuperscript{578} Constitutional Court relied on Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of the Republic of South Africa and 2000 (3) BCLR 241 (CC) par 86 and 89-90; New National Party of South Africa v Government of the Republic of South Africa and Others 1999 (5) BCLR 489 (CC) at par 24.  
\textsuperscript{579} New National Party of SA v Government of the RSA & Others 1999 (5) BCLR 489 (CC) par 24
\end{footnotesize}
“(5) The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, the High Court of South Africa, or a court of similar status, before that order has any force.”

The Court may make any of the following rulings, when one branch encroaches on the domain of another branch:

- must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency;\(^\text{580}\);
- may make any order that is just and equitable, including an order limiting the retrospective effect of the declaration of invalidity; and an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect;\(^\text{581}\); and
- Grant the appropriate relief in the event of a matter related to the Bill of Rights.\(^\text{582}\).

The Constitution does not specify the parameters of “any order that is just and equitable”, and the Court has been granted some discretion and flexibility in this regard.\(^\text{583}\). The Court will always balance the obligation to provide appropriate relief against protection of the doctrine of the separation of powers.\(^\text{584}\). In some instances, the Court has made a declaration of complete invalidity,\(^\text{585}\), and in others the Court will consider “reading in” to align the legislation with the

\(^{\text{580}}\) Section 172(1)(a) of the Constitution
\(^{\text{581}}\) Section 172(1)(b) of the Constitution
\(^{\text{582}}\) Section 38 of the Constitution
\(^{\text{583}}\) Fose v Minister of Safety and Security 1997 (7) BCLR 1675 (CC) par 38; Sanderson v Attorney-General, Eastern Cape 1997 (12) BCLR 1675 par 38
\(^{\text{584}}\) National Coalition for Gay and Lesbian Equity & Others v Minister of Home Affairs & Others 2000 (1) BCLR 39 (CC) par 66
\(^{\text{585}}\) S v Makwanyane 1995 (6) BCLR (CC)
Constitution\textsuperscript{586}. The Court will also consider a suspension of the invalidity to allow the relevant branch of government to rectify the unconstitutionality\textsuperscript{587}.

4.6 CONCLUSION

The Constitution is the benchmark for the exercise of power within and amongst the branches of government and government structures. It is the doctrine of the separation of powers that enables the division of institutional, procedural and structural powers within the Constitution, and allows for the protection of fundamental rights, and prevents the abuse of power.

\textsuperscript{586} National Coalition for Gay and Lesbian Equity & Others v Minister of Home Affairs & Others 2000 (1) BCLR 39 (CC) par 74-75

\textsuperscript{587} Dawood & Another v Minister of Home Affairs; Shalabi & Another v Minister of Home Affairs; Thomas & Another v Minister of Home Affairs 2000 (8) BCLR 837 (CC) par 64
CHAPTER 5: POLITICAL STEERING

5.1 INTRODUCTION

5.2 DEFINITION AND HISTORY OF “POLITICAL STEERING”
   5.2.1 ORIGIN OF THE METAPHOR OF “SHIP OF STATE”
   5.2.2 DEFINITION OF “POLITICAL STEERING”
   5.2.3 EVOLUTION OF “POLITICAL STEERING” IN PUBLIC ADMINISTRATION

5.3 THEORIES OF POLITICAL STEERING
   5.3.1 SYSTEMS THEORY BASIS FOR POLITICAL STEERING
   5.3.2 ACTOR-CENTERED APPROACH FOR POLITICAL STEERING
   5.3.3 COMBINED ACTION THEORY AND SYSTEMS THEORY PERSPECTIVE
   5.3.4 GOVERNANCE AS A SYNONYM FOR POLITICAL STEERING

5.4 CONCLUSION

TABLES
   5.1 Comparing Perspectives: Old Public Administration, New Public Management, and New Public Service
   5.2 Expansions from the basic paradigm of political governance
“But, I know enough people in that court, through the years, to know one thing: There's always somebody who surprises you, who rises above what they thought they appointed him for, and stays with the separation of powers, and with the right of the law to decide.” (Arthur Hertzberg, Conservative rabbi and prominent Jewish-American scholar and activist, 1921 – 2006) \(^{588}\)

5.1 **INTRODUCTION**

In the Preamble of the Constitution, the ideal was stated that a “new” South Africa must be created, free from the wounds of the past and moving towards a new future \(^{589}\). Chief Justice Langa stated that the goal for a Constitution is to be “transformative” \(^{590}\). But how is this transformation within a society achieved, and what is the relationship between the politicians and society?

The focus of “political steering” is the “intentional intervention in society” \(^{591}\) and by extension the rules that govern society. But, how does the Executive exercise...
influence over the formal rules (or legislation) that governs society at large? This Chapter will examine the origins and purpose of “political steering”.

5.2 DEFINITION AND HISTORY OF “POLITICAL STEERING”

5.2.1 ORIGIN OF THE METAPHOR OF “SHIP OF STATE”

The “ship of state” is a famous metaphor that Plato used in Book VI of The Republic, where Plato debated the definition of justice, the character of a just city (modern day term will be “state”), and the character of a just man592:

“I perceive, I said, that you are vastly amused at having plunged me into such a hopeless discussion; but now hear the parable, and then you will be still more amused at the meagreness of my imagination: for the manner in which the best men are treated in their own States is so grievous that no single thing on earth is comparable to it; and therefore, if I am to plead their cause, I must have recourse to fiction, and put together a figure made up of many things, like the fabulous unions of goats and stags which are found in pictures. Imagine then a fleet or a ship in which there is a captain who is taller and stronger than any of the crew, but he is a little deaf and has a similar infirmity in sight, and his knowledge of navigation is not much better. The sailors are quarrelling with one another about the steering --every one is of opinion that he has a right to steer, though he has never learned the art of navigation and cannot tell who taught him or when he learned, and will further assert that it cannot be taught, and they are ready to cut in pieces any one who says the contrary. They throng about the captain, begging and praying him to commit the helm to them; and if at any time they do not prevail, but others are preferred to them, they kill the others or throw them

592 Plato (360 BC) Online
overboard, and having first chained up the noble captain's senses with drink or some narcotic drug, they mutiny and take possession of the ship and make free with the stores; thus, eating and drinking, they proceed on their voyage in such a manner as might be expected of them. Him who is their partisan and cleverly aids them in their plot for getting the ship out of the captain's hands into their own whether by force or persuasion, they compliment with the name of sailor, pilot, able seaman, and abuse the other sort of man, whom they call a good-for-nothing; but that the true pilot must pay attention to the year and seasons and sky and stars and winds, and whatever else belongs to his art, if he intends to be really qualified for the command of a ship, and that he must and will be the steerer, whether other people like or not-the possibility of this union of authority with the steerer's art has never seriously entered into their thoughts or been made part of their calling. Now in vessels which are in a state of mutiny and by sailors who are mutineers, how will the true pilot be regarded? Will he not be called by them a prater, a star-gazer, a good-for-nothing?"

The analogy has been used Henry Wadsworth Longfellow (1807—1882)\textsuperscript{593}:

\begin{quote}
"Thou, too, sail on, O Ship of State! 
Sail on, O Union, strong and great! 
Humanity with all its fears, 
With all the hopes of future years, 
Is hanging breathless on thy fate! 
We know what Master laid thy keel, 
What Workmen wrought thy ribs of steel, 
Who made each mast, and sail, and rope, 
What anvils rang, what hammers beat,"
\end{quote}

\textsuperscript{593} Longfellow (1850) Online
In what a forge and what a heat
Were shaped the anchors of thy hope!
Fear not each sudden sound and shock,
’Tis of the wave and not the rock;
’Tis but the flapping of the sail,
And not a rent made by the gale!
In spite of rock and tempest’s roar,
In spite of false lights on the shore,
Sail on, nor fear to breast the sea!
Our hearts, our hopes, are all with thee.
Our hearts, our hopes, our prayers, our tears,
Our faith triumphant o’er our fears,
Are all with thee,—are all with thee!"

The Longfellow poem was recited by Winston Churchill in a broadcast to the British and Allied countries in 1941, after he received a letter from Roosevelt who quoted the poem594.

The metaphor was echoed in President Zuma’s595 response during the debate on the opening of the National House of Traditional Leaders when he twice stated:

➢ “The ship of State is in good hands. South Africa is poised to become a truly great nation.”
➢ “Leaders of our people standing here before you and having listened carefully to your deliberations, I am even more convinced that the Ship of State is in good hands. The future of South Africa is bright.”

But whose hands are on the steering wheel of the ship called “South Africa”? Is it the Legislature, or the Executive? How do the Judiciary, Legislature and Executive interact to determine the course of policy and legislation?

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594 Churchill (1941) Online
595 Zuma (2013) Online
5.2.2 DEFINITION OF “POLITICAL STEERING”

There is not a single definition of ‘political steering’.

The concept has been used in the development arena to mean “the operative management of political transformation and reform processes, involving all relevant stakeholders, and the strategic management and adjustment of processes, instruments and procedures according to future needs. It is seen as a way of bridging the gap between policy and practice by proceeding on the basis of development cooperation’s reality rather than hypothetical situations defined in policy commitments”596.

In the international policy arena, Mayntz defined “political steering” as “the intentional intervention of political actors in societal subsystems including the political system”597 or “steering actions of political authorities as they deliberately attempt to shape socio-economic structures and processes”598.

Policy experts, such as Héritier599 and Peters600, use “political steering” synonymously with “governance”601. Bähr defines “governance” as “a rule system of societal coordination and control of interdependent actors”602.

The concept of “political steering” has never been interrogated in the South African courts. Therefore, the concept will be examined from a public administrative perspective.

596 Frenken, Jacob, Muller & Stockmayer (2010) 15
598 Mayntz (1998) Online
601 Mayntz (1998) states that the term “governance” has been used since the 1990s in two ways: (1) cooperative model of government that is distinct from the hierarchical control model, state and non-state actors participate in mixed public / private networks; or (2) different forms of coordinating individual actions, or basic forms of social order.
602 Bähr (2010) 11
5.2.3 EVOLUTION OF “POLITICAL STEERING” IN PUBLIC ADMINISTRATION

Authors, such as Tiili and Denhardt, view the development of the paradigm of political steering, in the political-administrative interface, as a consequence of the evolution of the “New Public Management”. Greuning places the origin of New Public Management (“NPM”) in late 1970s and early 1980s in the United Kingdom and some local governments in California, USA. NPM was developed in opposition to “Old Style Bureaucracy”. Denhardt makes the following distinction between “Old Public Administration” and “New Public Management”.

<table>
<thead>
<tr>
<th>PRIMARY THEORETICAL AND EPISTEMOLOGICAL FOUNDATIONS</th>
<th>OLD PUBLIC ADMINISTRATION</th>
<th>NEW PUBLIC MANAGEMENT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Synoptic rationality, “administrative man”</td>
<td>Technological and economic rationality, “economic man,” or the self-interested decision maker</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>CONCEPTION OF THE PUBLIC INTEREST</th>
<th>OLD PUBLIC ADMINISTRATION</th>
<th>NEW PUBLIC MANAGEMENT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Politically defined and expressed in law</td>
<td>Represents the aggregation of individual interests</td>
<td></td>
</tr>
</tbody>
</table>

Denhardt & Denhardt (2000) 549 included a section on “New Public Service”: “The New Public Management has championed a vision of public managers as the entrepreneurs of a new, leaner, and increasingly privatized government, emulating not only the practices but also the values of business. Proponents of the New Public Management have developed their arguments largely through contrasts with the old public administration. In this comparison, the New Public Management will, of course, always win. We argue here that the better contrast is with what we call the “New Public Service,” a movement built on work in democratic citizenship, community and civil society, and organizational humanism and discourse theory. We suggest seven principles of the New Public Service, most notably that the primary role of the public servant is to help citizens articulate and meet their shared interests rather than to attempt to control or steer society.” For purposes of this thesis, the analysis of “New Public Service” has been removed.
<table>
<thead>
<tr>
<th>RESPONSES?</th>
<th>OLD PUBLIC ADMINISTRATION</th>
<th>NEW PUBLIC MANAGEMENT</th>
</tr>
</thead>
<tbody>
<tr>
<td>ROLE OF GOVERNMENT</td>
<td>Rowing (designing and implementing policies focusing on a single, politically defined objective)</td>
<td>Steering (acting as a catalyst to unleash market forces)</td>
</tr>
<tr>
<td>MECHANISMS FOR ACHIEVING POLICY OBJECTIVES</td>
<td>Administering programs through existing government agencies</td>
<td>Creating mechanisms and incentive structures to achieve policy objectives through private and nonprofit agencies</td>
</tr>
<tr>
<td>APPROACH TO ACCOUNTABILITY</td>
<td>Hierarchical—administrators are responsible to democratically elected political leaders</td>
<td>Market-driven—the accumulation of self-interests will result in outcomes desired by broad groups of citizens (or customers)</td>
</tr>
<tr>
<td>ADMINISTRATIVE DISCRETION</td>
<td>Limited discretion allowed administrative officials</td>
<td>Wide latitude to meet entrepreneurial goals</td>
</tr>
<tr>
<td>ASSUMED ORGANIZATIONAL STRUCTURE</td>
<td>Bureaucratic organizations marked by top-down authority within agencies and control or regulation of clients</td>
<td>Decentralized public organizations with primary control remaining within the agency</td>
</tr>
<tr>
<td>ASSUMED MOTIVATIONAL BASIS OF PUBLIC SERVANTS AND ADMINISTRATORS</td>
<td>Pay and benefits, civil-service protections</td>
<td>Entrepreneurial spirit, ideological desire to reduce size of government</td>
</tr>
</tbody>
</table>

Table 5.1: Comparing Perspectives: Old Public Administration, New Public Management, and New Public Service (Denhardt & Denhardt (2000) 554)

Denhardt indicates in the “Role of Government”-component that the role has moved from “rowing” to “steering”. Tiili\(^{609}\) argues that NPM has required Ministers (as the political heads of administrations) to become strategists and opinion-leaders who are expected to “clarify and communicate visions and values, choose appropriate strategies and identify, allocate and commit resources at the

\(^{609}\) Tiili (2007) 82 quoting Pollitt and Bouckaert (2004) 150
macro-level”. Aucoin\textsuperscript{610} argued that one of the reasons for the evolution of the NPM movement was to ensure that the elected government exercised greater political control over programs and policies.

But, the NPM movement was not always successful. An analysis of the transformation requirement from “rowing” to “steering” by Tiili\textsuperscript{611} indicated that this shift couldn’t be successfully implemented in Finland, United Kingdom or Australia, partly because “ministers had to respond to a constantly changing political, economic and social environment and thus, ministers’ ‘political horizons were far more limited’\textsuperscript{612}.

In South Africa, the wave of NPM came at the same time as the democratic changes in the early 1990s\textsuperscript{613}. Chipkin\textsuperscript{614} argues that the implementation of NPM in South Africa was, similar to other experiences in Europe and Australia that Tiili reported, uneven and therefore the transformation from “rowing” to “steering” did not always take place throughout the South African system. Chipkin argues that there are many international examples that can be cited

“that NPM-inspired reforms have not come about problem-free and the neat theoretical inputs of public choice and rational theories have failed to translate seamlessly into practice. In particular, they underestimated the degree to which managing for outputs was dependent on putting in place
many old-style bureaucratic processes – a blind spot that Schick warned against with his motto, ‘look before you leapfrog’.”

In South Africa the transformation of SARS and CIPRO are prime examples in this regard: In the SARS-example the members of the Service are paid market-related salaries and are not appointed in terms of the Public Service Act, 1994\textsuperscript{616}, the success of the model comes from careful attention to the core functions and processes of revenue collection. In the CIPRO-example, the agency neglected the administrative component of the organisation without the resultant successes that the NPM-model predicted\textsuperscript{617}.

But, how did “steering” become a synonym for “governance”?  

5.3 THEORIES OF POLITICAL STEERING

Policy analysts have tried to analyse the context of political steering, and three main approaches have emerged\textsuperscript{618}:

- Systems Theory;
- Actor-centred Theory;
- Combined action theory and systems theory perspective; and
- Governance Perspective.

5.3.1. SYSTEMS THEORY BASIS FOR POLITICAL STEERING

5.3.1.1. Background to systems theory\textsuperscript{619}

The systems approach attempts to link the policy process with a political system, and focus on the response of the political system to the needs of communities\textsuperscript{620}.

\textsuperscript{615} Chipkin & Lipietz (2012) 4
\textsuperscript{616} Proclamation No. 103 of 1994
\textsuperscript{617} Chipkin & Lipietz (2012) 23
\textsuperscript{618} Bähr (2010) 11
\textsuperscript{619} Systems Theory has been briefly discussed in Chapter 2, as part of policy development.
The systems approach allows for the influence of the political party process and the policy-making environment within which the policy is made\footnote{Maselesele (2011) 116}.

The most influential analyst of the political systems theory is David Easton, whose work in the 1960-1970s focused on the question of how political systems survived in a world of instability and change\footnote{Müller & Schumann (S.a) Online}. Müller and Schumann\footnote{Müller & Schumann (S.a) Online} explain Easton’s theory that “demands, expectations and support approach the political system, before being processed within the political system during the so-called conversion process and made into binding decisions for all members of society in the form of laws and provisions. These laws and provisions, in turn, create reactions within society and feedback and, again, to demands and/or support.”

The theory can be graphically presented as follows\footnote{Müller & Schumann (S.a) Online}.

![Figure 5.1: Easton’s Theory of a Political System (Müller & Schumann (S.a) Online)](image)

In contrast to Easton, Hendrick & Nachmias\footnote{Müller & Schumann (S.a) Online} argue that the systems approach is defined primarily by the manner in which the system transforms its environment.
As such, the boundaries of the system are determined by the activity, subject (inputs) and consequences (outputs) of transformation. Within the boundaries, the inner environment is made up by interdependent elements that assist with the transformation process. The outer environment has the activities and entities that do not contribute to the transformation. Therefore, a system’s boundaries are not defined by people, groups, institutions or nations, but by the limits of its activities.

The systems theory approach to politics “implies that a political system will tend towards long-term stability as the ‘outputs’ of government are brought in line with the ‘inputs’ or pressures placed upon it”\(^{626}\). This can be represented as follows:

![Figure 5.2: Systems Theory Approach to Politics (Adapted by author)](image)

Kaplan\(^{627}\) holds the view that “systems theory” is not a theory, but rather a set of concepts. Politics can be defined within the systems theory as “the regulation of

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\(^{626}\) Heywood (2007) 226

\(^{627}\) (1968) 30
the organization of the system and of the distribution of authority within it”的628, and the major limitation of the theory is that it can only deal with the macrostructure of political or social systems629. Also, the theory does not explain how decisions are made or policy developed within the “political system” (or the “black box” in the middle of the Figure 5.1 above)630.

As a counterweight to the limitations of the systems theory, the theory evolved to include elements of complex631 and chaos theory632. Snowden and Boone633 stated that the characteristics of a complex system are:

- "(The system) involves large numbers of interacting elements;
- The interactions are nonlinear, and minor changes can produce disproportionately major consequences;
- The system is dynamic, the whole is greater than the sum of its parts, and solutions can’t be imposed; rather, they arise from the circumstances. This is frequently referred to as emergence.
- The system has a history, and the past is integrated with the present; the elements evolve with one another and with the environment; and evolution is irreversible.
- Though a complex system may, in retrospect, appear to be ordered and predictable, hindsight does not lead to foresight because the external conditions and systems constantly change.

628 Kaplan (1968) 37
629 Kaplan (1968) 45
630 Anderson (2011) 20
631 Kurtz & Snowden (2003) 466 argue that “(o)ordered-systems thinking assumes that through the study of physical conditions, we can derive or discover general rules or hypotheses that can be empirically verified and that create a body of reliable knowledge, which can then be developed and expanded… In practice, all decision makers know this: however much they might like things to be ordered, they know that there are also circumstances in which “cultural factors,” “inspired leadership,” “gut feel,” and other complex factors are dominant”. Duit & Galaz (2008) 312 state the following regarding complexity theory: “Complexity theory starts from the assumption that there are large parts of reality in which changes do not occur in a linear fashion. Small changes do not necessarily produce small effects in other particular aspects of the system nor in the characteristics of the system as a whole.”
632 Luhmann theorized that “a system is defined by a boundary between itself and its environment, dividing it from an infinitely complex, or (colloquially) chaotic, exterior. The interior of the system is thus a zone of reduced complexity” (Princeton (S.a b) Online) (2007) 70
Unlike in ordered systems (where the system constrains the agents), or chaotic systems (where there are no constraints), in a complex system the agents and the system constrain one another, especially over time. This means that we cannot forecast or predict what will happen.”

Normally, government and policy systems are considered to be complex systems\(^{634}\), as opposed to simple\(^{635}\) or complicated systems\(^{636}\).

A further development of complex systems is a complex adaptive system. These systems have four common traits\(^ {637}\):

- The system consists of agents (e.g., cells, species, social actors, firms, and nations) that are assumed to follow certain behavioural patterns.
- Self-organisation occurs, because there is no central control that directs the behaviour of agents. The self-organisation is based on the available information about the behaviour of other agents that are near.
- As a result of self-organisation, the co-evolutionary processes that are driven by the agents’ attempts to increase individual fit gives rise to temporary and unstable equilibriums.
- The temporary and unstable equilibriums generate the shifting system behaviour with limited predictability (often denoted emergent properties) that is associated with complex adaptive systems.

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634 “Complex systems” consist of “many variables in an open system with non-linear relationships that cannot be described, explained or predicted with great accuracy” (Cilliers, as quoted by Cloete (2009) 305). An example of a complex system would be a family, although the relationship between the members can be described based on hierarchy (e.g. mother or sister), the inter-personal relations between members and associated members (such as in-laws, or distant relatives) cannot be fully described, explained or predicted with great accuracy.

635 “Simple systems” consist of “a few variables with linear relationships that can be described, explained and predicted with great accuracy” (Cilliers, as quoted by Cloete (2009) 304). Duit & Galaz (2008) 312 characterize a single system as “single-system equilibrium is reached through linear effects and feedback loops between key system variables”. An example of a simple system would be a bicycle, that consist of a few parts, which can be taken apart, studied, re-assembled and will ride (behave) as before and as predicted.

636 “Complicated systems” consists of “many variables in a closed system with linear and non-linear relationships that can be described, explained and predicted with great accuracy” (Cilliers, as quoted by Cloete (2009) 305). An example of a complicated system would be a Formula 1 racing car, which consists of many parts, that can be taken apart, studied, re-assembled and should ride (behave) as before, and as predicted.

637 Duit & Galaz (2008) 313
The effect of transformation in complex adaptive systems can be unpredictable. Duit and Galaž\textsuperscript{638} summarise it as follows:

“(S)mall events might trigger changes that are difficult or even impossible to reverse. In some cases the transition is sharp and dramatic. In others, although the dynamics of the system have shifted from one state to another, the transition itself may be slow but definite. Hence, seemingly stable systems can suddenly undergo comprehensive transformations into something entirely new, with internal controls and characteristics that are profoundly different from those of the original.”

Policy systems can be regarded as complex adaptive systems\textsuperscript{639}, because it is an open system where many role-players and ideas converge, and its results cannot be always understood or predicted. The \textit{ratio} for the determination of policy systems as “complex adaptive” is the following\textsuperscript{640}:

- The policy systems are \textit{complex}, because they are diverse and consist of many interconnected elements;
- The policy systems are \textit{adaptive}, because they have the ability to change, learn from previous experiences, and anticipate future events.

How are these systems analysed? Within the field of business strategy, Kurtz and Snowden\textsuperscript{641} have developed a model called “\textit{Cynefin}”. The model was refined by Snowden and Boone\textsuperscript{642} as a decision matrix, and has since been applied in the analysis of policy-making decisions\textsuperscript{643}.

\textsuperscript{638} Duit and Galaž (2008) 313
\textsuperscript{639} Cloete (2009) 307
\textsuperscript{640} Holland (1992) 25-26
\textsuperscript{641} Kurtz and Snowden (2003) 462-483
\textsuperscript{642} Snowden and Boone (2007) 68-76
\textsuperscript{643} Bush Administration (O’Neill (2004) 149–156), Australian Public Service (Bridgman (2007) Online)
The basis of the framework is the following:644:

“The Cynefin framework helps leaders determine the prevailing operative context so that they can make appropriate choices. Each domain requires different actions.

- **Simple** and **complicated** contexts assume an ordered universe, where cause-and-effect relationships are perceptible, and right answers can be determined based on the facts.

- **Complex** and **chaotic** contexts are unordered—there is no immediately apparent relationship between cause and effect, and the way forward is determined based on emerging patterns.

**The ordered** world is the world of fact-based management; the **unordered** world represents pattern based management.

The very nature of the fifth context – **disorder** - makes it particularly difficult to recognize when one is in it. Here, multiple perspectives jostle for prominence, factional leaders argue with one another, and cacophony rules. The way out of this realm is to break down the situation into constituent parts and assign each to one of the other four realms. Leaders can then make decisions and intervene in contextually appropriate ways.”

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644 Snowden & Boone (2007) 72
The framework can be graphically represented as follows:

![Cynefin Framework](image)

Figure 5.3: Cynefin Framework (Snowden & Boone (2007) 72)

The movement between domains has equal importance to the domain where the system is located, because a move across boundaries requires a different model of understanding and interpretation. The movement across boundaries has the following consequences:

- A system that moves from “simple” to “chaotic” will collapse, because there are no rules in a “chaotic” system.

- Many institutions attempt to regulate chaos by imposing the same rules that apply in simple systems, but because the environment is more

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645 Kurtz & Snowden (2003) 475
646 Kurtz and Snowden (2003) 476 use the example of Galileo and the Catholic Church who could not accept that the earth was round, despite the strong evidence to the contrary, and when the mathematician was proved correct, the Church had no means of containing the discovery.
dynamic in a “chaotic” system, these rules do not work and the system reverts to “chaotic”\textsuperscript{647}.

- If an organisation wants to move between “simple” and “complicated”, the change has to be done in increments to allow the system to gradually adapt to the new environment.

- When a system moves from “complicated” to “complex”, it is done by exploring the new environment, and testing the adaptability of the system by pilot studies.

- If the pilot study is not responsive, the system must revert back to the previous state “just-in-time” to prevent collapse and chaos, whilst still retaining the lessons from the “exploration”.

- “Swarming” is the term given to movement from the “chaotic” to the “complex”, where the organisation creates “points of order” where chaos can be contained\textsuperscript{648}.

- The rapid movement between “chaotic” and “complex” is referred to as “divergence-convergence”\textsuperscript{649}.

\textsuperscript{647} Kurtz and Snowden (2003) 466 use the following example: “a group of West Point graduates were asked to manage the playtime of a kindergarten as a final year assignment. The cruel thing is that they were given time to prepare. They planned; they rationally identified objectives; they determined backup and response plans. They then tried to “order” children’s play based on rational design principles, and, in consequence, achieved chaos.”

\textsuperscript{648} Kurtz and Snowden (2003) 477 uses the example that in a theatre fire, it is better to shout “the blinking orange lights are above the exit doors”, than to say “converge at the back of the theatre” when everyone is disorientated and panicking.

\textsuperscript{649} Kurtz and Snowden (2003) 477 use the example of small start-up companies that are more resilient to changes and chaos, because that is when they experience the most growth.
These movements can be graphically depicted as follows:

![Cynefin dynamics](image)

Figure 5.4: *Cynefin* dynamics (Kurtz & Snowden (2003) 476)

Therefore, to understand a complex environment, the analyst has to “set the stage, step back a bit, allow patterns to emerge, and determine which ones are desirable that will succeed”\(^650\). It is by understanding the dynamics between role-players, the environment and the system that a prediction about behaviour and outcome can be made.

### 5.3.1.2. Application of systems theory in the legislative process

One of the proponents of a systems theory analysis of political steering is Niklas Luhmann\(^651\). He states that political steering is solely an internal process within a political system, or as he terms it: “minimisation of internal differences of the political system”\(^652\).

In explaining the concept, Luhmann uses the analogy of a thermostat that regulates the temperature in a room, and only turns on when the temperature in a certain room falls below a preset threshold. Therefore, political steering will...
emerge when the differences in a political system become more than a certain degree.

Luhmann’s systems theory has special relevance for understanding the doctrine of the separation of powers in a constitutional state⁶⁵³:

“(S)ystems theory is especially useful with regard to research questions that deal with the political system’s relationship with other spheres of society. This is because systems theory does not observe these other areas through ‘political glasses’ but perceives them as operating according to their own rules and logic. For the purpose of this article, there are three concrete advantages of this approach: First, it provides a viable understanding of politics, law, their mutual relationship and the role of the constitution. Second, systems theory enables political scientists to view the specific situation of post-autocratic transitions as an attempt to discontinue the law’s subordination to politics—in other words, to usher in democracy and the rule of law. Third, this theory allows us to observe the role of formal institutions in constitutional conflicts.”

Luhmann’s theory was further developed and modified by other proponents of the systems theory:

➢ Willke and Teubner held that political steering takes place in a decentralized context, where the political system is not superior to other systems but rather operates as a supervisor at the same level⁶⁵⁴.

➢ Druwe and Görlitz saw political steering as an agitator that provides a stimulus to a political system, whilst being non-hierarchical and non-deterministic, and can only change the conditions that facilitate internal changes in society⁶⁵⁵.

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⁶⁵³ Hein (S.a) 5
⁶⁵⁵ Druwe and Görlitz (1992) as quoted by Bähr (2010) 12
Münch held the view that strands of political steering are interwoven in other societal systems, and can be regarded as making decisions that are binding on all the systems and have an effect on other processes within those systems.\(^{656}\)

5.3.2 ACTOR-CENTERED APPROACH FOR POLITICAL STEERING

5.3.2.1. Actor-centred Institutionalism approach

Mayntz & Scharpf\(^{657}\) combined methodological individualism\(^{658}\) with institutionalism\(^{659}\) in a new framework of “actor-centered institutionalism”. The basic assumption informing the approach is that an analysis of structures without reference to actors is of no more value than an analysis of the actor’s behaviour without reference to structures\(^{660}\). This approach integrates action-theory (or rational choice) and institutionalist (or structuralist) perspectives\(^{661}\).

Scharpf\(^{662}\) states the following regarding the advantages and disadvantages of the framework:

"What is gained by this fusion of paradigms is a better "goodness of fit" between theoretical perspectives and the observed reality of..."
political interaction that is driven by the interactive strategies of purposive actors operating within institutional settings that, at the same time, enable and constrain these strategies. What is lost is the greater parsimony of theories that will ignore either one or the other source of empirical variation.”

5.3.2.2. Application of Actor-centred Institutionalism framework in the legislative process

Scharpf explained political steering as the chance for intentional intervention in working subsystems of society to achieve policy goals, where actors are both the agents of political steering, but also the receivers (or addressee) of political steering. The actors are not individuals, but form part of a vast range of actors who hold different resources, interests and viewpoints on the current situation. The amount of political steering is determined by the actors that are involved, the network of actors and pattern of interaction between them.

Figure 5.5: Action Theory of the Elements of Political Steering (Adapted by author)

---

Some of the developments of political governance were driven by “the negotiation of political with societal actors in policy networks or neo-corporatist structures and the delegation of regulatory functions to institutions of local or sectoral self-government indicate a loss of steering capacity”, where the state appeared weak. However, Mayntz pointed to the fact that the issue was not a loss of state control, but rather a change in the form of state control, because it is the state that determines the institutional framework within which the self-regulation by society takes place:

“Where state actors participate in policy networks, they are a very special and privileged kind of participant; they retain crucial means of intervention, and this holds even where decision-making has been devolved to institutions of societal self-government. In particular, the state retains the right of legal ratification, the right to authoritative decision where societal actors do not come to a conclusion (e.g. in negotiations about technical standards), and the right to intervene by legislative or executive action where a self-governing system such as the German health system fails to meet regulatory expectations. Thus, hierarchical control and societal self-regulation are not mutually exclusive. They are different ordering principles which are very often combined, and their combination, self-regulation "in the shadow of hierarchy", can be more effective than either of the "pure" governance forms (Mayntz and Scharpf 1995).”

5.3.3 COMBINED ACTION THEORY AND SYSTEMS THEORY PERSPECTIVE

During the evolution of theories, proponents and opponents find strengths and weaknesses within the theoretical framework of each theory. The political steering
theory is no different in this regard, but Schimank combined the theories in 1992\textsuperscript{667}. He distinguished between the following three forms of goal-orientated and intentional intervention during political steering:

- Actors can try to achieve their goals by themselves; or
- Actors can directly influence other actors who are able to achieve the required goal; or
- Actors can indirectly influence other actors by shaping the structural context within which the other actors face. Furthermore, he identified the interdependent and not mutually exclusive structural dimensions that would influence political steering as “orientations specific to a societal system, institutional roles and actor constellations”\textsuperscript{668}.

Mayntz\textsuperscript{669} successfully integrated the action theory perspective (intentional intervention) with the system theory perspective (exclusion of possibility of success): political steering is restricted to “intentional and goal-orientated actions by an agent of steering which is directed towards an addressee of steering”\textsuperscript{670} regardless of success. Therefore, political steering aims to change the situation of the addressee from the destined end-result if the political steering did not occur, but whether successful political steering results in a new end-result, is immaterial\textsuperscript{671}.

The conclusion of the theorists is that political steering is “a form of intentional intervention which seeks to change or conserve a certain societal status quo and is constrained by structural properties”\textsuperscript{672}. In addition, the actors that are influenced by political steering do not only react, but may also actively participate in the formulation and implementation of policy decisions\textsuperscript{673}.

\begin{flushleft}
\textsuperscript{667} Schimank (1992) as quoted by Bähr (2010) 12  
\textsuperscript{668} Schimank (1992) as quoted by Bähr (2010) 13  
\textsuperscript{669} Bähr (2010) 13  
\textsuperscript{670} Mayntz quoted by Bähr (2010) 13  
\textsuperscript{671} Mayntz quoted by Bähr (2010) 13  
\textsuperscript{672} Bähr (2010) 13  
\textsuperscript{673} Bähr (2010) 13
\end{flushleft}
5.3.4. GOVERNANCE AS A SYNONYM FOR POLITICAL STEERING

When considering “governance”, what does it mean?

Bell, Hindmoor & Mols\(^{674}\) find the origins of the word “governance” in the Classical Greek word “kybernан” that means “to pilot, steer or direct”. Costantinos\(^{675}\) defines “governance” as “the conscious management of regimes with the aim of enhancing the effectiveness of political authority. Governance can be thought of as the applied realm of politics, in which political actors seek mechanisms to convert political preferences into managing society”.

The ultimate focus of “governance” is “the means used to shape or change the behaviour of people in order to achieve these goals”\(^{676}\). Governance’s main components are “steering” and “coordination”\(^{677}\).

Mayntz\(^{678}\) provided the following development path of the theory of political governance, with a special focus on the narrow sense of steering:

\(^{674}\) Bell, Hindmoor & Mols (2010) 852
\(^{675}\) Costantinos (2011) Online
\(^{676}\) Bell, Hindmoor & Mols (2010) 852
\(^{677}\) Blatter (2012) 11
\(^{678}\) Mayntz (1998) Online
Subsequent to the basic paradigm (policy development by government, and policy implementation by public agencies), Mayntz\(^{679}\) indicated that the following extensions developed in Europe:

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<th>DEVELOPMENT FROM BASIC PARADIGM OF POLITICAL GOVERNANCE</th>
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<tr>
<td>1ST</td>
<td>includes bottom-up perspective: sectoral structure and target group behaviour</td>
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<td>EXTENSION:</td>
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<tr>
<td>2ND</td>
<td>includes policy-development and implementation in public/private networks and self-regulating societal systems</td>
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<tr>
<td>EXTENSION:</td>
<td></td>
</tr>
<tr>
<td>3RD</td>
<td>includes effect of European policy upon domestic sectoral structures and policy-making</td>
</tr>
<tr>
<td>EXTENSION:</td>
<td></td>
</tr>
<tr>
<td>4TH</td>
<td>includes European level of policy-making</td>
</tr>
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</table>

\(^{679}\) Mayntz (1998) Online
Many of these extensions were driven by the society’s disillusionment with the “state as an effective political steering centre of society”\(^{680}\). In the latest development of the paradigm, Blatter\(^{681}\) concludes that the different theories of governance, including political governance and political steering, place emphasis on the symbiosis between state and society: societal control over the state versus state-control over society.

Mayntz\(^{682}\) proposes the following requirements for political actors within modern governance to successfully engage in political steering:

- “Political authorities must be powerful, but not omnipotent”\(^{683}\).
- Political authorities must be democratically elected in such a manner that the elected representatives reflect the interests of all major groups in society (socio-economic, ethnic or religion). The assumption is that if the legislature is representative of all the major groups of society, it will act in the best interest of all citizens, and not only in the interest of the dominant groups or political party.
- The legislature must be generally accepted as the guardian of the welfare of the citizens.

This new perspective means that the focus is moved away from the actors and their resources, to the “systems of coordination and control”\(^{684}\). Rosenau\(^{685}\) argued that “governance” represents a concept broader than “government”, but that both concepts are referring to “intentional interventions in society”.

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\(^{680}\) Mayntz (2003) 2
\(^{681}\) Blatter (2012) 70
\(^{682}\) Mayntz (2003) 4
\(^{683}\) Mayntz (2003) 4
\(^{684}\) Bähr (2010) 14
\(^{685}\) Bähr (2010) 14
When viewing the “systems of coordination and control” within the South African context, the following can be noted:

- The Constitution is the primary system of coordination and control, with specific regard to:
  - the supremacy of the Constitution (Section 2);
  - the Bill of Rights (Chapter 2);
  - the principles of Cooperative Governance (Chapter 3);
  - the separation of powers between Legislature (Chapter 4), Executive (Chapter 5) and Judiciary (Chapter 8); and
  - the creation of State Institutions Supporting Constitutional Democracy (Chapter 9).

- The Constitutional Court is the referee between branches of government to ensure that they fulfil their constitutional mandate and do not usurp powers and functions that belong to other branches.\(^{686}\)

- Sector framework legislation has been put in place to regulate the power relationship between different organs of state (e.g. the South African Schools Act, 1996 (Act No. 84 of 1996) regulates the relationship between the state, parents of learners and members of the community in which the school is located\(^{687}\), and the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003) that regulates the relationship between national and provincial government, traditional leaders and traditional communities\(^{688}\)).

### 5.4 CONCLUSION

When combining the arguments of Bähr\(^{689}\) and Mayntz\(^{690}\), political steering aims to change the situation of the addressee from the destined end-result as if the

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686 Chapter 4 of this dissertation
687 Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another 2013 (9) BCLR 989 (CC) par 49
688 Pilane and Another v Pilane and Another 2013 (4) BCLR 431 (CC) par 33
689 Bähr (2010) 14

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political steering did not occur, but whether successful political steering results in a new end-result, is immaterial. The focus of political steering remains an “intentional intervention into society”\(^691\).

Mangu\(^692\) argues that there is a direct linkage between “governance” (and political steering) and the doctrine of the separation of powers. “Good governance” requires, \textit{inter alia}, respect for human rights, promotion of the rule of law, which are all vital components of transformative constitutionalism. As stated by the Constitutional Court\(^693\): “At its core, constitutionalism is about the protection and development of rights, not their extinction”. Therefore constitutionalism and governance are different sides of the same coin.

When viewed from the public administration perspective, political steering is an acceptable phenomenon whereby policy-makers can influence the socio-economic structures and processes within society. When viewed from the legal perspective, does this “intervention” not constitute a breach of the doctrine of the separation of powers?

The following chapter will analyse the interplay between political steering attempts on the part of the executive in two legislative processes, with the purpose of determining the level of intentional intervention of political actors in legal subsystems including the legislative system.

\(^{690}\) As quoted by Bähr (2010) 13  
\(^{691}\) Bähr (2010) 14  
\(^{692}\) Mangu (S.a) 8  
\(^{693}\) \textit{S v Makwanyane & Other} 1995 (6) BCLR 665 (CC)
CHAPTER 6: CASE STUDIES OF EXECUTIVE POLITICAL STEERING IN THE LEGISLATIVE PROCESS

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“From where you sit, the White House may look as untidy as the inside of a stomach. As is said of the legislative process, sausage-making and policy-making shouldn’t be seen close-up. Don’t let that panic you. Things may be going better than they look from the inside.” (Donald Rumsfeld, American Secretary of Defense)\(^{694}\)

6.1 INTRODUCTION

The focus of political steering remains an “intentional intervention into society”\(^{695}\). Political steering is an acceptable public administration phenomenon whereby policy-makers (or the Executive) can influence the socio-economic structures and processes within society. However, when viewed from the legal perspective, does this “intervention” not constitute a breach of the doctrine of the separation of powers?

6.2 FRAMEWORK FOR ANALYSIS OF THE LEGISLATIVE PROCESS

As outlined in the previous chapter political steering can be defined as “the intentional intervention of political actors in legal subsystems including the legislative system”\(^{696}\).

Furthermore political steering is “a form of intentional intervention which seeks to change or conserve a certain societal status quo and is constrained by structural properties”\(^{697}\). In addition, the actors that are influenced by political steering do not only react, but may also actively participate in the formulation and implementation of policy decisions\(^{698}\).

\(^{694}\) Thinkexist (S.a d) Online
\(^{695}\) Bähr (2010) 14
\(^{696}\) Adapted from Mayntz (1995) as quoted by Bähr (2010) 11
\(^{697}\) Bähr (2010) 13
\(^{698}\) Bähr (2010) 13
Policy and legislative systems are considered to be complex adaptive systems. To analyse the patterns of political steering within the legislative process, the following methodology will be utilised when presenting the two case studies:

- The Bill, as published for public comment, will be the basis of departure, as this version contains all of the Executive Authority’s initiatives.
- The draft Bill, as introduced into Parliament will be the first benchmark, as this version has been amended to include the comments from the public.
- The discussions within the Portfolio Committee of the National Assembly will be analysed for different viewpoints between the Executive and the Legislature. Some of the discussions will necessitate an amendment to the Bill.
- The final Portfolio Committee version of the Bill that is recommended to the National Assembly for approval will be compared to the original Bill.
- Parliament will approve the Bill, and the approved version will be compared to the original Bill.
- The President will assent to the Bill, and the promulgated Act will be compared to the original Bill.

The discussions within the Portfolio Committee and Parliament will also be analysed for emerging trends to determine whether there was an intentional intervention by the Executive which seeks to change or conserve a certain societal status quo and is constrained by structural properties.\(^{699}\)

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\(^{699}\) Bähr (2010) 13
6.3 TRANSPORT LAWS AND RELATED MATTERS AMENDMENT BILL

6.3.1 BACKGROUND TO THE TRANSPORT LAWS AND RELATED MATTERS AMENDMENT BILL

The Cabinet approved the implementation of the Gauteng Freeway Improvement Plan (“GFIP”) in July 2007. The “(n)ormal procedures for toll schemes will apply including the declaration of all identified roads in the scheme as national roads, execution of the toll declaration process and the determination of toll tariffs.”

Between November 2007 and February 2008, the Director-General of Water and Environmental Affairs granted certain environmental approvals for the GFIP in terms of section 24 of the National Environmental Management Act, 1998.

A Government Gazette was published on 28 March 2008 with Notices that declared government’s intention to change parts of existing Gauteng freeways into toll roads:

- South African National Roads Agency Limited and the National Roads Act: Declaration of National Road N1 Section 20: Armadale to Midrand as continuous toll road and establishment of electronic toll points (Government Notice No. 349, Government Gazette No. 30912);
- South African National Roads Agency Limited and the National Roads Act: Declaration of National Road N1 Section 21: Midrand to Proefplaas Interchanges as continuous toll road and establishment of electronic toll points (Government Notice No. 350, Government Notice No. 30912);
- South African National Roads Agency Limited and the National Roads Act: Declaration of National Road N3 Section 12: Old Barn Interchange to Buccleuch Interchange as continuous toll road and establishment of toll points (Government Notice No. 351, Government Gazette No. 30912);

700 National Treasury & Others v Opposition to Urban Tolling Alliance & Others 2012 (11) BCLR 1148 (CC) par 32
701 Act No. 107 of 1998

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electronic toll points (Government Notice No. 351, Government Gazette No. 30912);

- South African National Roads Agency Limited and the National Roads Act: Declaration of National Road N4 Section 1: Koedoespoort to Hans Strydom Drive as continuous toll road and establishment of electronic toll points (Government Notice No. 352, Government Gazette No. 30912);

- South African National Roads Agency Limited and the National Roads Act: Declaration of National Road N12 Section 18: Diepkloof Interchange to Elands Interchange as continuous toll road and establishment of electronic toll points (Government Notice No. 353, Government Gazette No. 30912); and


Tenders were awarded by the South African National Roads Agency Limited ("SANRAL") and the construction of Phase 1 of the Gauteng Freeway Improvement Project was completed in early 2011.

On 11 February 2008, the Minister for Transport approved SANRAL’s (South African National Road Agency Ltd) request for toll determinations for the GFIP network. On 28 March and 28 July 2008, SANRAL declared the GFIP roads as toll roads.

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702 Government Notice No. 800, Government Gazette No. 31273 (South African National Roads Agency Limited and the National Roads Act: Declaration of National Road R21 Sections 1 and 2 from Hans Strydom Drive to Rietfontein Interchange (N12) as a toll road and establishment of electronic toll points) was published on 28 June 2008.

703 Motlanthe (2012) Online. Phase 1 included the upgrading of 185 km of freeways, and the upgrading of 34 interchanges in Gauteng (Gauteng (S.a) Online).

704 National Treasury & Others v Opposition to Urban Tolling Alliance & Others 2012 (11) BCLR 1148 (CC) par 32

However, in order for e-tolling to commence the Transport Minister will have to publish a tariff notice in terms of section 27(3)(c) of the SANRAL Act. The draft tariff notices have been withdrawn by the Minister for Transport706.

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705 *National Treasury & Others v Opposition to Urban Tolling Alliance & Others* 2012 (11) BCLR 1148 (CC) par 32

706 *National Treasury & Others v Opposition to Urban Tolling Alliance & Others* 2012 (11) BCLR 1148 (CC) par 33 mentioned two. Analysis by author indicated the following notices were dealing with the toll tariffs:

The Transport Law Enforcement and Related Matters General Amendment Bill, 2009 was published for public comments on 19 December 2008 (Government Notice No. 1544, Government Gazette No. 31715)\(^707\). The long title of the Bill was:

“To amend the South African National Roads Agency and National Roads Act, 1998 to provide more effectively for law enforcement relating to collection of tolls; to amend the Administrative Adjudication of Road Traffic Offences Act, 1998 to include in its ambit offences relating to operating licences and cross-border permits for public transport services and offences relating to non-payment of tolls on national roads; to amend the National Road Traffic Act, 1996 to add a presumption to facilitate the collection of tolls; to amend the Road Traffic Management Corporation Act, 1999 to empower the Road Traffic Management Corporation to enter into law enforcement agreements with the South African National Roads Agency; to amend the Cross-Border Road Transport Act, 1998 to empower the Cross-Border Road Transport Agency to collect toll on behalf of that Agency; and to provide for incidental matters.”

\(^707\) The deadline for public comments was 25 January 2009.
The Transport Law Enforcement and Related General Matters Amendment Bill, 2010 was published for public comments on 15 March 2010 (Government Notice No. 245, Government Gazette No. 33027)\footnote{The deadline for public comments was 15 April 2010. The draft Bill was published twice on the same day for public comments (Government Notice No. 245, Government Gazette No. 33027) & (Government Notice No. 246, Government Gazette No. 33028). In the Rule 241 Submission publication, it was stated that Government Notice No. 246, Government Gazette No. 33028 contained the Memorandum on the Objects of the Bill; however this publication was a duplication of the actual Bill.}708. The long title of the Bill was:

“To amend the-

- National Road Traffic Act, 1996, to provide for a definition of toll road and add a presumption to facilitate the collection of tolls;

- Administrative Adjudication of Road Traffic Offences Act, 1998, to include in its ambit offences relating to operating licences and cross-border permits for public transport services and offences relating to non-payment of tolls on national roads;

- Road Traffic Management Corporation Act, 1999 to empower the Road Management Corporation to enter into law enforcement agreements with the South African National Roads Agency;

and to provide for matters connected therewith.”

When comparing the long titles of the two Bills, the following is evident:

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<th>TRANSPORT LAW ENFORCEMENT AND RELATED MATTERS GENERAL AMENDMENT BILL, 2009 (LONG TITLE)</th>
<th>TRANSPORT LAW ENFORCEMENT AND RELATED GENERAL MATTERS AMENDMENT BILL, 2010 (LONG TITLE)</th>
<th>SIMILARITIES / DIFFERENCES BETWEEN VERSIONS</th>
</tr>
</thead>
<tbody>
<tr>
<td>To amend the South African National Roads</td>
<td>To amend the- • National Road Traffic</td>
<td>2010: No mention of amendment to South</td>
</tr>
<tr>
<td><strong>TRANSPORT LAW ENFORCEMENT AND RELATED MATTERS GENERAL AMENDMENT BILL, 2009 (LONG TITLE)</strong></td>
<td><strong>TRANSPORT LAW ENFORCEMENT AND RELATED GENERAL MATTERS AMENDMENT BILL, 2010 (LONG TITLE)</strong></td>
<td><strong>SIMILARITIES / DIFFERENCES BETWEEN VERSIONS</strong></td>
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<td>---</td>
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</tr>
<tr>
<td>Agency and National Roads Act, 1998 to provide more effectively for law enforcement relating to collection of tolls;</td>
<td>Act, 1996, to provide for a definition of toll road and add a presumption to facilitate the collection of tolls;</td>
<td>African National Roads Agency Act</td>
</tr>
<tr>
<td>• Administrative Adjudication of Road Traffic Offences Act, 1998 to include in its ambit offences relating to operating licences and cross-border permits for public transport services and offences relating to non-payment of tolls on national roads;</td>
<td>• Administrative Adjudication of Road Traffic Offences Act, 1998, to include in its ambit offences relating to operating licences and cross-border permits for public transport services and offences relating to non-payment of tolls on national roads;</td>
<td>No change between versions</td>
</tr>
<tr>
<td>to amend the National Road Traffic Act, 1996 to add a presumption to facilitate the collection of tolls;</td>
<td>2010: Removed</td>
<td></td>
</tr>
<tr>
<td>to amend the Road Traffic Management</td>
<td>• Road Traffic Management</td>
<td>2010: No mention of amendment of the Cross-</td>
</tr>
</tbody>
</table>
When comparing the two versions of the long title, the 2010-version deviated substantially from the 2009-version, as the only similarity that remained, is the amendment of the Adjudication of Road Traffic Offences Act, 1998.

<table>
<thead>
<tr>
<th>TRANSPORT LAW ENFORCEMENT AND RELATED MATTERS GENERAL AMENDMENT BILL, 2009 (LONG TITLE)</th>
<th>TRANSPORT LAW ENFORCEMENT AND RELATED GENERAL MATTERS AMENDMENT BILL, 2010 (LONG TITLE)</th>
<th>SIMILARITIES / DIFFERENCES BETWEEN VERSIONS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Corporation Act, 1999 to empower the Road Traffic Management Corporation to enter into law enforcement agreements with the South African National Roads Agency; to amend the Cross-Border Road Transport Act, 1998 to empower the Cross-Border Road Transport Agency to collect toll on behalf of that Agency; and to provide for incidental matters</td>
<td>Corporation Act, 1999 to empower the Road Management Corporation to enter into law enforcement agreements with the South African National Roads Agency; and to provide for matters connected therewith.</td>
<td>Border Road Transport Act, 1998 to empower the Cross-Border Road Transport Agency to collect toll on behalf of that Agency</td>
</tr>
</tbody>
</table>

Table 6.1: Comparison between Transport Law Enforcement and Related Matters General Amendment Bill, 2009 (Long Title) & Transport Law Enforcement and Related General Matters Amendment Bill, 2010 (Long Title)
The Transport Laws and Related Matters Amendment Bill, 2012 was approved by Cabinet on 2 August 2012. On 15 August 2012, the Minister for Transport published the Rule 241(1)(b) Notice in the Government Gazette: “Notice of Intention to Introduce the Transport Laws And Related Matters Amendment Bill, 2012 into Parliament in terms of Rule 241(1)(b) of the National Assembly”.

When comparing the long titles of the two previous Bills that were published and the Rule 241-version, the following can be noted:

<table>
<thead>
<tr>
<th>TRANSPORT LAW ENFORCEMENT AND RELATED MATTERS GENERAL AMENDMENT BILL, 2009 (LONG TITLE)</th>
<th>TRANSPORT LAW ENFORCEMENT AND RELATED MATTERS GENERAL AMENDMENT BILL, 2010 (LONG TITLE)</th>
<th>TRANSPORT LAWS AND RELATED MATTERS AMENDMENT BILL, 2012 (LONG TITLE)</th>
<th>SIMILARITIES / DIFFERENCES BETWEEN VERSIONS</th>
</tr>
</thead>
<tbody>
<tr>
<td>To amend the South African National Roads Agency and National Roads Act, 1998 to provide more effectively for law enforcement</td>
<td>To amend the National Road Traffic Act, 1996, to provide for a definition of toll road and add a presumption to and to amend the South African National Roads Agency limited and National Roads Act, 1998, to insert a definition;</td>
<td>Standard drafting convention</td>
<td></td>
</tr>
</tbody>
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709 SA News (2012) Online
710 Rule 241(1)(b) of the Rules of the National Assembly states that before a Bill is introduced in the National Assembly, the Executive must publish the draft Bill with a memorandum of objects in the Government Gazette and submit a copy of the draft Bill (and copies of the Government Gazette) to the Speaker.
711 General Notice No. 661, Government Gazette No. 35597
<table>
<thead>
<tr>
<th><strong>TRANSPORT LAW ENFORCEMENT AND RELATED MATTERS GENERAL AMENDMENT BILL, 2009 (LONG TITLE)</strong></th>
<th><strong>TRANSPORT LAW ENFORCEMENT AND RELATED MATTERS AMENDMENT BILL, 2010 (LONG TITLE)</strong></th>
<th><strong>TRANSPORT LAWS AND RELATED MATTERS AMENDMENT BILL, 2012 (LONG TITLE)</strong></th>
<th><strong>SIMILARITIES / DIFFERENCES BETWEEN VERSIONS</strong></th>
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<tbody>
<tr>
<td>relating to collection of tolls;</td>
<td>facilitate the collection of tolls;</td>
<td>is retained</td>
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<td></td>
<td></td>
<td><strong>To further provide for the differentiation in respect of the amount of toll that may be levied;</strong></td>
<td></td>
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<td></td>
<td></td>
<td>2012: New provision</td>
<td></td>
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<td></td>
<td></td>
<td><strong>to provide that the regulations made by the Minister must be published by notice in the Gazette;</strong></td>
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<td></td>
<td></td>
<td>2012: New provision</td>
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<td></td>
<td></td>
<td><strong>to provide for the Minister to also make regulations relating to specified toll related matters;</strong></td>
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<td></td>
<td></td>
<td>2012: New provision</td>
<td></td>
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<td><strong>TRANSPORT LAW ENFORCEMENT AND RELATED MATTERS GENERAL AMENDMENT BILL, 2009 (LONG TITLE)</strong></td>
<td><strong>TRANSPORT LAW ENFORCEMENT AND RELATED MATTERS GENERAL AMENDMENT BILL, 2010 (LONG TITLE)</strong></td>
<td><strong>TRANSPORT LAWS AND RELATED MATTERS AMENDMENT BILL, 2012 (LONG TITLE)</strong></td>
<td><strong>SIMILARITIES / DIFFERENCES BETWEEN VERSIONS</strong></td>
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<tr>
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<tr>
<td>to provide for the Minister to publish draft regulations in the Gazette calling for public comment;</td>
<td></td>
<td><strong>2012</strong>: New provision</td>
<td></td>
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<tr>
<td></td>
<td></td>
<td><strong>2012</strong>: New provision</td>
<td></td>
</tr>
<tr>
<td>to exclude the levying and collection of toll from the ambit of the National Credit Act, 2005; to amend the contents of the Act;</td>
<td></td>
<td><strong>2010</strong>: No change <strong>2012</strong>: Provision is removed</td>
<td></td>
</tr>
<tr>
<td>to amend the Administrative Adjudication of Road Traffic Offences Act, 1998</td>
<td>• Administrative Adjudication of Road Traffic Offences Act, 1998, to include in its...</td>
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712 Act No. 34 of 2005
<table>
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<tr>
<th>TRANSPORT LAW ENFORCEMENT AND RELATED MATTERS GENERAL AMENDMENT BILL, 2009 (LONG TITLE)</th>
<th>TRANSPORT LAW ENFORCEMENT AND RELATED GENERAL MATTERS AMENDMENT BILL, 2010 (LONG TITLE)</th>
<th>TRANSPORT LAWS AND RELATED MATTERS AMENDMENT BILL, 2012 (LONG TITLE)</th>
<th>SIMILARITIES / DIFFERENCES BETWEEN VERSIONS</th>
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</thead>
<tbody>
<tr>
<td>ambit offences relating to operating licences and cross-border permits for public transport services and offences relating to non-payment of tolls on national roads;</td>
<td>ambit offences relating to operating licences and cross-border permits for public transport services and offences relating to non-payment of tolls on national roads;</td>
<td>To provide for certain presumptions relating to the driving, operation and use of vehicle on a toll road and the use of</td>
<td>2012: Presumption is extended</td>
</tr>
<tr>
<td>to amend the National Road Traffic Act, 1996 to add a presumption to facilitate the collection of tolls;</td>
<td>(National Road Traffic Act, 1996, to provide for a definition of toll road and) add a presumption to facilitate the collection of tolls;</td>
<td></td>
<td></td>
</tr>
<tr>
<td>TRANSPORT LAW ENFORCEMENT AND RELATED MATTERS GENERAL AMENDMENT BILL, 2009 (LONG TITLE)</td>
<td>TRANSPORT LAW ENFORCEMENT AND RELATED GENERAL MATTERS AMENDMENT BILL, 2010 (LONG TITLE)</td>
<td>TRANSPORT LAWS AND RELATED MATTERS AMENDMENT BILL, 2012 (LONG TITLE)</td>
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<tr>
<td>electronic evidence to prove an alleged contravention of the South African National Roads Agency limited and National Roads Act;</td>
<td>• Road Traffic Management Corporation Act, 1999 to empower the Road Management Corporation to enter into law enforcement agreements with the South African National Roads</td>
<td>2010: No mention of amendment of the Cross-Border Road Transport Act, 1998 to empower the Cross-Border Road Transport Agency to collect toll on behalf of that Agency</td>
<td></td>
</tr>
<tr>
<td>2012: Provision is removed</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>TRANSPORT LAW ENFORCEMENT AND RELATED MATTERS GENERAL AMENDMENT BILL, 2009 (LONG TITLE)</strong></td>
<td><strong>TRANSPORT LAW ENFORCEMENT AND RELATED MATTERS AMENDMENT BILL, 2010 (LONG TITLE)</strong></td>
<td><strong>TRANSPORT LAWS AND RELATED MATTERS AMENDMENT BILL, 2012 (LONG TITLE)</strong></td>
<td><strong>SIMILARITIES / DIFFERENCES BETWEEN VERSIONS</strong></td>
</tr>
<tr>
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</tr>
<tr>
<td>Agency; Cross-Border Road Transport Act, 1998 to empower the Cross-Border Road Transport Agency to collect toll on behalf of that Agency; and to provide for incidental matters.</td>
<td>Cross-Border Road Transport Act, 1998, to empower the Cross-Border Road Transport Agency to collect toll on behalf of the South African National Roads Agency limited; and to provide for matters connected therewith.</td>
<td>2010: Provision is removed 2012: Provision is retained</td>
<td><strong>Standard drafting convention</strong></td>
</tr>
</tbody>
</table>

Table 6.2: Comparison between Transport Law Enforcement and Related Matters General Amendment Bill, 2009 (Long Title), Transport Law Enforcement and Related General Matters Amendment Bill, 2010 (Long Title) & Transport Law Enforcement and Related Matters General Amendment Bill, 2012 (Long Title)
When comparing the 2012-version’s long title, it shows more similarities with the 2009-version than with the 2010-version. Five new provisions have been included in the 2012-version that was never previously included.

6.3.2 PARLIAMENTARY PROCESS FOR THE TRANSPORT LAWS RELATED MATTERS GENERAL AMENDMENT BILL, 2012

The Transport Laws Related Matters General Amendment Bill, 2012 [B30-2012] was introduced into the National Assembly in October 2012 and referred to the Joint Tagging Mechanism on 23 October 2012.

6.3.2.1 Portfolio Committee for Transport held on 23 October 2012

The Bill was referred to the Portfolio Committee for Transport in the National Assembly. The Committee received a briefing from the Department of Transport on the Bill on 23 October 2012.

Adv Adam Masombuka, Director of Legislation, presented the Bill on behalf of the Department to the Committee. He provided background to the SANRAL Act and the Gauteng Freeway Improvement Plan, before presenting the clauses individually. The Department also indicated the stakeholders with whom the Bill was consulted with, and the financial implications of the Bill.

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713 SabinetLaw (2012 a) Online
714 NA (2012 a) 480
715 PC Transport (2012 a) Online
716 PC Transport (2012 a) Online
717 The presenter also indicated that the original 2008 version of the Bill was a “mixed Bill” as it contained sections that were considered to be Section 75 sections, and others that were Section 76 sections, but it was decided to present the 2012 version as a Section 75 Bill.
718 Shareholders Committee of the Road Traffic Management Corporation, Public Entity Oversight and Border Control, South African Chamber of Commerce, South African Tourism Service Association, the South African Police Service, the Cross-Border Road Transport Agency, the Road Traffic Management Corporation, and the National Treasury.
During the debate, the members of the Committee raised the following concerns, and received the following responses from the Department and SANRAL:

<table>
<thead>
<tr>
<th>NR</th>
<th>PORTFOLIO COMMITTEE CONCERN</th>
<th>DEPARTMENT RESPONSE</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>The motivation for the Cross-Border Road Transport Agency to collect tolls for SANRAL when there are no borders in Gauteng</td>
<td>There was a request from the Cross-Border Road Transport Agency to charge vehicles tolls at the border posts as other countries charge tolls for South African vehicles entering their country.</td>
</tr>
<tr>
<td>2.</td>
<td>Section 4 (Minister’s Regulatory Authority) does not provide for the Portfolio Committee to give inputs into regulations before they are published.</td>
<td>The Department indicated that it would be possible to include a provision to submit drafts of the regulations to the Portfolio Committee before publishing it in the Government Gazette.</td>
</tr>
<tr>
<td>3.</td>
<td>The members felt that it should have been a Section 76 Bill, as it affected Gauteng directly⁷¹⁹</td>
<td>The Parliamentary Legal Advisor explained that in the tagging of a Bill a checklist was used to decide in which section a Bill would fall. The Bill did not deal with any of the requirements of Section 76 which were ‘If the provisions of the Bill fall within a substantial area listed within Schedule 4 of the Constitution’. None of the provisions of the Bill deal with any of the categories listed in schedule 719.</td>
</tr>
</tbody>
</table>

⁷¹⁹ A committee member noted that the GFIP plan came from the Gauteng legislature and not from the Department of Transport or Parliament. The province decided to fund it through a toll system and this decision required national legislation to be drafted. Therefore, the member felt that it should be considered as a Section 76 Bill.
<table>
<thead>
<tr>
<th>NR</th>
<th>PORTFOLIO COMMITTEE CONCERN</th>
<th>DEPARTMENT RESPONSE</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>4 of the Constitution. Only the title of the Bill deals with transport but the content of the Bill does not fall into that category.</td>
<td></td>
</tr>
<tr>
<td>4.</td>
<td>The reasons why the National Credit Act was not applicable to the Bill when all the toll tariffs are not displayed publicly (only the e-tag tariffs are displayed).</td>
<td>No response from the Department</td>
</tr>
<tr>
<td>5.</td>
<td>How will the Bill deal with the &quot;cloning&quot; of number plates, when the owner will be held accountable in the Bill for the payment of the tolls?</td>
<td>The department was currently implementing a system to assist with cloned number plates, and having various meetings with SAPS. This was why the department encouraged users to get a tag; they were free and could not be cloned. If a tag and a number plate did not match, it would be recorded. The account holders would be able to see the information for every toll transaction.</td>
</tr>
<tr>
<td>6.</td>
<td>What is the meaning of “a road is presumed to be a toll road unless stated otherwise”?</td>
<td>No response from the Department</td>
</tr>
<tr>
<td>7.</td>
<td>There was a concern about the process of consultation, because it seems as if only government institutions were consulted.</td>
<td>The Bill was published in the Government Gazette for public consultation and comments were only received from the institutions</td>
</tr>
<tr>
<td>NR</td>
<td>PORTFOLIO COMMITTEE CONCERN</td>
<td>DEPARTMENT RESPONSE</td>
</tr>
<tr>
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<tr>
<td></td>
<td>listed in the beginning of the presentation.</td>
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</tbody>
</table>

Table 6.3: Comparison between Portfolio Committee concerns and Departmental responses

The Chairperson indicated that the Committee has the following concerns with the Bill:
- The lack of proper consultation;
- The fees; and
- The system that was being used to collect the fees as it was not a South African developed system.

6.3.2.2 Portfolio Committee for Transport held on 20 November 2012

The Portfolio Committee held public hearings on the Bill on 20 November 2012, where various interested parties gave inputs. Some of the interest parties included South African Local Government Association (“SALGA”) and Congress of South African Trade Unions (“COSATU”).

The Committee expressed concern that interested parties could give written inputs, but did not appear in person before the Committee.

Subsequent to the public hearings, the Bill was amended by the Portfolio Committee. The amendments are the following:

“On page 3, in line 3, after ‘‘amended’’ to insert ‘‘—’’.
2. On page 3, in line 3, to omit ‘‘by the addition in subsection (3) for paragraph (b)’’.
3. On page 3, in line 4, before ‘‘of’’ to insert

720 PC Transport (2012 b) Online
(b) by the insertion in subsection (4) of the following paragraph after paragraph (b):

‘‘(bA) the Agency, in co-operation with the municipality contemplated in subsection (4)(b)(ii) and the province in which the proposed toll road is situated, has performed a socio-economic and traffic impact assessment pertaining to the proposed toll road which must be submitted to the Minister and made available to the province and every municipality contemplated in subsection (4)(b);’’ and

(c) by the substitution in subsection (4) for paragraph (c) of the following paragraph:

‘‘(c) the Agency, in applying for the Minister’s approval for the declaration, has forwarded its proposals in that regard to the Minister together with a report on the comments and representations that have been received (if any). In that report the Agency must indicate—

(i) the outcome of the assessment contemplated in paragraph (bA);

(ii) the extent to which any of the matters raised in those comments and representations have been accommodated [in those proposals]; and

(iii) the steps proposed to mitigate against the impact or likely impact on alternative roads with regard to maintenance and traffic management that may result from the declaration contemplated in subsection (1);

and’’.”

6.3.2.3 National Assembly meeting held on 22 November 2012

The National Assembly721 met on 22 November 2012, and resolved as follows on the Bill:

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721 NA (2012 b) 4859

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“TWELFTH AND THIRTEENTH ORDERS [17:12]

Consideration of Report of Portfolio Committee on Transport on Transport Laws and Related Matters Amendment Bill [B 30B - 2012] (National Assembly - sec 75) (Announcements, Tablings and Committee Reports, 21 November 2012, p 4850).


There was no debate.

The Acting Deputy Chief Whip of the Majority Party moved: That the Report and the Bill be referred back to the Portfolio Committee on Transport and that permission be given to the Portfolio Committee on Transport in terms of Rule 249(3) (b) to inquire into amending other provisions of the legislation.

Motion agreed to.

Permission accordingly granted to the Portfolio Committee on Transport to inquire into amending other provisions of the legislation in terms of Rule 249(3) (b).”

6.3.2.4 Portfolio Committee for Transport held on 19 February 2012

The Bill was returned to the Portfolio Committee on 22 November 2012 to give the Freedom Front Plus (“FF+) an opportunity to propose amendments.

During the meeting, a representation was received from the Freedom Front Plus, to which SANRAL responded. The main thrust of the comments revolved around Clauses 3, 4, 5, and 6 of the Bill.

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722 PC Transport (2012 c) Online
723 Parliament (2012) Online

© University of Pretoria
The only recommendation by the Committee was that the impact assessments must be published in the Government Gazette, or reference must be made to the Departmental Website in the Gazette if the publication is not possible due to the length of it.

6.3.2.5 National Assembly meeting held on 5 March 2012

The National Assembly met in 5 March 2012, for, inter alia, a Second Reading of the Transport Laws and Related Matters Amendment Bill.

The Minister for Transport’s speech to the Assembly included the following statements:

“Honourable Speaker, the Bill seeks:

- To provide more effectively for the collection of toll;
- To amend the Cross-Border Road Transport Act, 1998 (Act No. 04 of 1998) in order to empower the Cross Border Road Transport Agency to assist SANRAL in the collection of tolls at the border posts.
- To amend the SANRAL Act to insert a definition of "owner";
- To further provide for the differentiation in respect of the amount of toll that may be levied;
- To provide that the regulations made by the Minister of Transport must be published by notice in the Gazette calling for comments from members of the public;
- To empower the Minister of Transport to make regulations relating to specified toll related matters;
- To provide for certain presumptions relating to the driving, operation and use of vehicles on toll road and the use of

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724 NA (2013) 406-407
725 GCIS (2013) Online

© University of Pretoria
electronic evidence to prove an alleged contravention of the SANRAL Act;

- To exclude the levying and collection of toll from the ambit of the National Credit Act, 2005; and
- To amend the contents of the SANRAL Act.”

The Minutes of the meeting reflects the following:

“SECOND ORDER [14:48]

Debate concluded.

Question put: That the Bill be read a second time.

Division demanded.

The House divided.

Ayes – 193: (Alphabetical list of Members voting “YES” follows)

Noes – 98: (Alphabetical list of Members voting “NO” follows)

Abstain-2: Holomisa, B H; Ntapane, S Z.

Question agreed to.

Bill read a second time.”

The Bill has been adopted by the National Assembly, and has been referred to the President for assent.
6.3.3 EMERGING TRENDS FOR EXECUTIVE POLITICAL STEERING FROM THE TRANSPORT LAWS AND RELATED MATTERS AMENDMENT BILL

When comparing the versions of the Bill, the level of deviation is investigated to determine how the Executive’s original intent was accepted and adopted by the Legislature.

Therefore, the following comparisons can be made⁷²⁶:

⁷²⁶ The Short Title is omitted by author from the comparison
<table>
<thead>
<tr>
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<tr>
<td>To amend the Cross-Border Road Transport Act, 1998, to empower the Cross-Border Road Transport Agency to collect toll on behalf of the South African National Roads Agency limited; and to amend the South African National Roads Agency limited and National Roads Act, 1998, to insert a definition; to further provide for the differentiation in respect of the amount of toll that may be levied; to provide that the regulations made by the Minister must be published by notice in the Gazette;</td>
<td>To amend the Cross-Border Road Transport Act, 1998, to empower the Cross-Border Road Transport Agency to collect toll on behalf of the South African National Roads Agency Limited; and to amend The South African National Roads Agency Limited and National Roads Act, 1998, to insert a definition; to further provide for the differentiation in respect of the amount of toll that may be levied; to provide that the regulations made by the Minister must be published by notice in the Gazette;</td>
<td>To amend the Cross-Border Road Transport Act, 1998, to empower the Cross-Border Road Transport Agency to collect toll on behalf of the South African National Roads Agency Limited; and to amend The South African National Roads Agency Limited and National Roads Act, 1998, to insert a definition; to further provide for the differentiation in respect of the amount of toll that may be levied; to provide that the regulations made by the Minister must be published by notice in the Gazette;</td>
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</table>

Version B30D-2012 was agreed to by the Portfolio Committee on Transport (National Assembly) and presented to the National Assembly.
<table>
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<td>to provide for the Minister to also make regulations relating to specified toll related matters; to provide for the Minister to publish draft regulations in the Gazette calling for public comment; to provide for certain presumptions relating to the driving, operation and use of vehicle on a toll road and the use of electronic evidence to prove an alleged contravention of the South African National Roads Agency Limited and National Roads Act; to exclude the levying and collection of toll from the ambit of the National Credit Act,</td>
<td>to provide for the Minister to make regulations relating to specified toll-related matters; to provide for the Minister to publish draft regulations in the Gazette calling for public comment; to provide for certain presumptions relating to the driving, operation and use of vehicles on a toll road and the use of electronic evidence to prove an alleged contravention of the South African National Roads Agency Limited and National Roads Act; to exclude the levying and collection of toll from the ambit of the National Credit Act,</td>
<td>to provide for the Minister to make regulations relating to specified toll-related matters; to provide for the Minister to publish draft regulations in the Gazette calling for public comment; to provide for certain presumptions relating to the driving, operation and use of vehicles on a toll road and the use of electronic evidence to prove an alleged contravention of the South African National Roads Agency Limited and National Roads Act; to exclude the levying and collection of toll from the ambit of the National Credit Act,</td>
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<tr>
<td>2.</td>
<td>Section 1 of The South African National Roads Agency Limited and National Roads Act, 1998, is hereby amended by the insertion after the definition of “national road” of the following definition: “‘owner’, in relation to a vehicle, has the meaning ascribed to it in section 1 of the— (a) National Road Traffic Act, 1996 (Act No. 93 of 1996); and (b) Cross-Border Road Transport Act, 1998 (Act No. 4 of 1998).”</td>
<td>Section 1 of The South African National Roads Agency Limited and National Roads Act, 1998, is hereby amended by the insertion after the definition of “national road” of the following definition: “‘owner’, in relation to a vehicle, has the meaning ascribed to it in section 1 of the— (a) National Road Traffic Act, 1996 (Act No. 93 of 1996); and (b) Cross-Border Road Transport Act, 1998 (Act No. 4 of 1998).”</td>
<td>Section 1 of The South African National Roads Agency Limited and National Roads Act, 1998, is hereby amended by the insertion after the definition of “national road” of the following definition: “‘owner’, in relation to a vehicle, has the meaning ascribed to it in section 1 of the— (a) National Road Traffic Act, 1996 (Act No. 93 of 1996); and (b) Cross-Border Road Transport Act, 1998 (Act No. 4 of 1998).”</td>
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<td>&quot;(v)&quot;</td>
<td>(v) the means by which the passage of a vehicle beneath or through a toll plaza is identified and the liability to pay toll is recorded; and (vi) the means of payment, including</td>
<td>&quot;(v)&quot; the means by which the passage of a vehicle beneath or through a toll plaza is identified and the liability to pay toll is recorded; and (vi) the means of payment,</td>
<td>&quot;(v)&quot; the means by which the passage of a vehicle beneath or through a toll plaza is identified and the liability to pay toll is recorded; and (vi) the means of payment,</td>
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Section 27 of The South African National Roads Agency Limited and National Roads Act, 1998, is hereby amended by the addition in subsection (3) for paragraph (b) of the following subparagraphs:

(v) the means by which the passage of a vehicle beneath or through a toll plaza is identified and the liability to pay toll is recorded; and (vi) the means of payment, including...
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<td>pre-payment of toll liability;”.</td>
<td>including pre-payment of toll liability;”.</td>
<td>(vi) the means of payment, including pre-payment of toll liability;”.</td>
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<td>(b) by the insertion in subsection (4) of the following paragraph after paragraph (b):</td>
<td>(b) by the insertion in subsection (4) of the following paragraphs after paragraph (b):</td>
<td>(b) by the insertion in subsection (4) of the following paragraphs after paragraph (b):</td>
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<td>“(bA) the Agency, in co-operation with the municipality contemplated in subsection (4)(b)(ii) and the province in which the proposed toll road is situated, has performed a socio-economic and traffic</td>
<td>“(bA) the Agency, in co-operation with the municipality contemplated in subsection (4)(b)(ii) and the province in which the proposed toll road is situated, has</td>
<td>“(bA) the Agency, in co-operation with the municipality contemplated in subsection (4)(b)(ii) and the province in which the proposed toll road is situated, has</td>
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<td>impact assessment pertaining to the proposed toll road which must be submitted to the Minister and made available to the province and every municipality contemplated in subsection (4)(b);” and (c) by the substitution in subsection (4) for paragraph (c) of the following paragraph: “(c) the Agency, in applying</td>
<td>performed a socio-economic and traffic impact assessment pertaining to the proposed toll road which must be submitted to the Minister and made available to the province and every municipality contemplated in subsection (4)(b); (bB) a notice of the publication of the</td>
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<td>for the Minister’s approval for the declaration, has forwarded its proposals in that regard to the Minister together with a report on the comments and representations that have been received (if any). In that report the Agency must indicate—</td>
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<td>(i) the outcome of the assessment</td>
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<td>report contemplated in paragraph (bA) is published in the Gazette, indicating the availability of such report;’’ and (c) by the substitution in subsection (4) for paragraph (c) of the following paragraph:</td>
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‘‘(c) the Agency, in applying for the Minister’s approval for the declaration, has forwarded its proposals in that regard to the
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<td>contemplated in paragraph ((bA));</td>
<td>Minister together with a report on the comments and representations that have been received (if any). In that report the Agency must indicate—</td>
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<td>(\text{(ii)}) the extent to which any of the matters raised in those comments and representations have been accommodated ([\text{in those proposals}]); and (\text{(iii)}) the steps proposed to mitigate against the</td>
<td>(\text{(i)}) the outcome of the assessment contemplated in paragraph ((bA)); (\text{(ii)}) the extent to which any of the matters</td>
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<td>impact or likely impact on alternative roads with regard to maintenance and traffic management that may result from the declaration contemplated in subsection (1); and’’.</td>
<td>raised in those comments and representations have been accommodated [___ those proposals]: and (iii) the steps proposed to mitigate against the impact or likely impact on alternative roads with regard to</td>
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<td>(a) by the substitution in subsection (1) for the words preceding paragraph</td>
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<td>maintenance and traffic management that may result from the declaration</td>
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<td>contemplated in subsection (1); and’’.</td>
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|  | “(1) The Minister, after consultation with the Agency and by notice in the Gazette, may make regulations that are not inconsistent with this Act—”;
(b) by the insertion in subsection (1) of the following paragraphs after paragraph (d):

“(dA) providing for the terms and conditions applicable to the payment of toll and for the establishment of a system that permits the registration of persons” | “(1) The Minister, after consultation with the Agency and by notice in the Gazette, may make regulations that are not inconsistent with this Act—”;
(b) by the insertion in subsection (1) of the following paragraphs after paragraph (d):

“(dA) providing for the terms and conditions applicable to the payment of toll and for the establishment of a system that permits the registration of persons” | “(1) The Minister, after consultation with the Agency and by notice in the Gazette, may make regulations that are not inconsistent with this Act—”;
(b) by the insertion in subsection (1) of the following paragraphs after paragraph (d):

“(dA) providing for the terms and conditions applicable to the payment of toll and for the establishment of a system that permits the registration of persons” |
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<td>liable to pay toll; providing specifications for— (d) (i) any tolling equipment, electrical, electronic or mechanical device or a combination thereof used for the identification of vehicles on toll roads in order to</td>
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<td>(i) the manner in which the liability to pay toll; and</td>
<td>(ii) the installation, maintenance and verification of the device and tolling equipment contemplated in subparagraph (i);</td>
<td>(i) the manner in which the liability to pay toll; and</td>
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<td>(ii) the installation, maintenance and verification of the device and tolling equipment contemplated in subparagraph (i);</td>
<td>(ii) the installation, maintenance and verification of the device and tolling equipment contemplated in subparagraph (i);</td>
<td>(ii) the installation, maintenance and verification of the device and tolling equipment contemplated in subparagraph (i);</td>
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<td>liability to pay toll will be recorded, including the time and the manner in which such toll must be paid; (ii) the payment of toll in cash, electronically or by other method, which is subject to but not dependent</td>
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<td>on any conditions that the Agency may determine under section 27(1)(b); (iii) the offences and penalties applicable to the owner or user or driver of a vehicle in the event of the non-payment of toll; (iv) the method of</td>
<td>on any conditions that the Agency may determine under section 27(1)(b); (iii) the offences and penalties applicable to the owner or user or driver of a vehicle in the event of the non-payment of toll;</td>
<td>on any conditions that the Agency may determine under section 27(1)(b); (iii) the offences and penalties applicable to the owner or user or driver of a vehicle in the event of the non-payment of toll;</td>
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<td>notifying the owner, driver or the user of the vehicle of his or her liability to pay toll; and (v) the manner of recovering outstanding payment of toll; and’’; (c) by the insertion after subsection (1) of the following subsection: ‘‘(1A) The regulations contemplated in subsection (1)/dA to (iv) the method of notifying the owner, driver or the user of the vehicle of his or her liability to pay toll; and (v) the manner of recovering outstanding payment of toll; and’’; (c) by the insertion after subsection (1) of the following subsections: ‘‘(1A) The regulations contemplated in subsection (1)/dA to (iv) the method of notifying the owner, driver or the user of the vehicle of his or her liability to pay toll; and (v) the manner of recovering outstanding payment of toll; and’’; (c) by the insertion after subsection (1) of the following subsections: ‘‘(1A) The regulations contemplated in subsection (1)/dA to (iv) the method of notifying the owner, driver or the user of the vehicle of his or her liability to pay toll; and (v) the manner of recovering outstanding payment of toll; and’’; (c) by the insertion after subsection (1) of the following subsections: ‘‘(1A) The regulations contemplated in subsection (1)/dA to (iv) the method of notifying the owner, driver or the user of the vehicle of his or her liability to pay toll; and (v) the manner of recovering outstanding payment of toll; and’’; (c) by the insertion after subsection (1) of the following subsections: ‘‘(1A) The regulations contemplated in subsection (1)/dA to</td>
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<td>may provide for the issuing of directions, conditions or requirements for matters connected therewith.”; and</td>
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<td>by the addition of the following subsection:</td>
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<td>(4)</td>
<td>“Before the Minister makes any regulation, he or she must publish a draft of the proposed regulation in the Gazette together with a notice calling on interested persons to comment in writing within a period specified in the notice, which may not be less than four weeks from the date of publication of the notice, any</td>
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<td>(1B)</td>
<td>Before the Minister makes any regulation contemplated in subsection (1), the Minister must submit a draft of the proposed regulation to Parliament for comment.”; and</td>
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<td>by the addition of the following subsection:</td>
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"Gazette together with a notice calling on interested persons to comment in writing within a period specified in the notice, which may not be less than four weeks from the date of publication of the notice, any objections or representations which they would like to make with the Director-General for submission to the Minister.”.
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<td><strong>Presumptions</strong>&lt;br/&gt;59A. (1) In the absence of evidence to the contrary, where it is necessary to prove who was driving, operating or using the vehicle at the time when the liability to pay toll was incurred, it shall be deemed that such vehicle was driven, operated or used by the owner of the vehicle—&lt;br/&gt; (a) in respect of any prosecution in terms of this Act relating to the driving, operation or use of a vehicle on a toll road or the payment</td>
<td><strong>Presumptions</strong>&lt;br/&gt;59A. (1) In the absence of evidence to the contrary, where it is necessary to prove who was driving, operating or using the vehicle at the time when the liability to pay toll was incurred, it shall be deemed that such vehicle was driven, operated or used by the owner of the vehicle—&lt;br/&gt; (a) in respect of any prosecution in terms of this Act relating to the driving, operation or use of a vehicle on a toll road or the payment of toll; or</td>
<td><strong>Presumptions</strong>&lt;br/&gt;59A. (1) In the absence of evidence to the contrary, where it is necessary to prove who was driving, operating or using the vehicle at the time when the liability to pay toll was incurred, it shall be deemed that such vehicle was driven, operated or used by the owner of the vehicle—&lt;br/&gt; (a) in respect of any prosecution in terms of this Act relating to the driving, operation or use of a vehicle on a toll road or the payment of toll; or</td>
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<td>Agency for the recovery of outstanding toll monies.</td>
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<td>(2) For the purposes of subsection (1) and in the absence of evidence to the contrary, where the owner of the vehicle concerned is a juristic person, it shall be deemed that such vehicle was driven, operated or used as contemplated in that subsection by an employee of the owner of the vehicle in the course and scope of its</td>
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<td>(3)     In a prosecution for an alleged contravention of this Act where electronic evidence is produced and if the machine producing the electronic evidence has been checked for correct working and reading by a person trained in the operation thereof, such electronic evidence upon its production shall, in the absence of evidence to the contrary, be presumed to be accurate and may be used to prove the alleged contravention.</td>
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<td>(4)     Where in any prosecution in terms of this Act it is alleged that an in the course and scope of its business.</td>
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<td>offence was committed on a toll road, the road concerned shall, in absence of evidence to the contrary, be presumed to be a toll road.”’.</td>
<td>offence was committed on a toll road, the road concerned shall, in absence of evidence to the contrary, be presumed to be a toll road.”’.</td>
<td>terms of this Act it is alleged that an offence was committed on a toll road, the road concerned shall, in absence of evidence to the contrary, be presumed to be a toll road.”’.</td>
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<td>Section 60 of The South African National Roads Agency Limited and National Roads Act, 1998, is hereby amended— (a) by the substitution for the heading of the following heading: “Amendment, exclusion and repeal of laws””; and (b) by the addition of the following subsection:</td>
<td>Section 60 of The South African National Roads Agency Limited and National Roads Act, 1998, is hereby amended— (a) by the substitution for the heading of the following heading: “Amendment, exclusion and repeal of laws””; and (b) by the addition of the following subsection:</td>
<td>Section 60 of The South African National Roads Agency Limited and National Roads Act, 1998, is hereby amended— (a) by the substitution for the heading of the following heading: “Amendment, exclusion and repeal of laws””; and (b) by the addition of the following subsection:</td>
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<td>7.</td>
<td>“(3) Despite the provisions of the National Credit Act, 2005 (Act No. 34 of 2005), the provisions of that Act are not applicable to the levying and collecting of toll in terms of this Act.”.</td>
<td>“(3) Despite the provisions of the National Credit Act, 2005 (Act No. 34 of 2005), the provisions of that Act are not applicable to the levying and collecting of toll in terms of this Act.”.</td>
<td>“(3) Despite the provisions of the National Credit Act, 2005 (Act No. 34 of 2005), the provisions of that Act are not applicable to the levying and collecting of toll in terms of this Act.”.</td>
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6.3.3.1 Legislative Amendments proposed by the Executive

The Executive proposed the Long Title and Sections 1, 2, 4, 5, 6, 7 and 8, and these sections were accepted by the Legislature.

In the Portfolio Committee meeting of 23 October 2012, some of the members questioned the reasons why the National Credit Act was excluded from the ambit of the Bill, and what the legal interpretation of “a road is presumed to be a toll road unless stated otherwise” was. These questions were not responded to by the Department, but no actions were taken by members during the following meetings to follow up on this question.

The Portfolio Committee made the following amendment proposal for Section 3 in version [B30B-2012] of the Bill:

> (a) by the addition in subsection (3)(b) of the following subparagraphs:
>   
>   “(v) the means by which the passage of a vehicle beneath or through a toll plaza is identified and the liability to pay toll is recorded; and
> (vi) the means of payment, including pre-payment of toll liability;”.
> (b) by the insertion in subsection (4) of the following paragraphs after paragraph
> (b):
> (bA) the Agency, in co-operation with the municipality contemplated in subsection (4)(b)(ii) and the province in which the proposed toll road is situated, has performed a socio-economic and traffic impact assessment pertaining to the proposed toll road
which must be submitted to the Minister and made available to the province and every municipality contemplated in subsection (4)(b):

(bB) a notice of the publication of the report contemplated in paragraph (bA) is published in the Gazette, indicating the availability of such report;’’ and

(c) by the substitution in subsection (4) for paragraph (c) of the following paragraph:

‘‘(c) the Agency, in applying for the Minister’s approval for the declaration, has forwarded its proposals in that regard to the Minister together with a report on the comments and representations that have been received (if any). In that report the Agency must indicate—

(i) the outcome of the assessment contemplated in paragraph (bA);

(ii) the extent to which any of the matters raised in those comments and representations have been accommodated [in those proposals]; and

(iii) the steps proposed to mitigate against the impact or likely impact on alternative roads with regard to maintenance and traffic management that may result from the declaration contemplated in subsection (1); and’’.”

“Section 58 of The South African National Roads Agency Limited and National Roads Act, 1998, is hereby amended ... by the insertion after subsection (1) of the following subsections: ...
(1B) Before the Minister makes any regulation contemplated in subsection (1), the Minister must submit a draft of the proposed regulation to Parliament for comment.”;

Both of these proposed amendments by the Portfolio Committee were accepted by the Department and the Executive during deliberations of the Portfolio Committee.

6.3.3.2 Legislative Amendments proposed by the Legislature but not accepted by the Executive

The National Council of Provinces’ Select Committee on Public Services received a briefing from the Department on the Bill on 30 April 2013, but “(a)s the Bill had been tagged a Section 75, the National Council of Provinces was not authorised to veto the Bill but could only recommend amendments”728.

At the meeting of 6 May 2013, the NCOP Committee729 resolved to adopt the Bill, subject to an amendment. The amendment was minuted as follows:

“Report of the Select Committee on Public Services on the Transport Laws and Related Matters Amendment Bill, dated 7 May 2013:

The Select Committee on Public Services, having considered the subject of the Transport Laws and Related Matters Amendment Bill [B 30D-2012] (National Assembly – sec 75), referred to it, reports the Bill with a proposed amendment as follows:

CLAUSE 4

1. On page 4, in line 12, to omit "comment" and to substitute "consideration".”

728 NCOP (2013 a) Online
729 NCOP (2013 b) Online.
The Committee Report dated the 7 May 2013 that had appeared in the ATC (Announcements, Tablings, Committee Reports) was rescinded on 21 May 2013 after a complaint by the Democratic Alliance regarding the process followed by the Committee. During the meeting, the Committee dealt with the proposed amendment of Section 4 as follows:

“Mr Jacobs, referring to Clause 4(c)1(B), stated that the Committee had made a suggestion on this clause. He now proposed to rescind the suggestion and to leave the clause as it was reflected in the Bill.

Ms Themba seconded the proposed rescission.

Mr Groenewald said that the DA supported the rescission.”

6.3.3.3 Emerging trends from the Transport Laws and Related Matters Amendment Bill

The Bill was originally published for the first time by the Executive for public comments in 2008 and a second version was published in 2010, before the Bill was introduced in the National Assembly in 2012. When comparing the three versions, the 2008-version and the version submitted to the National Assembly show more similarities between them, than the 2010-version. This indicates that the Executive reverted back to the original concept when submitting the draft Bill to the Legislature.

After the introduction of the Bill, the Portfolio Committee only recommended two amendments, whilst the Select Committee recommended a single amendment (which was later rescinded). These amendments were included in the final version

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of the Bill that was adopted by Parliament (National Assembly and the National Council of Provinces).

One of the amendments deals with the delegation of legislative authority to the Minister for Transport regarding:

“(dA) providing for the terms and conditions applicable to the payment of toll and for the establishment of a system that permits the registration of persons liable to pay toll;

(dB) providing specifications for—
   (i) any tolling equipment, electrical, electronic or mechanical device or a combination thereof used for the identification of vehicles on toll roads in order to record the liability to pay toll; and
   (ii) the installation, maintenance and verification of the device and tolling equipment contemplated in subparagraph (i);

(dC) providing for—
   (i) the manner in which the liability to pay toll will be recorded, including the time and the manner in which such toll must be paid;
   (ii) the payment of toll in cash, electronically or by other method, which is subject to but not dependent on any conditions that the Agency may determine under section 27(1)(b);
   (iii) the offences and penalties applicable to the owner or user or driver of a vehicle in the event of the non-payment of toll;
   (iv) the method of notifying the owner, driver or the user of the vehicle of his or her liability to pay toll; and
   (v) the manner of recovering outstanding payment of toll; and”;

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“(1A) The regulations contemplated in subsection (1)(dA) to (dC) may provide for the issuing of directions, conditions or requirements for matters connected therewith.”

The amendment requires the Minister to submit a draft of the proposed regulation to Parliament for “comments”. Although it is an amendment of the original executive version of the Bill, it is not a substantial deviation from the original proposal, because in the original proposal734: “(4) Before the Minister makes any regulation, he or she must publish a draft of the proposed regulation in the Gazette together with a notice calling on interested persons to comment in writing within a period specified in the notice, which may not be less than four weeks from the date of publication of the notice, any objections or representations which they would like to make with the Director-General for submission to the Minister.”. Parliament could have submitted comments on the proposed regulation in a similar manner as other government departments, municipalities, civil society or any other stakeholder that will be affected by the regulation.

Furthermore, the requirement for “comments” from Parliament prior to the enactment of Regulations does not place an obligation on the Minister to accept the comments received from Parliament, or require the approval of Parliament to proceed with the Regulations.

6.4 USE OF OFFICIAL LANGUAGES BILL

In order to determine whether a similar pattern, where the Legislature makes minor inputs, can be discerned, a different Bill submitted by different Minister to a different Portfolio Committee is selected.

6.4.1 BACKGROUND TO THE USE OF OFFICIAL LANGUAGES BILL

In 1996, the Department of Arts, Culture, Science and Technology developed a policy document “Towards a National Language Plan for South Africa”\textsuperscript{735}. Building on this policy, the Department of Arts and Culture published a “National Language Policy Framework” that envisaged a National Language Act.

The Department of Arts and Culture published the draft \textit{SA Languages Bill}\textsuperscript{736} on 30 May 2003 for public comments. The long title of the Bill is:

“To provide for an enabling framework for promoting South Africa’s linguistic diversity and encouraging respect for language rights within the framework of building and consolidating a united, democratic South African nation, taking into account the broad acceptance of linguistic diversity, social justice, the principle of equal access to public services and programmes, respect for language rights, the establishment of language services in all spheres of government, the powers and functions of such services, and matters connected therewith.”

The process was halted, and on 25 July 2005, Cabinet decided that the Minister for Arts and Culture, together with the Minister for Justice should not take the National Language Bill through Parliament, but rather find alternative, non-legislative mechanisms to deal with the matter\textsuperscript{737}.

According to the Director-General\textsuperscript{738} of the Department of Arts and Culture, the Department consulted with the Department of Justice and Constitutional

\textsuperscript{735} Background provided by Gauteng North High Court in the matter of \textit{Lourens v President van die Republiek van Suid-Afrika en Andere} (2013 (1) SA 499 (GNP)) (paragraphs are not numbered)

\textsuperscript{736} General Notice No. 1514, \textit{Government Gazette} No. 24893

\textsuperscript{737} Background provided by Gauteng North High Court in the matter of \textit{Lourens v President van die Republiek van Suid-Afrika en Andere} (2013 (1) SA 499 (GNP)) (paragraphs are not numbered)

\textsuperscript{738} PC Arts & Culture (2011) Online
Development, Department of Basic Education (as it was now known) and the Department of Health. The discussions focused on the use of languages in courts, and the “implementation of the Human Technology (HLT) projects in conjunction with the Council for Scientific and Industrial Research (CSIR) … “and identified various structures that promoted the use of official languages such as the Pan South African Languages Board (PanSALB), the Provincial Languages Committee, the National Lexicography Unit and Hansard”739.

In 2010, Mr Lourens approached the North Gauteng High Court, and obtained judgment against the Minister for Arts and Culture, to compel the government to finalise and promulgate national legislation to regulate and monitor the use of all eleven official languages as mandated by the Constitution740. The Court ordered the Minister to pass legislation that will give effect to Section 6 of the Constitution741 within two years.

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739 PC Arts & Culture (2011) Online
740 Lourens v President van die Republiek van Suid-Afrika en Andere (2013 (1) SA 499 (GNP)) (paragraphs are not numbered)
741 "6 Languages (1) The official languages of the Republic are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu.
(2) Recognising the historically diminished use and status of the indigenous languages of our people, the state must take practical and positive measures to elevate the status and advance the use of these languages.
(3) (a) The national government and provincial governments may use any particular official languages for the purposes of government, taking into account usage, practicality, expense, regional circumstances and the balance of the needs and preferences of the population as a whole or in the province concerned; but the national government and each provincial government must use at least two official languages.
(b) Municipalities must take into account the language usage and preferences of their residents.
(4) The national government and provincial governments, by legislative and other measures, must regulate and monitor their use of official languages. Without detracting from the provisions of subsection (2), all official languages must enjoy parity of esteem and must be treated equitably.
(5) A Pan South African Language Board established by national legislation must-
(a) promote, and create conditions for, the development and use of-
   (i) all official languages;
   (ii) the Khoi, Nama and San languages; and
   (iii) sign language; and
(b) promote and ensure respect for-
   (i) all languages commonly used by communities in South Africa, including German, Greek, Gujarati, Hindi, Portuguese, Tamil, Telegu and Urdu; and

When comparing the long titles of the previous Bill that was published and the Rule 241-version, the following can be noted:

(ii) Arabic, Hebrew, Sanskrit and other languages used for religious purposes in South Africa.”

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742 SA News (2011) Online
743 Rule 241(1)(b) of the Rules of the National Assembly states that before a Bill is introduced in the National Assembly, the Executive must publish the draft Bill with a memorandum of objects in the *Government Gazette* and submit a copy of the draft bill (and copies of the *Government Gazette*) to the Speaker.
744 The Preamble and Short Title are omitted by author from the comparison
<table>
<thead>
<tr>
<th><strong>SA LANGUAGES BILL, 2003</strong></th>
<th><strong>SOUTH AFRICAN LANGUAGE BILL, 2011</strong>&lt;sup&gt;745&lt;/sup&gt;</th>
<th><strong>SIMILARITIES / DIFFERENCES BETWEEN VERSIONS</strong></th>
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</thead>
<tbody>
<tr>
<td>To provide for an enabling framework for promoting South Africa’s linguistic diversity and encouraging respect for language rights within the framework of building and consolidating a united, democratic South African nation, taking into account the broad acceptance of linguistic diversity, social justice, the principle of equal access to public services and programmes, respect for language rights, the establishment of language services in all spheres of government, the powers and functions of such services and matters connected therewith.</td>
<td>To provide for the regulation and monitoring of the use of official languages by national government for government purposes; to require the adoption of language policies by national departments, national public entities and national public enterprises; to provide for the establishment and functions of a National Language Unit; to provide for the establishment and functions of language units by national departments, national public entities and national public enterprises; to provide for monitoring of and reporting on official language use by the national government; to facilitate intergovernmental coordination of</td>
<td>2003: The Bill provides for a framework and intends to establish language services in all spheres of government 2011: The Bill provides for the regulation and monitoring of the use of official languages and intends to establish language units in the national sphere</td>
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</table>

<sup>745</sup> The clauses of the 2011 version of the Bill have been re-arranged by author to allow for easier comparison.
<table>
<thead>
<tr>
<th><strong>SA LANGUAGES BILL, 2003</strong></th>
<th><strong>SOUTH AFRICAN LANGUAGE BILL, 2011</strong></th>
<th><strong>SIMILARITIES / DIFFERENCES BETWEEN VERSIONS</strong></th>
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</thead>
</table>
| language policies; and to provide for matters connected therewith. | **Definitions**
1. In this Act, unless the context otherwise indicates -

"Constitution" means the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996);

"indigenous languages" mean the languages which, according to historical record, originated in South Africa;

"language unit" means a language unit established in terms of section 6 of this Act;

"legislative instrument" means any act or regulation that originates from a government organ with legislative powers; | **2003**: Definitions include “indigenous languages”, “legislative instrument”, “organ of state”, “rotation” and “South African languages”

**2011**: Definitions include “national departments”, “national public entities” and “national public enterprises” and "Pan South African Language Board" |

"Minister" means the Minister responsible for language matters;

"national department" means national departments, national public entities and national public enterprises;

"National Language Unit" means the
### SA LANGUAGES BILL, 2003

"Minister" means the Minister responsible for language matters;
"official languages" means the languages referred to in section 6(1) of the Constitution;
"organ of state" means any department of state or administration in the national, provincial or local sphere of government;
"other institution" means an institution referred to in section 4(1)(b) of this Act;
"rotation" means the process by which documents intended for the general public that are published and disseminated by any national government department and, mutatis mutandis any provincial administration, will be available simultaneously in six of the languages as

### SOUTH AFRICAN LANGUAGE BILL, 2011

National Language Unit established in terms of section 5;
"national public enterprise" means a national government business enterprise defined in section 1 and listed in schedule 3 part B of the Public Finance Management Act, 1999 (Act No. 1 of 1999);
"national public entity" means a national public entity defined in section 1 and listed in Schedules 2 and 3 to the Public Finance Management Act, 1999 (Act No. 1 of 1999);
"official language" means an official language contemplated in section 6(1) of the Constitution;
"Pan South African Language Board"

### SIMILARITIES / DIFFERENCES BETWEEN VERSIONS
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<th><strong>SA LANGUAGES BILL, 2003</strong></th>
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<th><strong>SIMILARITIES / DIFFERENCES BETWEEN VERSIONS</strong></th>
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<tr>
<td>stipulated in section 5(2) of this Act, or as determined by provincial measures; “South African languages” means all the indigenous languages as defined herein, as well as all other languages generally used in South Africa, including those referred to in section 6(5)(a) and (b) of the Constitution; “this Act” includes any regulation made in terms of this Act.</td>
<td>means the Board established in terms of section 2 of the Pan South African Language Board Act, 1995 (Act No. 59 of 1995); &quot;prescribe&quot; means prescribed by regulations; &quot;this Act&quot; includes any regulations made in terms of section 14.</td>
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<td><strong>Objects</strong></td>
<td><strong>Objects of Act</strong></td>
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<tr>
<td>2. The objects of this Act are -</td>
<td>2. The objects of this Act are-</td>
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<td>(a) to give effect to the letter and spirit of section 6 of the Constitution;</td>
<td>(a) to regulate and monitor the use of official languages by the national government for government purposes;</td>
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<td>(b) to promote the equitable use of the official languages of South Africa;</td>
<td>(b) to promote parity of esteem and</td>
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<td>(c) to enable all South Africans to use</td>
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<th>SA LANGUAGES BILL, 2003</th>
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<th>SIMILARITIES / DIFFERENCES BETWEEN VERSIONS</th>
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<td>the official languages of their choice as a matter of right within the range of contexts contemplated in this Act, with a view to ensuring equal access to government services and programmes, to education, and to knowledge and information; to provide for a regulatory framework to facilitate the effective implementation of the constitutional obligations concerning multilingualism.</td>
<td>equitable treatment of the official languages of the Republic; to facilitate equitable access to the services and information of the national government; and to promote good language management by the national government for efficient public service administration and to meet the needs of the public.</td>
<td>Removed in the 2011-version</td>
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**Guiding principles**

3(1) The guiding principles of this Act are as follows:

(a) The promotion and accommodation of

(b) The equitable treatment of the official languages of the Republic;
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<th>SA LANGUAGES BILL, 2003</th>
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<th>SIMILARITIES / DIFFERENCES BETWEEN VERSIONS</th>
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<tr>
<td>linguistic diversity must be pursued in accordance with the Constitution and relevant international law.</td>
<td>(b) The promotion of the use of all indigenous languages and South African Sign Language/s.</td>
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<td>(b) The promotion of the use of all indigenous languages and South African Sign Language/s.</td>
<td>(c) The entrenchment of language equity and language rights must be pursued in such a way that both national unity and democracy are promoted.</td>
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<tr>
<td>(c) The entrenchment of language equity and language rights must be pursued in such a way that both national unity and democracy are promoted.</td>
<td>(d) The learning of South African languages, especially the indigenous languages, must be encouraged.</td>
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<tr>
<td>(d) The learning of South African languages, especially the indigenous languages, must be encouraged.</td>
<td>(e) Measures for the implementation of multilingualism must take into</td>
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| (e) Measures for the implementation of multilingualism must take into | }
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<th><strong>SIMILARITIES / DIFFERENCES BETWEEN VERSIONS</strong></th>
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<tr>
<td>account the interests, needs and aspirations of all affected parties, and their participation in language matters must be promoted.</td>
<td>(f) There must be intergovernmental coordination and harmonisation of policies, legislation and actions relating to the entrenchment and promotion of multilingualism.</td>
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<tr>
<td>(2) The principles set out in subsection (1) shall apply to all organs of state and to other institutions where and when applicable, and shall - (a) apply alongside all other appropriate and relevant considerations in respect of the promotion of multilingualism;</td>
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<th><strong>SA LANGUAGES BILL, 2003</strong></th>
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<th><strong>SIMILARITIES / DIFFERENCES BETWEEN VERSIONS</strong></th>
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<td>(b) serve as a general framework within which all measures for the implementation of this Act must be formulated;</td>
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<td>(c) serve as guidelines by reference to which any organ of state must exercise any function in terms of this Act;</td>
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<td>(d) guide the interpretation, administration and implementation of this Act.</td>
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<td><strong>Application and interpretation</strong></td>
<td><strong>Application of Act</strong></td>
<td><strong>2003</strong>: Act is binding on all organs of state that exercise a public power or perform a public function. <strong>2011</strong>: The Act is only binding on the national sphere of government.</td>
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<td>4(1) This Act binds -</td>
<td>3. (1) This Act applies to</td>
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<td>(a) the state, which shall include any department of state or administration in the national, provincial or local sphere of government; and</td>
<td>(a) national departments;</td>
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<td></td>
<td>(b) national public entities; and</td>
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<td></td>
<td>(c) national public enterprises.</td>
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<td>(2) This Act takes precedence over any inconsistent provision of any other Act</td>
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(b) any institution exercising a public power or performing a public function in terms of any legislation, subject to the provisions of section 5(5)(c).

(2) When interpreting a provision of this Act, any person, court or tribunal shall prefer any reasonable interpretation that is consistent with the objects of the Constitution and this Act to any alternative interpretation that is inconsistent with the objects as contained in section 2.

(3) This Act shall take precedence over inconsistent provisions of any other Act on language use, except the Constitution.

(4) No provision of this Act shall be construed in such a manner that the regulating the use of official languages by the national government.
<table>
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<tr>
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</table>
| powers and functions of –  | (i) any state institution, supporting constitutional democracy established in terms of section 181 of the Constitution or any other legislation;  
(ii) the Pan South African Language Board established in terms of the Pan South African Language Board Act, 1995 (Act No. 59 of 1995), are limited or undermined. | |
| **Language policy**  | **Language policy**  | **2003**: The Language Policy prescripts are extensive and comprehensive.  
2011: The Language Policy gives more discretion to the national sphere regarding the content of the Policy. |
| 5(1) The application of this section and all measures taken in pursuance thereof shall ensure the equitable treatment and parity of esteem of the languages concerned.  
(2) In addition to the purposes in section | 4. (1) Within 18 months of the commencement of this Act or such further period as the Minister may prescribe, the national government must adopt a language policy regarding its use of | |
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<tr>
<td>7(b), and subject to the provisions of subsection (5), government documents shall be made available in all 11 official languages, and in cases where this is not feasible, national government departments shall publish documents simultaneously in at least six official languages. The selection of languages shall apply as is stated in subsection (3)(a) and on a rotational basis from the two categories of official languages in subsection (3)(a)(v) and (vi), except when the relevant organ of state or other institution can show that it is reasonably necessary to follow an alternative policy in the interest of effective governance or communication. (3)(a) The languages referred to in official languages for government purposes.</td>
<td>(2) A language policy adopted in terms of subsection (1) must-&lt;br&gt;&lt;br&gt;-comply with the provisions of section 6(3) of the Constitution and this Act;&lt;br&gt;-identify at least two official languages that a national department, national public entity or national public enterprise will use for government purposes;&lt;br&gt;-stipulate how official languages will be used, amongst other things, in communicating with the public, official notices, government publications and inter- and intra-</td>
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<td><strong>SA LANGUAGES BILL, 2003</strong></td>
<td><strong>SOUTH AFRICAN LANGUAGE BILL, 2011</strong></td>
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<td>subsection (2) are -</td>
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<td>(i) Tshivenda</td>
<td>(d) describe how a national department,</td>
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<td>(ii) Xitsonga</td>
<td>national public entity or national</td>
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<td>(iii) Afrikaans</td>
<td>public enterprise will communicate</td>
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<td>(iv) English</td>
<td>with the public where the language</td>
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<td>(v) At least one from the Nguni group</td>
<td>of choice of the public is not an</td>
<td></td>
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<td>(vi) At least one from the Sotho group</td>
<td>official language contemplated in</td>
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<td>(4) Any alternative policy referred to in subsection (2) -</td>
<td>paragraph (b);</td>
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<td>(a) shall be adopted and implemented in consultation with the Pan South African Language Board; and</td>
<td>(e) describe how members of the public</td>
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<td>(b) comply with the provisions of sections 6(3)(a) and 30 of the Constitution.</td>
<td>can access the language policy;</td>
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<td></td>
<td>(f) provide for a complaints mechanism</td>
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<td>whereby the public may file a complaint</td>
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<td>regarding the use of official languages</td>
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<td>by the national government;</td>
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<td>(g) provide for any other matter that the Minister</td>
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<td>may prescribe; and</td>
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<td><strong>SA LANGUAGES BILL, 2003</strong></td>
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<tr>
<td>(5) The selection of any applicable number of languages in terms of subsection (2) shall apply to –</td>
<td>(h) be published in the <em>Gazette</em> as soon as reasonably practicable, but not later than 90 days after its adoption.</td>
<td></td>
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<tr>
<td>(a) legislative, executive and judicial functions of government in the national sphere taking into account all relevant factors, including usage, practicality and the balance of the needs and preferences of the population as a whole, provided that no less than six languages shall be used in the national sphere for the purpose of written communication as determined in terms of subsection (6);</td>
<td>(3) Every national department, national public entity and national public enterprise must-</td>
<td></td>
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<tr>
<td>(b) legislative, executive and judicial functions of government in the</td>
<td>(a) ensure that a copy of its language policy is available on request to members of the public at all their offices; and</td>
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<td></td>
<td>(b) display at all their offices a summary of their language policy in such manner and place that it can be read by the public.</td>
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<td><strong>SA LANGUAGES BILL, 2003</strong></td>
<td><strong>SOUTH AFRICAN LANGUAGE BILL, 2011</strong></td>
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<td>provincial and local spheres, provided that regional and local circumstances shall receive due recognition in addition to the factors referred to in paragraph (a). (c) institutions referred to in section 4(l)(b) where applicable, and provided that the nature, aim and activities of such an institution receive due recognition in determining an appropriate language policy. (6) The Minister may make use of his or her powers under section 12 to - (a) classify, after consultation with other Ministries, the communication, reports, records, documentation and</td>
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**SA LANGUAGES BILL, 2003**

| Legislative instruments to which this section, read with section 7(b) where applicable, shall apply; (b) provide for timeframes within which this Act or any part thereof must be implemented; and (c) consider within a reasonable time, mechanisms, including proposals for the amendment of this Act that will ensure the application of this Act to private institutions providing essential services to the public. |

**SOUTH AFRICAN LANGUAGE BILL, 2017**

| Language units 6(1) Within five years after the commencement of this Act, a language unit shall be established - (a) for each department of the national Establishment of National Language Unit 5. The Minister must- (a) establish a National Language unit in the Department |

**SIMILARITIES / DIFFERENCES BETWEEN VERSIONS**

2003: There is no differentiation between the language units of the different spheres of government.

2011: The section only deals with the establishment of a National Language
<table>
<thead>
<tr>
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<th><strong>SIMILARITIES / DIFFERENCES BETWEEN VERSIONS</strong></th>
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</thead>
<tbody>
<tr>
<td>government; and (b) for each province in terms of provincial legislation providing for the implementation of this Act. (2) Provincial governments shall take the necessary measures to support and strengthen the capacity of local governments to comply with the provisions of this Act and the constitutional provisions on language. (3) Where an existing unit in any sphere of government is already involved in language matters, the relevant national department or province may assign such powers and functions to the unit as are necessary for the fulfilment of its obligations in terms of this Act and the</td>
<td><em>(b)</em> ensure that the National Language unit is provided with the personnel, administrative and other resources necessary for its effective functioning.</td>
<td>Unit.</td>
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<tr>
<td><strong>SA LANGUAGES BILL, 2003</strong></td>
<td><strong>SOUTH AFRICAN LANGUAGE BILL, 2011</strong></td>
<td><strong>SIMILARITIES / DIFFERENCES BETWEEN VERSIONS</strong></td>
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<tr>
<td>Constitution.</td>
<td>Functions of National Language unit</td>
<td>2011: New section dealing with the functions of the National Language Unit</td>
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<tr>
<td></td>
<td>6. (1) The National Language unit must-</td>
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<td></td>
<td>(a) advise the Minister on</td>
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<td>(i) policy and strategy to regulate</td>
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<td>and monitor the use of official</td>
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<td>languages by the national government</td>
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<td>for government purposes;</td>
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<td>(ii) policy and strategy to promote</td>
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<td>all official languages to enjoy</td>
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<td>parity of esteem and equitable</td>
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<td>treatment by the national government;</td>
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<td>(iii) facilitation of equitable</td>
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<td>access by the public, through the</td>
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<td></td>
<td>language policy, to services</td>
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<tr>
<td><strong>SA LANGUAGES BILL, 2003</strong></td>
<td><strong>SOUTH AFRICAN LANGUAGE BILL, 2011</strong></td>
<td><strong>SIMILARITIES / DIFFERENCES BETWEEN VERSIONS</strong></td>
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<tr>
<td>rendered by and information of a national department, national public entity or national public enterprise; (iv) promotion of good language management within a national department, national public entity or national public enterprise; and (v) the functions of language units contemplated in section 7;</td>
<td>liaise with the language units contemplated in section 7 to promote the general coordination; (c) perform any other function that the</td>
<td></td>
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<tr>
<td>SA LANGUAGES BILL, 2003</td>
<td>SOUTH AFRICAN LANGUAGE BILL, 2011</td>
<td>SIMILARITIES / DIFFERENCES BETWEEN VERSIONS</td>
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<tr>
<td>Minister may prescribe;</td>
<td>Minister may prescribe;</td>
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<tr>
<td>(d) receive annual reports from language units contemplated in section 7;</td>
<td>(d) receive annual reports from language units contemplated in section 7;</td>
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<tr>
<td>(e) complete an annual report on its functions for submission to the Minister.</td>
<td>(e) complete an annual report on its functions for submission to the Minister.</td>
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<tr>
<td>(2) The national language unit must, through the Minister and after consultation with other relevant ministers, request national departments, national public entities and national public enterprises to submit annual reports on--</td>
<td>(2) The national language unit must, through the Minister and after consultation with other relevant ministers, request national departments, national public entities and national public enterprises to submit annual reports on--</td>
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<tr>
<td>(a) the activities of their language units;</td>
<td>(a) the activities of their language units;</td>
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<tr>
<td>(b) the implementation of the language policy;</td>
<td>(b) the implementation of the language policy;</td>
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<tr>
<td>(c) any complaints received regarding the use of official languages and the</td>
<td>(c) any complaints received regarding the use of official languages and the</td>
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</tbody>
</table>
### SA LANGUAGES BILL, 2003 vs SOUTH AFRICAN LANGUAGE BILL, 2011

<table>
<thead>
<tr>
<th><strong>Manner in which the complaints were dealt with.</strong></th>
<th><strong>SIMILARITIES / DIFFERENCES BETWEEN VERSIONS</strong></th>
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</thead>
<tbody>
<tr>
<td></td>
<td>2011: New section dealing with the establishment of language units in national departments, national public entities and national enterprises</td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>Establishment of language units in national departments, national public entities and national enterprises</strong></th>
<th>2003: There is no differentiation between the powers and functions of language units of the different spheres of government.</th>
</tr>
</thead>
<tbody>
<tr>
<td>7. Every national department national public entity and national public enterprise must-</td>
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<tr>
<td><em>(a)</em> establish a language unit; and</td>
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<tr>
<td><em>(b)</em> ensure that the language unit is provided with the personnel, administrative and other resources necessary for its effective functioning.</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>Powers and functions of language units</strong> (to be read in conjunction with section 6)</th>
<th>2003: There is no differentiation between the powers and functions of language units of the different spheres of government.</th>
</tr>
</thead>
<tbody>
<tr>
<td>7 A language unit shall have the powers</td>
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<tr>
<td><strong>SA LANGUAGES BILL, 2003</strong></td>
<td><strong>SOUTH AFRICAN LANGUAGE BILL, 2011</strong></td>
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<tr>
<td>and functions to -</td>
<td>8. Every language unit must-</td>
</tr>
<tr>
<td>(a) facilitate and monitor the</td>
<td>(a) advise the responsible</td>
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<tr>
<td>implementation of regulations</td>
<td>accounting officer or accounting</td>
</tr>
<tr>
<td>made in fulfilment of the</td>
<td>authority on the development,</td>
</tr>
<tr>
<td>obligations imposed by this Act;</td>
<td>adoption and implementation of</td>
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<tr>
<td>(b) take effective and positive</td>
<td>the language policy in respect of</td>
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<tr>
<td>measures for the implementation</td>
<td>the national department, national</td>
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<tr>
<td>of the national language policy</td>
<td>public entity or national public</td>
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<tr>
<td>in section 5 in regard to the</td>
<td>enterprise concerned;</td>
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<tr>
<td>following:</td>
<td>(b) monitor and assess the use</td>
</tr>
<tr>
<td>(i) intra and interdepartmental</td>
<td>of official languages by the</td>
</tr>
<tr>
<td>oral communication in all</td>
<td>national department, national</td>
</tr>
<tr>
<td>spheres of government;</td>
<td>public entity or national public</td>
</tr>
<tr>
<td>(ii) intra and interdepartmental</td>
<td>enterprise concerned;</td>
</tr>
<tr>
<td>written communication in all</td>
<td>(c) monitor and assess compliance</td>
</tr>
<tr>
<td>spheres of government;</td>
<td>with the language policy of the</td>
</tr>
<tr>
<td>(iii) oral communication with the</td>
<td>national department, national</td>
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<tr>
<td>public; (iv) written</td>
<td>public entity or national public</td>
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<tr>
<td></td>
<td>enterprise concerned</td>
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<tr>
<td><strong>SA LANGUAGES BILL, 2003</strong></td>
<td><strong>SOUTH AFRICAN LANGUAGE BILL, 2011</strong></td>
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<tr>
<td>communication with the public; and (v) international communication where applicable. (c) conduct language surveys and audits relevant to its sphere of activity with a view to assessing the appropriateness of existing language policy and practice and to make recommendations for the improvement of such policy and practice; (d) inform the public, through the effective dissemination of information, of the content and implementation of the language policy of the relevant organ of state; (e) do all things incidental to or necessary for the proper fulfilment of the obligations</td>
<td>or national public enterprise concerned; (d) compile reports to be submitted to the national language unit in terms of section 6(2); (e) promote all official languages to enjoy parity of esteem and equitable treatment by the national government; (f) facilitate equitable access by the public to the services and information of the national department, national public entity or national public enterprise concerned; and (g) promote good language management by the national department, national</td>
</tr>
<tr>
<td><strong>SA LANGUAGES BILL, 2003</strong></td>
<td><strong>SOUTH AFRICAN LANGUAGE BILL, 2011</strong></td>
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<tr>
<td>referred to in paragraphs (a) to (d).</td>
<td>public entity or national public enterprise concerned.</td>
</tr>
</tbody>
</table>

**Development of indigenous languages and South African Sign Language/s**

8. Subject to the provisions of section 9(a), the Minister shall take practical and positive measures for the development of the indigenous languages and South African Sign Language/s, in particular to -

- (a) identify priority areas for the development of these languages;
- (b) support existing structures involved in the development of these languages;
- (c) establish new structures and programmes for the development of these languages; and
<table>
<thead>
<tr>
<th><strong>SA LANGUAGES BILL, 2003</strong></th>
<th><strong>SOUTH AFRICAN LANGUAGE BILL, 2011</strong></th>
<th><strong>SIMILARITIES / DIFFERENCES BETWEEN VERSIONS</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>(d) support cross-border projects for the development of these languages in the Southern African region.</td>
<td></td>
<td>&quot;This section was removed in the 2011 version&quot;</td>
</tr>
</tbody>
</table>

**Cooperation**

9. Without derogating from the provisions of the Pan South African Language Board Act, 1995 (Act No. 59 of 1995), imposed by this Act, especially those in sections 7 and 8, language units or any other organ of state involved in the implementation of this Act -

(a) shall, where applicable and when necessary for the effective implementation of this Act and to avoid duplication of activities and services, liaise and cooperate with any other public or private body,
### SA LANGUAGES BILL, 2003

(b) institution or service that has the necessary resources and capacity to facilitate the effective implementation of this Act; and may enter into an agreement with any such person or institution for delivering a service or product, conducting research that will facilitate the implementation of this Act, the development of South African languages, or the adaptation or development of appropriate technology to facilitate the development and use of South African languages in fulfilling any of the obligations.

### SOUTH AFRICAN LANGUAGE BILL, 2011

### SIMILARITIES / DIFFERENCES BETWEEN VERSIONS

<table>
<thead>
<tr>
<th>Reports</th>
<th>Monitoring of and reporting on official</th>
<th>2003: Annual reports from national</th>
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<tr>
<th><strong>SA LANGUAGES BILL, 2003</strong></th>
<th><strong>SOUTH AFRICAN LANGUAGE BILL, 2011</strong></th>
<th><strong>SIMILARITIES / DIFFERENCES BETWEEN VERSIONS</strong></th>
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</thead>
<tbody>
<tr>
<td>10(1) A language unit shall report annually to -</td>
<td><strong>language use</strong></td>
<td>departments must be submitted to Parliament, provincial departments to the provincial legislature.</td>
</tr>
<tr>
<td>(a)  (i) in the case of a departmental language unit, Parliament through the relevant national department; or</td>
<td>9. (1) The Minister is responsible for monitoring the use of official languages by the national government for government purposes.</td>
<td>2011: Annual reports are submitted to the Minister for Arts and Culture.</td>
</tr>
<tr>
<td>(ii) in the case of a provincial language unit, the provincial legislature concerned and the National Council of Provinces; and</td>
<td>(2) The national language unit must submit its annual report to the Minister on-</td>
<td></td>
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<tr>
<td>(b) the Pan South African Language Board, which may take any action provided for in section 8(l)(b) to (d) of the Pan South African Language Board Act, (Act No. 59 of 1995).</td>
<td>(a) the activities of the national language unit and any other language units setup in national departments, national public enterprises and national public entities;</td>
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<tr>
<td>(2) Any report submitted in terms of</td>
<td>(b) the implementation of the language policy in national departments, national public enterprises and national public entities;</td>
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<td>(c) any complaints received regarding the</td>
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<th>SA LANGUAGES BILL, 2003</th>
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<th>SIMILARITIES / DIFFERENCES BETWEEN VERSIONS</th>
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<tr>
<td>subsection (1) shall -</td>
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<tr>
<td>(a) indicate the extent to which the obligations imposed by this Act have been complied with;</td>
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<tr>
<td>(b) explain the nature of language-related complaints received from the public and what action was taken to address the complaints;</td>
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<tr>
<td>(c) elaborate on the problems encountered with the implementation of this Act and what steps have been or are being taken to overcome such problems;</td>
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<td>(d) where necessary, make recommendations for the development, improvement, modernisation, reform or</td>
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<tr>
<td>use of official languages in the national government and the manner in which these complaints were dealt with; and</td>
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<tr>
<td>(d) any other matter that the Minister may prescribe.</td>
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<tr>
<td>(3) The Minister may prescribe the form and content of the reports to be submitted and the timeframes for submitting such reports.</td>
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</table>
### SA LANGUAGES BILL, 2003

- amendment of this Act;
- (e) where necessary, deal with any other matter that could contribute towards the promotion of multilingualism.

(3) Any report submitted in terms of this section shall be duly taken into consideration by the relevant organ of state when subsequent measures for the implementation of this Act are taken.

(4) The provisions of sections 5 and 7 shall, where applicable, apply to the choice of languages in which reports must be submitted in terms of this section.

### SOUTH AFRICAN LANGUAGE BILL, 2011

#### SIMILARITIES / DIFFERENCES BETWEEN VERSIONS

- Compliance by national departments, national public enterprises and national public entities

- 2011: New section dealing with compliance by national departments, national public enterprises and national
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<thead>
<tr>
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<th><strong>SIMILARITIES / DIFFERENCES BETWEEN VERSIONS</strong></th>
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<tbody>
<tr>
<td>10. The National Language unit may request Cabinet through the Minister, to intervene in cases where a particular national department, national public enterprise or national public entity does not comply with the provisions of this Act.</td>
<td></td>
<td>public entities</td>
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<tr>
<td><strong>Annual report to Parliament</strong></td>
<td></td>
<td>2011: New section dealing with Minister for Arts and Culture’s responsibility to submit an annual report to Parliament.</td>
</tr>
<tr>
<td>11. The Minister must on an annual basis, table in Parliament a report on the status of the use of official languages by the national government for government purposes.</td>
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<tr>
<td><strong>Intergovernmental forums on official language use</strong></td>
<td></td>
<td>2011: New section dealing with intergovernmental forums on official language use.</td>
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<tr>
<td>12. (1) The Minister may establish one or more intergovernmental forums- (&lt;a&gt;) to promote general coordination,</td>
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<td>SA LANGUAGES BILL, 2003</td>
<td>SOUTH AFRICAN LANGUAGE BILL, 2011</td>
<td>SIMILARITIES / DIFFERENCES BETWEEN VERSIONS</td>
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<tr>
<td>cooperation and consultation between national departments, national public entities and national enterprises on the use of official languages for government purposes; (b) to coordinate, align and monitor the implementation of language policies; and (c) to perform any other functions that the Minister may prescribe.</td>
<td>(2) The Minister must, (b) in respect of the forums contemplated in subsection (1) (a) determine their composition; (b) determine their terms of reference; (c) convene their meetings; and (d) determine any other matter necessary for their effective functioning.</td>
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<th><strong>SA LANGUAGES BILL, 2003</strong></th>
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<th><strong>SIMILARITIES / DIFFERENCES BETWEEN VERSIONS</strong></th>
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<tr>
<td><strong>Exemptions from application of section 7</strong></td>
<td>13. (1) The Minister may, on application by a national public enterprise or national public entity listed in the Schedules to the Public Finance Management Act, 1999 (Act No. 1 of 1999) exempt such a national public enterprise or national public entity from the application of section 7(1). (2) The Minister may, on good cause shown and on such terms and conditions as the Minister may determine, by notice in the <em>Gazette</em> exempt a national public enterprise or national public entity from the application of section 7(1). (3) The application for an exemption</td>
<td><strong>2011:</strong> New section dealing with exemptions</td>
</tr>
<tr>
<td><strong>SA LANGUAGES BILL, 2003</strong></td>
<td><strong>SOUTH AFRICAN LANGUAGE BILL, 2011</strong></td>
<td><strong>SIMILARITIES / DIFFERENCES BETWEEN VERSIONS</strong></td>
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<tr>
<td><strong>Remedies</strong></td>
<td>contemplated in subsection (1) must be in the form and manner prescribed by the Minister.</td>
<td>This section was removed in the 2011 version</td>
</tr>
<tr>
<td>11(1) Any person acting on his or her own behalf, or any person, body of persons or institution acting on behalf of its members or members of a language group or any organ of state may apply to the Court for an appropriate remedy in terms of this section.</td>
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<tr>
<td>(2) An application may be made under subsection (1) concerning any alleged violation or threatened violation of a language right, language policy or language practice resulting from -</td>
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<td>(a) the non-compliance or compliance</td>
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<td><strong>SA LANGUAGES BILL, 2003</strong></td>
<td><strong>SOUTH AFRICAN LANGUAGE BILL, 2011</strong></td>
<td><strong>SIMILARITIES / DIFFERENCES BETWEEN VERSIONS</strong></td>
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<tr>
<td>with the obligations contained in this Act and in the National Language Policy Framework; (b) the non-compliance with a recommendation, finding or decision of the Pan South African Language Board in relation to this Act. (3) A Court, in proceedings under this section, may grant such remedy as it considers appropriate and just in the circumstances, including - (a) an interim order; (b) a declaratory order; (c) an interlocutory order or interdict; (d) an order for the payment of any damages:</td>
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<tr>
<td><strong>SA LANGUAGES BILL, 2003</strong></td>
<td><strong>SOUTH AFRICAN LANGUAGE BILL, 2011</strong></td>
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<tr>
<td>(e) an order for the implementation of special measures to address the situation complained of;</td>
<td>(e) an order for the implementation of special measures to address the situation complained of;</td>
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<tr>
<td>(f) an order requiring the respondent to undergo an audit of language policies and practices;</td>
<td>(f) an order requiring the respondent to undergo an audit of language policies and practices;</td>
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<tr>
<td>(g) an order to comply with any provision of this Act, or a finding, recommendation or decision of the Pan South African Language Board:</td>
<td>(g) an order to comply with any provision of this Act, or a finding, recommendation or decision of the Pan South African Language Board:</td>
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<tr>
<td>(h) an appropriate order of costs against any party to the proceedings.</td>
<td>(h) an appropriate order of costs against any party to the proceedings.</td>
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</table>

(4) Nothing in this section derogates from any right of action a person might have other than the right of action set out in this section.
<table>
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<tr>
<th>SA LANGUAGES BILL, 2003</th>
<th>SOUTH AFRICAN LANGUAGE BILL, 2011</th>
<th>SIMILARITIES / DIFFERENCES BETWEEN VERSIONS</th>
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<tr>
<td>(5) In proceedings under this section relating to a complaint against an organ or institution to which this Act applies, the Court may admit as evidence information relating to any similar complaint under this Act or the Pan South African Language Board Act, 1995 (Act No. 59 of 1995), in respect of the same organ or institution. (6) Where the Court is of the opinion that an application in terms of this section has raised an important new principle in relation to this Act, the Court may order that costs be awarded to the applicant even if the applicant has not been successful in the result.</td>
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<tr>
<td>Regulations</td>
<td>Regulations</td>
<td>2003: The Minister may make regulations</td>
</tr>
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<td><strong>SA LANGUAGES BILL, 2003</strong></td>
<td><strong>SOUTH AFRICAN LANGUAGE BILL, 2011</strong></td>
<td><strong>SIMILARITIES / DIFFERENCES BETWEEN VERSIONS</strong></td>
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<tr>
<td>12(1) The Minister, after consultation with the relevant parliamentary or other committees, may by notice in the Gazette, make regulations regarding - (a) any matter which is required or permitted by this Act; (b) any matter which may be necessary or expedient to achieve the objectives of this Act; (c) a language code of conduct for public officials, after consultation with the Department of Public Service and Administration; and (d) any other mechanisms that will ensure effective enforcement of this Act.</td>
<td>14.(1) The Minister may, after consultation with the Pan South African Language Board, make regulations not inconsistent with the provisions of this Act regarding (a) the form and content of language policies; (b) timeframes for establishing language units; (c) the form and content of reports required in terms of section 9; (d) the manner, form and timeframes for submitting applications for exemption contemplated in terms of section 12; (e) any matter which in terms of this Act is required, or permitted, to be</td>
<td>after consultation with the relevant parliamentary or other committees. 2011: The Minister may make regulations after consultation with the Pan South African Language Board, and the draft regulations must be published for public comments in the <em>Government Gazette</em> for 30 days.</td>
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<tr>
<td><strong>SA LANGUAGES BILL, 2003</strong></td>
<td><strong>SOUTH AFRICAN LANGUAGE BILL, 2011</strong></td>
<td><strong>SIMILARITIES / DIFFERENCES BETWEEN VERSIONS</strong></td>
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<td>may result in financial expenditure for the state be made by the Minister acting in consultation with the Minister of Finance</td>
<td>prescribed; and any matter in respect of which the Minister considers it necessary or expedient to make regulations in order to achieve the objects of this Act.</td>
<td></td>
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<td>(2) Before making regulations under this Act, the Minister must-</td>
<td>(f) publish the proposed regulations in the <em>Gazette</em> for public comment;</td>
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<tr>
<td>(a) publish the proposed regulations in the <em>Gazette</em> for public comment;</td>
<td>(b) grant a period of at least 30 days for written representations to the Minister on the proposed regulations; and</td>
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<td>(c) consider any such written representations received.</td>
<td>(c) consider any such written representations received.</td>
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</table>

Table 6.5: Comparison between draft *SA Languages Bill, 2003* and *South African Language Bill, 2011*
When comparing the two versions, the most important change is that the original intention was to ensure the promotion and establishment of language services in all three spheres of government (national, provincial and local government), whilst in the draft Bill it is limited to national government.

6.4.2 PARLIAMENTARY PROCESS FOR THE SOUTH AFRICAN LANGUAGE BILL, 2011

To determine to what extent the Legislature interacted with the Bill, it is important to trace the Bill through the Parliamentary process.

6.4.2.1 Portfolio Committee for Arts and Culture meeting held on 15 November 2011

The Director-General (Mr Sibusiso Xaba) of the Department of Arts and Culture briefed the Portfolio Committee on the background, and content of the Bill. The Director-General indicated the following key principles of the Bill:

- “the promotion of use of language,
- access to information and services, and
- good language management by government departments.”

The benefits of the Bill will be that people have better access to services, the ad hoc costs will be more manageable, and departments would be able to plan better and appropriately for the different languages. However, the Bill is not the only instrument to promote multilingualism, because the Pan South African Board is also trying to achieve the same results.

The Committee approved the hosting of public hearings into the Bill.

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746 PC Arts & Culture (2011) Online
747 PC Arts & Culture (2011) Online
748 PC Arts & Culture (2011) Online
749 The hearings was held on 17 and 18 January 2012 (PMG (2012) Online)
6.4.2.2 Portfolio Committee for Arts and Culture meeting held on 29 February 2012

The Portfolio Committee deliberated on the proposed amendments flowing from the public hearings.

The Department presented the following amendments:

**Title**
Following the meeting the drafters had with the state law advisors and parliamentary legal advisors, it was decided the name of the Bill should be changed to Use of Official Languages Bill.

**Long Title and Preamble amendments**
The Preamble must embrace all the obligations of government in relation to Section 6 of the Constitution. This had been done by the Bill stating that ‘whereas the use of the Republic’s official languages must be promoted and pursued in accordance with the Constitution of the Republic of South Africa’. It recognised the diminished use and status of indigenous languages of South Africa and required that the state must take practical and positive measures to elevate the status and advance the use of these languages.

(The amendments to clauses 1, 2 and 3 were based around language and clarity.)

**Clause 4 amendments**
There was a need to limit the power of the Minister. Thus clause 4(1) was reworded to provide for language policies to be put in place within 18 months but allowed the Minister to extend the period, but not further than 6 months. The Minister would thus be bound by the 6 months.
The Department proposed, following discussions with the Parliamentary Legal Advisors, the following amendments to Clause 4:

4(2) A language policy adopted in terms of subsection (1) must—
(a) comply with the provisions of section 6(3) of the Constitution;
(b) identify at least three official languages that the national department, national public entity or national public enterprise will use for government purposes, provided that at least two of the official languages identified must be indigenous languages of historically diminished use and status;
(c) stipulate how official languages will be used, amongst other things, in effectively communicating with the public, official notices, government publications and inter- and intra-government communications;
(d) describe how the national department, national public entity or national public enterprise will effectively communicate with members of the public whose language of choice is:
   (i) not an official language contemplated in subsection (b); or
   (ii) South African sign language.

3) In identifying at least three official languages as contemplated in subsection (2)(b), every national department, national public entity and national public enterprise must take into account its obligation to take practical and positive measures to elevate the status and advance the use of indigenous languages of historically diminished use and status in accordance with section 6(2) of the Constitution.

Clause 8(d)
Clause 8(d) stated that a language unit in every national department, national public entity and national enterprise after compiling a report had to submit it to both the Minister and PanSALB, to assist with PanSALB’s oversight role.
**Deletion of Clause 10**

The wording of the heading changed from Annual Report to Parliament National Assembly. The Parliamentary Legal Advisors had asked for the word ‘Parliament’ to be changed to ‘National Assembly’. This was to avoid confusion about which of the Houses of Parliament was to be responsible for this Bill.

Also, when the Minister granted exemptions in terms of clause 12, the annual report tabled in the National Assembly needed to include which entities were granted exemption of clause 7. This enabled Parliament to know who had or had not been exempted for purposes of oversight.

**Clause 12 Exemption**

The exemption referred to in Clause 7 was an exemption to establish a national language unit and was not an exemption from the entire legislation. Where that exemption was granted “the national public entity or a national public enterprise must assign a senior employee to perform the functions of a language unit”. They still had to comply with the Act but only needed one person to perform the function.

The proposals were debated. The Democratic Alliance proposed an additional amendment for an ombudsman to handle complaints about national language units that were not dealing properly with languages, which were not accepted by the Committee.

### 6.4.2.3 Portfolio Committee for Arts and Culture meeting held on 7 March 2012

The Portfolio Committee convened on 7 March 2012 to deliberate on Clause 4(2).

The following summary of the legislative proposals can be provided:

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752 PC Arts & Culture (2012 b) Online
“The Chairperson had sought legal advice on the constitutionality of Clause 4(2) from the Office of the Speaker who stated at this meeting that it was constitutional.

Parliamentary Legal Advisor suggested that the amendment proposed by the Department was a safer option; the State Legal Advisor stated that the phrase “at least” made it constitutional.

The Department came with a slight change to the wording of the ‘safe option’ amendment presented in the previous meeting.

However, the Chairperson and several committee members were angered by this late proposal by the Department and after stopping the meeting for a committee caucus, decided to end the meeting.

The Department was chastised and told to be ready with its proposal at the next meeting.

Some members already confirmed they did not agree with the department amendment and would stand by their previous vote.”

6.4.2.4 Portfolio Committee for Arts and Culture meeting held on 9 May 2012

The major focus of this meeting was the proposed amendment of clause 4 (Language Policy). After a discussion, the following summary would suffice:

“The drafters (Department) were asked to present the latest proposals for clause 4, and these, in summary, were that clause 4(2)(b) would be redrafted to require identification, by the national department, national public entity or national public enterprise, of “at least three official languages” that would be used for government purposes. A new clause 4(3) would be added to specify that, in identifying those languages, the entities must take into account their “obligation to take practical and positive measures to elevate the status and advance the use of indigenous languages of historically diminished use and status, in accordance with

753 PC Arts & Culture (2012 c) Online

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section 6(2) of the Constitution”. This created a direct link between the Constitution and what the Bill sought to achieve. A Parliamentary Legal Advisor then gave her opinion on section 6(3) of the Constitution and stressed that it created obligations, not rights, and that it would not be inconsistent to mention either two or three languages.”

6.4.2.5 Portfolio Committee for Arts and Culture held on 30 May 2012

The Committee deliberated on the final list of amendments (mostly dealing with Clause 4). These proposals were formally adopted by the Committee and forwarded to the National Assembly.

6.4.2.6 National Assembly meeting held on 7 August 2012

The National Assembly met on 7 August 2012, and resolved as follows on the Bill:

“FIRST ORDER [15:33]
Second Reading debate – Use of Official Languages Bill [B 23B - 2011]
(National Assembly — sec 75) (introduced as South African Languages Bill).
Debate concluded.
Bill read a second time.”

754 PC Arts & Culture (2012 d) Online
755 NA (2012 c) 2617. The Bill was also transmitted to the NCOP on 7 August 2012 (Parliament (2012) 2624): “(1) Bill passed by National Assembly and transmitted for concurrence on 7 August 2012:
(a) Use of Official Languages Bill [B 23B – 2011] (National Assembly – sec 75) (introduced as South African Languages Bill)”.

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6.4.2.7 Final legislative steps in the approval process

The Bill was adopted by the National Council of Provinces on 18 September 2012, without amendments, and referred to the President for assent.\(^{756}\)

The President assented to the Bill on 2 October 2012, and is now named the “Use of Official Languages Act, 2012 (Act No. 12 of 2012)”.

6.4.3 EMERGING TRENDS FOR EXECUTIVE POLITICAL STEERING FROM THE SOUTH AFRICAN LANGUAGES BILL

The following table is a comparison between the Bill, as submitted to Parliament, and the version as amended by the Portfolio Committee:\(^{757}\):

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<tr>
<td>To provide for the regulation and monitoring of the use of official languages by national government for government purposes; to require the adoption of language policies by national departments, national public entities and national public enterprises; to provide for the establishment and functions of a National Language Unit; to provide for the establishment and functions of language units by national departments, national public entities and national public enterprises; to provide for monitoring of and reporting on official language use by the national</td>
<td>To provide for the regulation and monitoring of the use of official languages by national government for government purposes; to require the adoption of a language policy by a national department, national public entity and national public enterprise; to provide for the establishment and functions of a National Language Unit; to provide for the establishment and functions of language units by a national department, national public entity and national public enterprise; to provide for monitoring of and reporting on use of official languages by national</td>
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\(^{756}\) SabinetLaw (2012 b) Online

\(^{757}\) There is no difference between the version approved by the Portfolio Committee for Arts and Culture, or the National Assembly.
### Definitions

1. In this Act, unless the context indicates otherwise—

"**Constitution**" means the Constitution of the Republic of South Africa, 1996;

"**Department**" means the national Department of Arts and Culture;

"**language unit**" means a language unit established in terms of section 7;

"**Minister**" means the Minister responsible for language matters;

"**national department**" means national departments, national public entities and national public enterprises;

"**National Language Unit**" means the National Language Unit established in terms of section 5;

"**national public enterprise**" means a national government business enterprise defined in section 1 and listed in schedule 3 part B of the Public Finance Management Act, 1999 (Act No. 1 of 1999);

"**national public entity**" means a national public entity defined in section 1 and listed in Schedules 2 and 3 to the

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**SOUTH AFRICAN LANGUAGE BILL, 2011 [B23-2011]**

Government; to facilitate intergovernmental coordination of language policies; and to provide for matters connected therewith.

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**USE OF OFFICIAL LANGUAGES BILL [B23B-2011]**

Government; to facilitate intergovernmental coordination of language units; and to provide for matters connected therewith.

---

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**Objects of Act**

2. The objects of this Act are—

   (a) to regulate and monitor the use of official languages by the national government for government purposes;

   (b) to promote parity of esteem and equitable treatment of the official languages of the Republic;

---

**Objects of Act**

2. The objects of this Act are—

   (a) to regulate and monitor the use of official languages for government purposes by national government;

   (b) to promote parity of esteem and equitable treatment of official languages of the Republic;

   (c) to facilitate equitable access to
### SOUTH AFRICAN LANGUAGE BILL, 2011 [B23-2011]

| (c) | To facilitate equitable access to the services and information of the national government; and |
| (d) | To promote good language management by the national government for efficient public service administration and to meet the needs of the public. |

### USE OF OFFICIAL LANGUAGES BILL [B23B-2011]

| (c) | Services and information of national government; and |
| (d) | To promote good language management by national government for efficient public service administration and to meet the needs of the public. |

### Application of Act

| 3. (1) This Act applies to |
| (a) National departments; |
| (b) National public entities; and |
| (c) National public enterprises. |

| 3. (2) This Act takes precedence over any inconsistent provision of any other Act regulating the use of official languages by the national government. |

### Language policy

| 4. (1) Within 18 months of the commencement of this Act or such further period as the Minister may prescribe, the national government must adopt a language policy regarding its use of official languages for government purposes. |
| (2) A language policy adopted in terms of subsection (1) must— |

| (a) Comply with the provisions of section 6(3) of the Constitution and this Act; |

| 4. (2) A language policy adopted in terms of subsection (1) must— |

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<td>(b) identify at least two official languages that a national department, national public entity or national public enterprise will use for government purposes;</td>
<td>(a) comply with the provisions of section 6(3)(a) of the Constitution;</td>
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<tr>
<td>(c) stipulate how official languages will be used, amongst other things, in communicating with the public, official notices, government publications and inter- and intra-government communications;</td>
<td>(b) identify at least three official languages that the national department, national public entity or national public enterprise will use for government purposes;</td>
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<tr>
<td>(d) describe how a national department, national public entity or national public enterprise will communicate with the public where the language of choice of the public is not an official language contemplated in paragraph (b);</td>
<td>(c) stipulate how official languages will be used, amongst other things, in effectively communicating with the public, official notices, government publications and inter- and intra-government communications;</td>
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<tr>
<td>(e) describe how members of the public can access the language policy;</td>
<td>(d) describe how the national department, national public entity or national public enterprise will effectively communicate with members of the public whose language of choice is:</td>
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<tr>
<td>(f) provide for a complaints mechanism whereby the public may file a complaint regarding the use of official languages by the national government;</td>
<td>(i) not an official language contemplated in paragraph (b); or</td>
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<td>(g) provide for any other matter that</td>
<td>(ii) South African sign language.</td>
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(e) describe how members of the
(h) be published in the *Gazette* as soon as reasonably practicable, but not later than 90 days after its adoption.

(3) Every national department, national public entity and national public enterprise must—

(a) ensure that a copy of its language policy is available on request to members of the public at all their offices; and

(b) display at all their offices a summary of their language policy in such manner and place that it can be read by the public.

(3) In identifying at least three official languages as contemplated in subsection (2)(b), every national department, national public entity and national public enterprise must take into account its obligation to take practical and positive measures to elevate the status and advance the use of indigenous languages of historically diminished use and status in accordance with section 6(2) of the Constitution.

(4) Every national department, national public entity and national public enterprise must—

(a) ensure that a copy of its language policy;

(f) provide a complaints mechanism to enable members of the public to lodge complaints regarding the use of official languages by a national department, national public entity or national public enterprise;

(g) provide for any other matter that the Minister may prescribe; and

(h) be published in the *Gazette* as soon as reasonably practicable, but within 90 days of its adoption.
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<tr>
<th><strong>SOUTH AFRICAN LANGUAGE BILL, 2011 [B23-2011]</strong></th>
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<td>Establishement of National Language Unit 5. The Minister must—</td>
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<td>(a) establish a National Language unit in the Department</td>
<td>(a) establish a National Language Unit in the Department; and</td>
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<td>(b) ensure that the National Language unit is provided with the personnel, administrative and other resources necessary for its effective functioning.</td>
<td>(b) ensure that the National Language Unit is provided with human resources, administrative resources and other resources necessary for its effective functioning.</td>
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<td>(a) advise the Minister on</td>
<td>(a) advise the Minister on policy and strategy—</td>
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<td>(i) policy and strategy to regulate and monitor the use of official languages by the national government for government purposes;</td>
<td>(i) to regulate and monitor the use of official languages by national government for government purposes;</td>
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<td>(ii) policy and strategy to promote all official</td>
<td>(ii) to promote parity of esteem and equitable</td>
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<td>languages to enjoy parity of esteem and equitable treatment by the national government; (iii) facilitation of equitable access by the public, through the language policy, to services rendered by and information of a national department, national public entity or national public enterprise; (iv) promotion of good language management within a national department, national public entity or national public enterprise; and (v) the functions of language units contemplated in section 7;</td>
<td>treatment of the official languages of the Republic and facilitate equitable access to the services and information of national departments, national public entities and national public enterprises; (iii) to promote good language management within national departments, national public entities and national public enterprises; and (iv) on the functions of language units contemplated in section 8;</td>
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<td>(b) liaise with the language units contemplated in section 7 to promote the general coordination; (c) perform any other function that the Minister may prescribe; (d) receive annual reports from language units contemplated in</td>
<td>(b) liaise with and promote the general co-ordination of language units contemplated in section 7; (c) perform the functions provided for in section 8 for the Department; and (d) perform any other function that the Minister may prescribe.</td>
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### Establishment of language units in national departments, national public entities and national enterprises

7. Every national department, national public entity and national public enterprise must—

- (a) establish a language unit; and
- (b) ensure that the language unit is provided with the personnel, administrative and other resources necessary for its

### Establishment of language units in national departments, national public entities and national public enterprises

7. Every national department, national public entity and national public enterprise must—

- (a) establish a language unit; and
- (b) ensure that the language unit is provided with human resources, administrative resources and
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<th><strong>SOUTH AFRICAN LANGUAGE BILL, 2011 [B23-2011]</strong></th>
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<td>effective functioning.</td>
<td>other resources necessary for its effective functioning.</td>
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<td><strong>Functions of language units in national departments, national public entities and national enterprises</strong></td>
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<td>8. Every language unit must—</td>
<td>8. Every language unit must—</td>
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<td>(a) advise the responsible accounting officer or accounting authority on the development, adoption and implementation of the language policy in respect of the national department, national public entity or national public enterprise concerned;</td>
<td>(a) advise the responsible accounting officer or accounting authority on the development, adoption and implementation of the language policy for the national department, national public entity or national public enterprise concerned;</td>
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<td>(b) monitor and assess the use of official languages by the national department, national public entity or national public enterprise concerned;</td>
<td>(b) monitor and assess the use of official languages by the national department, national public entity or national public enterprise concerned;</td>
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<td>(c) monitor and assess compliance with the language policy of the national department, national public entity or national public enterprise concerned;</td>
<td>(c) monitor and assess compliance with the language policy of the national department, national public entity or national public enterprise concerned;</td>
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<tr>
<td>(d) compile reports to be submitted to the national language unit in terms of section 6(2);</td>
<td>(d) compile and submit a report to the Minister and to the Pan South African Language Board in terms of section 9;</td>
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<td>(e) promote all official languages to enjoy parity of esteem and equitable treatment by the</td>
<td>(e) promote parity of esteem and</td>
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### SOUTH AFRICAN LANGUAGE BILL, 2011 [B23-2011]

- national government;
  - (f) facilitate equitable access by the public to the services and information of the national department, national public entity or national public enterprise concerned; and
  - (g) promote good language management by the national department, national public entity or national public enterprise concerned.

### USE OF OFFICIAL LANGUAGES BILL [B23B-2011]

- equitable treatment of official languages of the Republic and facilitate equitable access to services and information of the national department, national public entity or national public enterprise concerned;
  - (f) promote good language management by the national department, national public entity or national public enterprise concerned; and
  - (g) perform any other functions that the Minister may prescribe.

### Monitoring of and reporting on official language use

9. (1) The Minister is responsible for monitoring the use of official languages by the national government for government purposes.

(2) The national language unit must submit its annual report to the Minister on—

- (a) the activities of the national language unit and any other language units setup in national departments, national public enterprises and national public entities;
- (b) the implementation of the language policy;
- (c) any complaints received regarding its use of official languages and

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<td>policy in national departments, national public enterprises and national public entities; (c) any complaints received regarding the use of official languages in the national government and the manner in which these complaints were dealt with; and (d) any other matter that the Minister may prescribe. (3) The Minister may prescribe the form and content of the reports to be submitted and the timeframes for submitting such reports.</td>
<td>the manner in which these complaints were dealt with; and (d) any other matter that the Minister may prescribe. (3) The Minister may prescribe the form and content of the reports to be submitted and the timeframes for submitting such reports. (4) Notwithstanding the provisions of subsections (2) and (3), the Minister may at any time require any national department, national public entity or national public enterprise to submit a report to the Minister on its use of official languages, within a time period determined by the Minister. (5) The Minister may instruct a national department, national public entity or national public enterprise that has failed to comply with any provision of this Act to comply with the Act within a time period determined by the Minister.</td>
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**Compliance by national departments, national public enterprises and national public entities**

10. The National Language unit may request Cabinet through the Minister, to intervene in cases where a particular national department, national public enterprise or national public entity does...
### SOUTH AFRICAN LANGUAGE BILL, 2011 [B23-2011]

not comply with the provisions of this Act.

### USE OF OFFICIAL LANGUAGES BILL [B23B-2011]

Annual report to Parliament

11. The Minister must on an annual basis, table in Parliament a report on the status of the use of official languages by the national government for government purposes.

### Intergovernmental forums on official language use

12. (1) The Minister may establish one or more intergovernmental forums—

(a) to promote general coordination, cooperation and consultation between national departments, national public entities and national enterprises on the use of official languages for government purposes;

(b) to coordinate, align and monitor the implementation of language policies; and

(c) to perform any other functions that the Minister may prescribe.

(2) The Minister must, (b) in respect of the forums contemplated in subsection (1)

### Intergovernmental forums on use of official languages

11. The Minister may—

(a) establish one or more intergovernmental forums—

(i) to promote general coordination, cooperation and consultation between national departments, national public entities and national public enterprises on the use of official languages for government purposes;

(ii) to coordinate, align and monitor the implementation of language policies; and
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<th><strong>USE OF OFFICIAL LANGUAGES BILL [B23B-2011]</strong></th>
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<td>(a) determine their composition:</td>
<td>(iii) to perform any other function that the Minister may prescribe.</td>
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<td>(b) determine their terms of reference;</td>
<td>(b) in respect of such forums—</td>
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<tr>
<td>(c) convene their meetings; and</td>
<td>(i) determine their composition;</td>
</tr>
<tr>
<td>(d) determine any other matter necessary for their effective functioning.</td>
<td>(ii) determine their terms of reference;</td>
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<td>(iii) convene their meetings; and</td>
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<td>(iv) determine any other matter necessary for their effective functioning</td>
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**Exemptions from application of section 7**

13. (1) The Minister may, on application by a national public enterprise or national public entity listed in the Schedules to the Public Finance Management Act, 1999 (Act No. 1 of 1999) exempt such a national public enterprise or national public entity from the application of section 7(1).

(2) The Minister may, on good cause shown and on such terms and conditions as the Minister may determine, by notice in the Gazette exempt a national public enterprise or national public entity from the application of section 7(1).

**Exemptions from application of section 7**

12. (1) The Minister may, on application by a national public entity or national public enterprise listed in the Schedule 3 Parts A or B to the Public Finance Management Act, 1999 (Act No. 1 of 1999) exempt, wholly or in part, such national public entity or national public enterprise from the application of section 7.

(2) The Minister may, on his or her own accord and on such terms and conditions as the Minister may determine, by notice in the Gazette, exempt a national public entity or national public enterprise listed in Schedule 3 Parts A or B to the Public Finance Management Act, 1999 (Act No. 1 of 1999) exempt, wholly or in part, such national public entity or national public enterprise from the application of section 7.
(3) The application for an exemption contemplated in subsection (1) must be in the form and manner prescribed by the Minister.

Finance Management Act, 1999 (Act No. 1 of 1999) from the application of section 7.

(3) The application for an exemption must be in the form and manner prescribed by the Minister.

(4) If the Minister exempts a national public entity or national public enterprise from the application of section 7 the national public entity or national public enterprise must assign a senior employee to perform the functions of a language unit.

Regulations
14.(1) The Minister may, after consultation with the Pan South African Language Board, make regulations not inconsistent with the provisions of this Act regarding

(a) the form and content of language policies;
(b) timeframes for establishing language units;
(c) the form and content of reports required in terms of section 9;
(d) the manner, form and timeframes for submitting applications for exemption contemplated in terms of section 12;
(e) any matter which in terms of this

Regulations
13. (1) The Minister may, after consultation with the Pan South African Language Board, make regulations, not inconsistent with the provisions of this Act, regarding—

(a) the form and content of a language policy;
(b) timeframes for establishing a language unit;
(c) the form and content of a report contemplated in section 9;
(d) the manner, form and timeframes for submitting an application for exemption in terms of section 12;
(e) any matter which in terms of this
(f) any matter in respect of which the Minister considers it necessary or expedient to make regulations in order to achieve the objects of this Act.

(2) Before making regulations under this Act, the Minister must—

(a) publish the proposed regulations in the Gazette for public comment;

(b) grant a period of at least 30 days for written representations to the Minister on the proposed regulations; and

(c) consider any such written representations received.

Table 6.6: Comparison between South African Language Bill, 2011 and Use of Official Languages Bill [B23B-2011]

When comparing the two versions, there are no significant changes, apart from the change to the title of the Bill.

6.4.3.1 Legislative Amendments proposed by the Executive

Throughout the process, the representatives of the Department of Arts and Culture played a leading role in presenting the Bill, and formulating different versions of the proposed amendments. The most striking example of the role of the Department was during the Portfolio Committee meeting of 29 February 2012, where the Department made proposals regarding the following sections in the Bill:
Change of the title of the Bill to “Use of Official Languages Bill”;

Long Title and Preamble amendments;

Section 4: Limiting the Minister’s power for extension to a maximum of 24 months and Departments must identify at least three official languages that it will use for government purposes.

Section 8: All reports by language units of national departments must be submitted to the Pan South African Language Board, and not only to the Minister;

Section 10: The Minister has to include the names of departments that are exempted from the Act when reporting to the National Assembly; and

Section 12: Departments could allocate a single official to perform the functions of the language units, and do not need to establish a fully-fledged unit.

6.4.3.2 Legislative Amendments proposed by the Legislature

During the Portfolio Committee meeting of 29 February 2012, the Democratic Alliance proposed additional amendments which were not accepted by the Committee.

The members of the Committee debated over the course of two meetings on the content of Section 4. When the Bill was adopted by the Committee, the only changes from the original version were related to the number of languages that a Department must choose for its official dealings with the public, and the responsibility of Departments to cater for other official languages and sign-language, not included in their language policy.

The Committee did not insist that the draft Regulations initiated by the Minister be submitted to it prior to promulgation.
6.5 IMPACT OF EXECUTIVE POLITICAL STEERING ON THE LEGISLATIVE PROCESS

From the case studies presented, it seems that the Portfolio Committees are proposing only a limited number of amendments to Parliament, even after holding extensive public hearings. Also Portfolio Committees are not demanding that draft Regulations be presented to them for scrutiny, prior to promulgation thereof by Ministers. Furthermore, it does not seem as if the Portfolio Committees are able to present alternatives to the proposals from the Executive branch. Therefore, the original versions of the draft Bills are almost unchanged when it is processed into an Act by Parliament.

The question can be asked whether this is not to be expected in a dominant-party political system where all the members of the Executive are ANC members, and the party holds 65,9% of the seats in Parliament? Giliomee and Simkins\textsuperscript{758} argues that a dominant-party system leads to the \textit{“abuse of office and ‘arbitrary decisionmaking that undermines the integrity of democratic institutions, particularly that of the legislature and its ability to check the executive”}.

The two case studies indicated that the Executive’s vision for legislation, as expressed in the draft Bills, is largely retained during the legislative process in Parliament. These case studies indicate that there is a high level of political steering within the legislative process.

However, another contributing factor to be considered when Bills are largely unchanged is the drafting capacity within Parliament. Portfolio Committees are very reliant on the inputs from the relevant Department, and not so much on the Parliamentary Law Advisors or the Office of the Chief State Law Advisor\textsuperscript{759}. The

\textsuperscript{758} As quoted by Brooks (2002) 123

\textsuperscript{759} \textit{“The feeling has been expressed that Parliament relies too heavily on the State Law Advisers and departmental officials in processing and finalising draft legislation. Furthermore, the State Law Advisers are primarily advisers to the Executive; Parliament has no control over them. The question is whether they are not too close to the Executive (too “executive minded”) to be expected to give objective legal advice to committees of Parliament.”} (PMG (2010) Online)
two case studies also indicated that the National Assembly is not proposing any additional amendments, and is almost “rubber stamping” the versions of the Bills as proposed by the Portfolio Committees.

This sentiment was echoed by the Chief Whip of the Majority Party (ANC)\textsuperscript{760} during his 2012/13 budget speech in Parliament:

“The poor quality of legislation is often the consequence of inadequate scrutiny,” Sisulu said. “As the subject matter of legislation becomes more sophisticated and highly technical, our Parliament and members must become more professional.”

In addition, Parliament is delegating their legislative powers to the Executive with regard to the promulgation of regulations, without retaining some oversight function on the content of the draft regulations.

From the case studies, it seems as if the Executive authority, through the involvement of the Department, is very active during the legislative process. The extensive involvement of a national department in the legislative process has not yet been the subject of a Constitutional Court challenge\textsuperscript{761}. If the Court does however have to adjudicate on the involvement of the Executive in the legislative process, it may declare that Act unconstitutional based on a breach of the doctrine of the separation of powers.

The Constitutional Court has to balance the competing interests of ensuring that the other branches of government act constitutionally, but still respect the doctrine

\textsuperscript{760} SabinetLaw (2012 c) Online
\textsuperscript{761} The Constitutional Court has deliberated on the extensive delegation of legislative authority by Parliament to the Executive: Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others 1995 (10) BCLR 1289; AAA Investments (Proprietary) Limited v Micro Finance Regulatory Council and Another 2006 (11) BCLR 1255 (CC); 2007 (1) SA 343
on the separation of powers\textsuperscript{762}. This requirement for balance was echoed by the Constitutional Court\textsuperscript{763}:

“(T)his Court may frequently find itself faced with complex problems as to what properly belongs to the discretionary sphere which the Constitution allocates to the legislature and the executive, and what falls squarely to be determined by the judiciary ... The search for an appropriate accommodation in this frontier territory accordingly imposes a particularly heavy responsibility on the courts to be sensitive to considerations of institutional competence and the separation of powers.”

The exercise of legislative power is subject to the prescripts of the Constitution, which requires that there must be rational connection between proposed legislation and the achievement of a legitimate government purpose\textsuperscript{764,765}.

The Court has to balance the competing interests of ensuring that the other branches of government act constitutionally, but still respect the doctrine on the separation of powers\textsuperscript{766}. This requirement for balance was echoed by the Constitutional Court in the matter of \textit{Prince v President, Cape Law Society & Others}\textsuperscript{767}:

“(T)his Court may frequently find itself faced with complex problems as to what properly belongs to the discretionary sphere which the Constitution allocates to the legislature and the executive, and what falls squarely to be determined by the judiciary ... The search for an appropriate accommodation in this frontier territory accordingly imposes a particularly heavy responsibility

\textsuperscript{762} Seedorf and Sibanda (S.a) Ch12-p56
\textsuperscript{763} \textit{Prince v President, Cape Law Society & Others} 2002 (2) BCLR 231 (CC) par 155-156
\textsuperscript{764} \textit{Affordable Medicines Trust & Other v Minister of Health} 2005 (6) BCLR 529 (CC) par 74; \textit{S v Lawrence, S v Nega, S v Solberg} 1997 (10) BCLR 1348 (CC) par 44
\textsuperscript{765} \textit{Fedsure & Other v Greater Johannesburg Metropolitan Council} 1998 (12) BCLR 1458 (CC)
\textsuperscript{766} Seedorf and Sibanda (S.a) Ch12-p56
\textsuperscript{767} \textit{Prince v President, Cape Law Society & Others} 2002 (2) BCLR 231 (CC) par 155-156
on the courts to be sensitive to considerations of institutional competence and the separation of powers.”

6.6 CONCLUSION

South Africa has a very unique application of the doctrine of the separation of powers, and each branch of government has a different role to play: the Executive initiate legislation, the Legislature adopts legislation and the Judiciary guards that the legislation complies to the Constitution.

Although political steering is an accepted public administration phenomenon and can be ascribed in South Africa to the ANC being the dominant political party, Executive political steering can be a two-edged sword, which if not managed properly by all role-players, could negate the role of the Legislature to nothing:

➤ On the one hand, executive political steering may cause the executive branch to infringe on the powers and functions of the legislative branch of government. When Bills are accepted “as is” from the Executive, and without substantially interrogating each proposal, the Portfolio Committees and Parliament are not exercising their authority to the fullest extent.

➤ On the other hand, it is accepted that there is an acute shortage of legislative drafters, and that national departments employ content specialists. Parliamentarians cannot be specialists in all the fields that they have to legislate on, and it is not cost-effective to replicate the national department’s structures in Parliament to provide such expertise to the members.

Somewhere in the middle, the balance must be struck between executive political steering and the doctrine of the separation of powers to give effect to the principles and values in the Constitution.
CHAPTER 7: RECOMMENDATIONS AND CONCLUSION

7.1 INTRODUCTION

For the purpose of good order a holistic perspective of the research conducted thus far is provided:

- In Chapter 2, the dissertation examined the concepts and theories of policy development. This Chapter investigated who is responsible for the

768 Glenister v President of the Republic of South Africa and Others 2011 (7) BCLR 651 (CC) par 62
development of policy and legislation in South Africa, and how these policies are developed and adopted. The Chapter also investigated the linkages between policy and legislation.

- Chapter 3 focused on the South African legislative process as prescribed by the South African Constitution. The Chapter looked at the roles of the executive, the legislators and the judiciary during the process, and identified areas of tension between the role-players.
- The doctrine of the separation of powers was the main theme in Chapter 4. The Chapter investigated how the doctrine is developed and applied in the South African context, with specific reference to the development of policy and legislation.
- Chapter 5 examined the concept of “political steering” with regard to the legislative process, and how it manifests in South Africa.
- In Chapter 6 the influence of executive political steering was measured during the analysis of two case studies, with a focus on the effect of the influence of political steering on the legislative process, and the implications for the separation of powers in South Africa.
- The research concludes in Chapter 7 when final analyses are drawn and recommendations are made regarding the influence of executive political steering in the legislative process.

7.2 RESEARCH PROCESS REVISITED

In this dissertation the following research process was followed:
- Determine the “field of study” for the proposed research.
- Identify a specific complex problem within a researchable application area.
- Conduct a holistic survey of the functional area in which the complex problem exists, to determine the impact of the problem on the specific area of application and the value the proposed research may bring.
- Conduct an abbreviated literature review on the subject matter being investigated. The purpose being to not only provide insight into the
complexity of the problem, but also to provide insight into the literature pertaining to the field of study of the proposed research.

- Describe and formulate the research problem.
- Describe and formulate the research question and associated investigative questions.
- Select an appropriate research design and methodology, which includes the data collection design and methodology.
- Determine the key research objectives for the proposed research.
- Document the research process, which will be followed for the proposed research and formulate an associated work plan.
- Identify the limitations, which may impact on the proposed research.
- Conduct an in-depth literature review on the subject being researched.
- Collect, analyse and interpret the research data.
- Write up the dissertation.
- Proofread the dissertation and submit for formal vetting.

7.3 RESEARCH PROBLEM REVISITED

The research problem which was researched in this dissertation, reads as follows:

Government authority consists of a legislative, executive and judicial authority. Legislative authority is defined as “the power to make, amend and repeal rules of law”; executive authority is “the power to execute and enforce rules of law”; and judicial authority is “the power, in disputes, to determine what the law is and how it should be applied in the dispute”.

The Constitution of the Republic of South Africa, 1993 (hereafter referred to as “the Interim Constitution”) was adopted to facilitate the political transition in South Africa from a system where the Parliament is supreme, to a system where the Constitution is supreme. The Interim Constitution paved the way for the

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769 Rautenbach and Malherbe (2009) 84-85
770 Rautenbach and Malherbe (2009) 85
771 Rautenbach and Malherbe (2009) 85
772 Rautenbach and Malherbe (2009) 85
adoption of the current Constitution, based on the “constitutional principles”\(^{773}\) contained in it. These constitutional principles formed the criteria that the Constitutional Court had to base the certification of the final Constitution on\(^{774}\).

Constitutional Principle VI of the Interim Constitution stated the following:

“There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness”.

This principle was recognised in the Constitution of the Republic of South Africa, 1996 (hereafter referred to as “the Constitution”):

- The national legislative authority is vested in Parliament\(^{775}\);
- The national executive authority is vested in the President\(^{776}\); and
- The judicial authority is vested in the courts\(^{777}\).

Together, these authorities make up the different, but interdependent, branches of government\(^{778}\). Each of these branches has a different constitutional role to play in the development and implementation of policy and legislation.

The Constitutional Court has since 1993 been faced with questions related to the boundaries of the separation of powers\(^{779}\), and defined the principles of the South African model of the doctrine as follows:

\(^{773}\) Schedule 4 of the Interim Constitution

\(^{774}\) Section 74 of the Interim Constitution

\(^{775}\) Section 43(a) of the Constitution

\(^{776}\) Section 85(1) of the Constitution

\(^{777}\) Section 165(1) of the Constitution

\(^{778}\) Parliament (S.a.a) Online

\(^{779}\) E.g De Lange v Smuts NO and Others 1998 (7) BCLR 779 (CC); President of the Republic of South Africa and Others v South African Rugby Football Union and Others 1999 (10) BCLR 1059 (CC); South African Association of Personal Injury Lawyers v Heath and Others 2001 (1) BCLR 77 (CC); President of the Republic of South Africa and Others v United Democratic Movement 2002 (11) BCLR 1164 (CC); Doctors for Life International v Speaker of the National Assembly and Others 2006 (12) BCLR 1399 (CC); Glenister v President of the Republic of South Africa and Others 2009 (2) BCLR 136 (CC); International Trade Administration Commission v SCAW South Africa (Pty) Ltd 2010 (5) BCLR 457 (CC). The most recent judgment dealing with the separation of powers doctrine is National Society for the Prevention of Cruelty to Animals v Minister of Agriculture, Forestry and Fisheries and Others 2013 (10) BCLR 1159 (CC).
“The principle of separation of powers, on the one hand, recognises the functional independence of branches of government. On the other hand, the principle of checks and balances focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another. In this sense it anticipates the necessary or unavoidable intrusion of one branch on the terrain of another.”

The Court indicated that the overlap between the executive and the legislative, where the members of Cabinet are also members of the legislature, strengthens the accountability of the executive to the legislative authority. In practice, the overlap has not always occurred in the areas of accountability and oversight, but sometimes during the drafting of legislation when “ANC MPs made a dramatic about-turn this week, caving into pressure from members of the executive and withdrawing a bold proposal to give Parliament more say in the determination of road toll fees.”

The active involvement of the executive (and its representatives) in the legislative process can be examined in the context of “political steering”. The aim of political steering is to manage transformation and reform processes within policy and legislative development and implementation.

Against the background of the research problem elaborated upon above, the research problem statement for this dissertation reads as follows: “The impact of political steering on the South African legislative process”.

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780 In re: Certification of the Constitution of the RSA, 1996 1996 (10) BCLR 1253 (CC) par 109
781 In re: Certification of the Constitution of the RSA, 1996 1996 (10) BCLR 1253 (CC) par 111
782 Makinana (2013) Online
783 Frenken, Jacob, Muller & Stockmayer (2010) 15
The research problem, in the opinion of this author, can be mitigated if the emerging trends, which are elaborated upon in Chapter 6 of this dissertation, are considered by all role-players during the legislative process.

7.4 RESEARCH QUESTION REVISITED

The research question which forms the ratio of the research and formulated within the ambit of Chapter 1, reads as follows:

“What is the impact of political steering on the South African legislative process?”

The resolution to the question lies in the awareness that the executive authority may be too involved in the legislative process in Parliament, but because national government employs specialist legislative drafters and content experts, they could provide valuable assistance to the members of Parliament.

7.5 INVESTIGATIVE QUESTIONS REVISITED

The investigative questions which were researched in support of the research question are listed below together with a short synopsis of the findings which provided individual answers to the set questions:

➤ What is the legislative process?
   The Constitution allocates the national legislative authority to Parliament. Parliament consists of the National Assembly and the

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784 Section 43 of the Constitution
National Council of Provinces. The legislative process is a complex, adaptive process that can be summarised as follow:

- Proposal for law is formulated;
- Proposal for law is considered;
- Proposal for law is refined;
- Proposal for law is approved;
- Law is implemented; and
- Law is reviewed.

What are the roles and responsibilities of the executive vis-a-vis the legislative authorities in the legislative process and the impact of the separation of powers doctrine on the process?

The doctrine of the separation of powers can be defined as follow:

“The doctrine of the separation of powers entails that the freedom of the citizens of a state can be ensured only if a concentration of power, which can lead to abuse, is prevented by a division of government authority into legislative, executive and judicial authority, and its exercise by different government bodies.”

The Constitutional Court acknowledged that the South African application of the doctrine will be unique, because there is “no universal model of..."

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785 Section 42(1) of the Constitution. The principle that the National Assembly and the National Council of Provinces are both responsible for legislation was confirmed by the Constitutional Court: “In terms of section 42(1) of the Constitution, Parliament consists of the National Assembly and the NCOP. The national legislative authority vests in Parliament. These democratic institutions represent different interests in the law-making process. The National Assembly represents “the people . . . to ensure government by the people”. The NCOP “represents the provinces to ensure that provincial interests are taken into account” in the legislative process. Both must therefore participate in the law-making process and act together in making law to ensure that the interests they represent are taken into consideration in the law-making process. If either of these democratic institutions fails to fulfil its constitutional obligation in relation to a bill, the result is that Parliament has failed to fulfil its obligation” (Doctors for Life International v Speaker of the National Assembly and Others 2006 (12) BCLR 1399 (CC) par 29).

786 Rautenbach & Malherbe (2009) 84
The final responsibility to measure any legislation against the doctrine of the separation of powers rests with the Constitutional Court\(^{788}\). The Court may make any of the following rulings, when one branch encroached too much into the domain of another branch:

- must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency\(^{789}\);
- may make any order that is just and equitable, including an order limiting the retrospective effect of the declaration of invalidity; and an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect\(^{790}\); and
- Grant the appropriate relief in the event of a matter related to the Bill of Rights\(^{791}\).

What is “political steering” and how does it impact on the legislative process?

Political steering can be defined as “the intentional intervention of political actors in legal subsystems including the legislative system”\(^{792}\). South Africa has a very unique application of the doctrine of the separation of powers, and each branch of government has a different role to play. From the case studies, it was evident that the executive is intervening, albeit by using the departmental experts and specialists, to

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787 *In re: Certification of the Constitution of the RSA, 1996* 1996 (10) BCLR 1253 (CC) on par 109

788 Ntlama (2012) 144 compared the importance of the Constitutional Court to “a ‘safety valve’ for the maintenance of power balances to ensure the efficiency and institutional integrity of each branch”.

789 Section 172(1)(a) of the Constitution

790 Section 172(1)(b) of the Constitution

791 Section 38 of the Constitution

792 Adapted from Mayntz (1995) as quoted by Bähr (2010) 11

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ensure that their vision for legislation remains largely intact. However, by retaining the executive’s vision for legislation, the boundaries of the doctrine of the separation of powers may be pushed too far.

What are the implications of executive political steering for the separation of powers doctrine?
Executive political steering may cause the executive branch to infringe on the powers and functions of the legislative branch of government. When Bills are accepted “as is” from the Executive, and without substantially interrogating each proposal, the Portfolio Committees and Parliament are not exercising their authority to the fullest extent. However, it is accepted that there is an acute shortage of legislative drafters, and that national departments employ content specialists. Parliamentarians cannot be specialists in all the fields that they have to legislate on, and it is not cost-effective to replicate the national department’s structures in Parliament to provide such expertise to the members. Somewhere in the middle, a balance must be struck between executive political steering and the doctrine of separation of the powers to give effect to the principles and values of the Constitution.

7.6 RESEARCH DESIGN AND METHODOLOGY

Legislative processes are adaptive, complex systems, and to analyse these systems a model called “Cynefin” was used. The basis of the framework is the following:

“The Cynefin framework helps leaders determine the prevailing operative context so that they can make appropriate choices. Each domain requires different actions.

Simple and complicated contexts assume an ordered universe, where cause-and-effect relationships are
perceptible, and right answers can be determined based on the facts.

- **Complex and chaotic contexts are unordered** — there is no immediately apparent relationship between cause and effect, and the way forward is determined based on emerging patterns.

The **ordered** world is the world of fact-based management; the **unordered** world represents pattern based management.

The very nature of the fifth context – **disorder** - makes it particularly difficult to recognize when one is in it. Here, multiple perspectives jostle for prominence, factional leaders argue with one another, and cacophony rules. The way out of this realm is to break down the situation into constituent parts and assign each to one of the other four realms. Leaders can then make decisions and intervene in contextually appropriate ways."

To be able to analyse complex, adaptive systems, the dissertation identified the emerging trends, and used the trends as a basis of understanding the dynamics of the interaction between the role-players, environment and systems.

Two case studies were utilized to indicate the interaction between the different branches of government during the legislative process, and how they harness and interact with the process\(^{795}\). The emerging trends from the two case studies will form the basis of conclusions and recommendations.

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\(^{795}\) Case studies are often described as exploratory research used in areas where there are few theories or a deficient body of knowledge. Descriptive case studies are used where the objective is restricted to describing the current practice (Hussey & Hussey (1997) 66)
7.7 KEY RESEARCH FINDINGS

From the case studies presented, it seems that the Portfolio Committees are proposing only a limited number of amendments to Parliament, even after holding extensive public hearings. Also Portfolio Committees are not demanding that draft Regulations be presented to them for scrutiny, prior to promulgation thereof by Ministers. It does not seem as if the Portfolio Committees are able to present alternatives to the proposals from the Executive branch. Therefore, the original versions of the draft Bills are almost unchanged when it is processed into an Act by Parliament.

The two case studies indicated that the Executive’s vision for legislation, as expressed in the draft Bills, is largely retained during the legislative process in Parliament. These case studies indicate that there is a high level of political steering within the legislative process. However, there are also other contributing factors when Bills are largely unchanged from the draft Bills submitted to Parliament to the promulgated Act, that have to be considered, such as the drafting capacity within Parliament and the effect of the dominance that the ANC enjoys.

Portfolio Committees are very reliant on the inputs from the relevant Department, and not so much on the Parliamentary Law Advisors or the Office of the Chief State Law Advisor\(^\text{796}\). The two case studies also indicated that the National Assembly is not proposing any additional amendments, and is almost “rubber stamping” the versions of the Bills as proposed by the Portfolio Committees.

This sentiment was echoed by the Chief Whip of the Majority Party (ANC)\(^\text{797}\) during his 2012/13 budget speech in Parliament:

\(^{796}\) “The feeling has been expressed that Parliament relies too heavily on the State Law Advisers and departmental officials in processing and finalising draft legislation. Furthermore, the State Law Advisers are primarily advisers to the Executive; Parliament has no control over them. The question is whether they are not too close to the Executive (too “executive minded”) to be expected to give objective legal advice to committees of Parliament.” (PMG (2010) Online)

\(^{797}\) SabinetLaw (2012 c) Online
“The poor quality of legislation is often the consequence of inadequate scrutiny,” Sisulu said. “As the subject matter of legislation becomes more sophisticated and highly technical, our Parliament and members must become more professional.”

In addition, Parliament is delegating their legislative powers to the Executive with regard to the promulgation of regulations, without retaining some oversight function on the content of the draft regulations.

From the case studies, it seems as if the Executive authority, through the involvement of the Department, is very active during the legislative process.

The extensive involvement of a national department in the legislative process has not yet been the subject of a Constitutional Court challenge. If the Court does however have to adjudicate on the involvement of the Executive in the legislative process, it may declare that Act unconstitutional based on a breach of the doctrine of the separation of powers.

The Constitutional Court has to balance the competing interests of ensuring that the other branches of government act constitutionally, but still respect the doctrine on the separation of powers. This requirement for balance was echoed by the Constitutional Court:

“(T)his Court may frequently find itself faced with complex problems as to what properly belongs to the discretionary sphere which the Constitution allocates to the legislature and the executive, and what falls squarely to be determined by the judiciary … The search for an appropriate accommodation in this frontier territory accordingly imposes a particularly heavy responsibility

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798 The Constitutional Court has deliberated on the extensive delegation of legislative authority by Parliament to the Executive: Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others 1995 (10) BCLR 1289; AAA Investments (Proprietary) Limited v Micro Finance Regulatory Council and Another 2006 (11) BCLR 1255 (CC); 2007 (1) SA 343
799 Seedorf and Sibanda (S.a) Ch12-p56
800 Prince v President, Cape Law Society & Others 2002 (2) BCLR 231 (CC) par 155-156
on the courts to be sensitive to considerations of institutional competence and the separation of powers.”

The exercise of legislative power is subject to the prescripts of the Constitution, which requires that there must be rational connection between proposed legislation and the achievement of a legitimate government purpose. The Constitutional Court has stated that laws and Acts that are not rationally related to a legitimate purpose are unconstitutional because arbitrariness is inconsistent with the Constitution, even if the Act does not affect fundamental rights. In the evaluation, the Court itself stated the following:

“First and foremost it must be emphasised that the Court has a judicial and not a political mandate. Its function is clearly spelt out in (Interim Constitution) 71(2): to certify whether all the provisions of the (New Text) comply with the (Constitutional Principles). That is a judicial function, a legal exercise. Admittedly a constitution, by its very nature, deals with the extent, limitations and exercise of political power as also with the relationship between political entities and with the relationship between the state and persons.”

The Court has to balance the competing interests of ensuring that the other branches of government act constitutionally, but still respect the doctrine on the separation of powers. This requirement for balance was echoed by the Constitutional Court in the matter of Prince v President, Cape Law Society & Others:

“(T)his Court may frequently find itself faced with complex problems as to what properly belongs to the discretionary sphere

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801 Affordable Medicines Trust & Other v Minister of Health 2005 (6) BCLR 529 (CC) par 74; S v Lawrence, S v Nega, S v Solberg 1997 (10) BCLR 1348 (CC) par 44
802 Fedsure & Other v Greater Johannesburg Metropolitan Council 1998 (12) BCLR 1458 (CC)
803 New National Party of SA v Government of the RSA & Others 1999 (5) BCLR 489 (CC) par 19
804 President of the Republic of South Africa and Others v United Democratic Movement 2002 (11) BCLR 1164 (CC) par 55
805 Seedorf and Sibanda (S.a) Ch12-p56
806 Prince v President, Cape Law Society & Others 2002 (2) BCLR 231 (CC) par 155-156

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which the Constitution allocates to the legislature and the executive, and what falls squarely to be determined by the judiciary ...

... The search for an appropriate accommodation in this frontier territory accordingly imposes a particularly heavy responsibility on the courts to be sensitive to considerations of institutional competence and the separation of powers.”

7.8 RECOMMENDATIONS

After completion of this dissertation, the following recommendations can be made:

- Very little research has been done on executive political steering in the South African legislative process, and it is proposed that more studies be done on the impact of steering by the Executive by expanding the range of case studies;

- The dynamics and relations between the legislative and the executive branches should be further investigated;

- The influence of a dominant political party on the judiciary should be further investigated; and

- A comparative legal study of executive political steering in other legal jurisdictions should be done, to determine if the South African experience is unique.

7.9 CONCLUSION

South Africa is a young democracy and still adapting to the principles and values of constitutionalism. Each of the three branches of government (Executive, Judiciary and Legislature) has a different role to play to protect the Constitution.
The doctrine of the separation of powers was included in the Constitution to protect the country from abuse of political power: “The doctrine of the separation of powers entails that the freedom of the citizens of a state can be ensured only if a concentration of power, which can lead to abuse, is prevented by a division of government authority into legislative, executive and judicial authority, and its exercise by different government bodies.”

Political steering is an accepted phenomenon in the public administration domain, where the politicians intervene intentionally in the rules that govern society. In South Africa the question can be asked whether this is not to be expected in a dominant-party political system where all the members of the Executive are ANC members, and the party holds the overwhelming majority of the seats in Parliament?

Portfolio Committees are very reliant on the inputs from the relevant Department, and not so much on the Parliamentary Law Advisors or the Office of the Chief State Law Advisor. The National Assembly is not proposing any additional amendments, and is almost “rubber stamping” the versions of the Bills as proposed by the Portfolio Committees.

However, there are also other contributing factors when Bills are largely unchanged from the draft Bills submitted to Parliament to the promulgated Act, that have to be considered, such as the drafting capacity within Parliament and the effect of the dominance that the ANC enjoys.

807 Rautenbach & Malherbe (2009) 84
808 Adapted from Mayntz (1995) as quoted by Bähr (2010) 11
809 “The feeling has been expressed that Parliament relies too heavily on the State Law Advisers and departmental officials in processing and finalising draft legislation. Furthermore, the State Law Advisers are primarily advisers to the Executive; Parliament has no control over them. The question is whether they are not too close to the Executive (too “executive minded”) to be expected to give objective legal advice to committees of Parliament.” (PMG (2010) Online)
In addition, Parliament is delegating their legislative powers to the Executive with regard to the promulgation of regulations, without retaining some oversight function on the content of the draft regulations.

From the case studies, it seems as if the Executive authority, through the involvement of the Department, is very active during the legislative process. The only check and balance in the system is the Judiciary that will check the level of political steering against the doctrine of the separation of powers.

The intentional intervention in the rules of society by the Executive will be a test for South Africa’s young democracy that is still adapting to the principles and values of constitutionalism. Each of the branches of government has a different role to play to protect the Constitution, and it is only when the parameters of the doctrine of the separation of powers are respected by each branch, that the Constitution and its ideals will be achieved.


ANC see African National Congress


DCoG see Department of Cooperative Governance

DoJ see Department of Justice and Constitutional Development


DEPARTMENT OF COOPERATIVE GOVERNANCE. 2013a. COGTA Revised Route Form. (Internal DCoG Email received from Communications Unit on 15/8/2013)

DEPARTMENT OF COOPERATIVE GOVERNANCE. 2013b. After hours ICT support to staff members. (Internal DCoG Email received from Communications Unit on 25/7/2013)


DoJ see Department of Justice and Constitutional Development


ETU see Educational and Training Unit


FFC see Financial and Fiscal Commission


GAUTENG see Gauteng Provincial Department of Roads and Transport


GCIS see Government Communication and Information Service


IEC see Independent Electoral Commission


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IPID see Independent Police Investigative Directorate

JOINT RULES OF PARLIAMENT see Parliament


KLARE, K.E. 1998. Legal culture and transformative constitutionalism. SA Journal for Human Rights. 146-188


NA see NATIONAL ASSEMBLY


NCOP see National Council of Provinces

NPC see NATIONAL PLANNING COMMISSION

NTLAMA, N. 2012. The “Deference” of Judicial Authority to the State. Obiter. 135-144


PC Committee see PORTFOLIO COMMITTEE


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PMG see Parliamentary Monitoring Group


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PSC see Public Service Commission


RULES OF THE NATIONAL ASSEMBLY see National Assembly

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