CHAPTER 1

THE CONSTITUTIONAL MANDATE: DYNAMIC AND PRO-ACTIVE LEGISLATURES

Because the people of South Africa finally chose a profoundly legal path to their revolution, those who frame and enact constitution and law are in the vanguard of the fight for change. It is in the legislatures that the instruments have been fashioned to create a better life for all. It is here that oversight of government has been exercised. It is here that our society with all its formations has had an opportunity to influence policy and its implementation.

- President Nelson Mandela, National Assembly 1999

In 1994, ten new legislatures were designed as the centrepieces of South Africa’s new system of representative democracy. They were to be dynamic and pro-active institutions that would help build a democratic culture in South Africa.

Under the new dispensation, the country’s new legislatures face important and difficult challenges. First, can they act on the powerful imperative for rapid social and economic transformation and become active agents in the constitutional project of transforming the country or will they remain on the sidelines? Secondly, will they overcome the profound rupture between government and citizens which characterised the apartheid years and become forums for forging links between society and the state? And thirdly, will they succeed in injecting the values of co-operative government and inclusiveness into the workings of the representative system, despite the legacies of a divided and violent past?

South Africa’s young legislatures are products of the country’s democratic transition and their challenges arise in a difficult context of institutional volatility. Like other new democracies, South Africa had to ensure full political participation without a history of representative institutions. Prior to 1994, the South African Parliament was not only undemocratic, it was also unrepresentative. It originated from a limited franchise based on racial divisions. Rather than giving voice to a diversity of political and social interests, its main function was to applaud the government’s initiatives. Dominated by the executive, Parliament offered few opportunities for an honest and open examination of government policies and actions. Although some opposition parties attempted to use it to expose some of the worst abuses of the apartheid regime, neither they nor the rank and file
members of the government party had any real part in governing the country. Their role was to legitimise the executive’s policies and actions for the limited electorate.

Important constitutional and institutional choices were made during the negotiations, but the legacy of the old South African Parliament and its Westminster model endured. The new parliamentary system retained the concept of party government and a cabinet responsible to the legislature but, the South African Constitution envisages a stronger role for the new legislatures than their counterparts in Westminster systems. Old parliamentary rules and procedures needed to be reviewed and old practices reconsidered in light of the constitutional commitment to legislatures as truly deliberative and representative bodies. As in any new institution, arrangements in the national Parliament and the provincial legislatures are still being developed and fine-tuned in daily practice. This is an ongoing political process, but it takes place within a constitutional framework that embodies fundamental choices about the role and responsibilities of legislative institutions.

Now that the country, after its second democratic elections in 1999, is moving into the phase of democratic consolidation, it is time to take stock of the process of building representative democracy. Are these legislatures doing what they were designed to do: building representative democracy?

A study started in 1998, the Legislative Landscape Study, considered how well the legislatures in South Africa had succeeded in fulfilling their constitutional mandate and identified work that still had to be done. In this publication we discuss the most central findings of that project. The Study assessed the impact of the new constitutional framework on the day-to-day functioning of the legislatures. This impact is deeply influenced by the political environment in which the legislatures perform their functions and the political cultures within which they are embedded. Legislatures are inherently political bodies and difficult political questions surround the process of institutional transformation. In order to develop a common and distinctly South African parliamentary tradition, it is important to distinguish matters of political or partisan strategy from the constitutional issues at stake. Therefore, we start by discussing the constitutional mandate.

Any description of the constitutional mandate needs to proceed on three levels:

> The broad constitutional principles and values that all South African institutions must serve and promote.
> The general role and responsibilities of legislatures that the Constitution establishes.
> The differentiated and interrelated roles of eleven South African legislative chambers as partners in the single system of democratic governance set out in the Constitution.

**CONSTITUTIONAL PRINCIPLES**

Section 1 of the Constitution spells out the overarching principles that inform every aspect of government in South Africa:

’The Republic of South Africa is one, sovereign, democratic state founded on
the following values –
(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
(b) Non-racialism and non-sexism.
(c) Supremacy of the Constitution and the rule of law.
(d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.’

From this section and other constitutional provisions, one can draw four clusters of constitutional principles against which all South African institutions, including national and provincial legislatures, should be judged.

(i) Legislatures must promote constitutionalism and human rights

The ‘interim’ Constitution of 1993, and its successor, the ‘final’ Constitution of 1996, brought democracy to South Africa. They also put an end to arbitrary government by committing South Africa to constitutionalism and the promotion and protection of human rights. In one sense, this is a familiar role for a constitution. Constitutions are commonly expected to constrain government and entrench the rule of law. In the South African context, like others, this means that all state action must take place within the framework provided by the constitution and the law enacted under it. State power cannot be used outside the framework of the Constitution.

But in an important way, the South African Constitution is very different from many other constitutions. Unlike most constitutions, it does not simply intend to stabilise the country, securing existing patterns and power relationships. Its project is to transform South Africa and a key component of this project is to end poverty. In other words, the Constitution demands change. This demand is directly articulated in the Bill of Rights, which affirms rights to housing, health care services, sufficient food, water, social security and education.

The Bill of Rights also says, in section 7, that ‘the state must respect, protect, promote and fulfil the rights in the Bill of Rights’. This means that protection of the Constitution and human rights and the promotion of constitutionalism are not the preserve of the courts as many people seem to think. Courts are institutions of last resort. Legislatures are institutions that oversee the development and implementation of policy. They must be proactive in developing a democratic rights culture and must be central agents in the realisation of rights and the transformation of the country.

(ii) Legislatures must be inclusive

Inclusiveness has two dimensions for legislatures. First, legislatures must be constituted in a way that offers representation to all South Africans. Section 1 touches on basic elements of inclusiveness: a multi-party system of government, universal suffrage and regular elections. The implementation of these values is secured by provisions spelling out the political rights of citizens and requiring regular elections based on proportional representation (sections 19, 46 and 105). The second dimension concerns practices within South Africa’s legislatures.
They must respect participatory democracy and ensure proportional party representation in their proceedings (sections 57 and 116).

(iii) Legislatures must be accessible, open, responsive and participatory

Section 1 of the Constitution also embraces the principles of accessibility and participation in its commitment to openness and responsiveness. An important implication of the constitutional commitment to openness is reflected in provisions that require public access to legislative processes (sections 59, 72 and 118). Legislatures are the primary institution through which South Africans have a voice in government, and they act as a critical link between citizens and government.

(iv) Legislatures must be efficient and effective

Effectiveness means that legislatures must be responsive to the preferences of citizens, and must ensure that the development and implementation of policy meets the economic and social challenges that face the country. This includes the realisation of the principles of co-operative government and of the framework of values that are to guide public administration. Efficiency means that the work of legislatures is conducted in ways that are timely and cost-effective, and that ensure that the two chambers of the national Parliament and the nine provincial legislatures interact in a co-operative manner. One element of this is a well-run legislative committee system, which allows a division of labour and level of expertise not always present in the plenary sessions of legislatures.¹

ROLES AND RESPONSIBILITIES: PUTTING REPRESENTATION INTO PRACTICE

The four clusters of principles described above establish the framework for representative democracy in a parliamentary system. In this system, legislatures share one overarching role: they are representative bodies, representing the people as in the National Assembly and the provincial legislatures or, as in the case of the NCOP, the provinces. The test of legislative effectiveness becomes ‘Are the people (or provinces) well represented?’

The representative nature of both the National Assembly and the NCOP is clearly stated in the Constitution. Section 42(3) states ‘The National Assembly is elected to represent the people and to ensure government by the people under the Constitution.’ The clause then lists the ways in which the Assembly fulfils this role. Section 42(4) is worded similarly: ‘The NCOP represents the provinces to ensure that provincial interests are taken into account in the national sphere of government...’ Other provisions show how representation must be put into practice in both the national Parliament and in provincial legislatures. For instance, the electoral system of proportional representation ensures that all the diverse groups that make up South African society will find a voice in the legislature. The constitutionally prescribed multi-party nature of legislative committees is intended to ensure that these diverse views are fully considered in legislative processes. The Constitution also envisages that citizens will have access to, and will participate in, legislative processes.

Thus the Constitution suggests that the representative role of legislatures is to be realised both in institutional arrangements (such as the participation of...
minority parties and the facilitation of public participation in legislative work) and in the representativeness of their members (encouraged by the electoral system). Accordingly, two questions are central in assessing their success: ‘Do the institutional arrangements in legislatures enhance representation?’ and ‘Does the composition of the legislatures reflect a commitment to represent all sectors of the South African electorate?’

Legislatures have four major responsibilities in fulfilling their representative role.

(i) Selecting officials for the legislature and elsewhere

Every legislature in South Africa must have procedures to identify its office bearers (presiding officers, committee chairs etc). In addition, the National Assembly plays a role in choosing people for a number of national, constitutionally established positions (including the President (section 86), the Judicial Service Commission (section 178(1)(h)), most of the Chapter 9 institutions ('State Institutions Supporting Constitutional Democracy') and the Public Service Commission (section 196)).

(ii) Making law

Making law is a critical part of the work of each South African legislature. After all, legislatures are named for their law-making role. But in a modern parliamentary system, with partially fused legislative and executive powers, the law-making responsibility of legislatures is more modest than their name might suggest. Initiating legislation is not the most important law-making function of South African legislatures. This is primarily the task of the executive. The main responsibility of the legislature is rather to ensure that legislation initiated by the executive is fully debated in an open public forum, that all the issues that the legislation may raise are adequately addressed, that the needs of citizens are properly accommodated and that appropriate changes are made.

Most of the law-making work of South African legislatures, therefore, takes place in their consideration of bills initiated by the executive. But legislatures are not limited to such work. They can do more. The Constitution expressly states that in exercising their legislative powers the National Assembly, the National Council of Provinces and provincial legislatures may ‘initiate or prepare legislation, except money Bills’ (sections 55(1)(ii), 68(1)(ii) and 114(1)(ii)). The constitutional right of a committee or member of a legislature to introduce bills (sections 73(2) and 119) backs up these provisions.

(iii) Providing, sustaining and overseeing the executive

The National Assembly and provincial legislatures provide and sustain the national and provincial executives in South Africa through the operation of accountable or responsible government. The legislature creates the executive by choosing the national President and the provincial Premiers. They are chosen by a majority of the legislature and, at least in theory, remain in office only so long as they maintain this confidence. The source of executive power lies with the legislatures.

Once the executive is in office, the role of the legislature shifts. Only rarely – in
situations in which the governing party holds less than a majority of seats, or when the cabinet is split internally – will the legislature dismiss a government. In normal times, the choice of government will occur only every five years, after an election has been held. In the day-to-day work of a legislature, the fundamental role of the legislature is to provide ongoing scrutiny or oversight of government. It is the responsibility of the legislatures to ensure that government acts within the confines of the Constitution and the law. This is a responsibility of the entire legislature and its members, regardless of party affiliation.  

In practice, oversight means the review of government actions and decisions (which includes actions of government officials). It also includes scrutiny of the annual budget. The size of modern government makes it difficult if not impossible for legislatures to scrutinise all government action effectively. For this reason, part of the oversight function must be to ensure that there are adequate alternative mechanisms in place so that problems are recognised and brought to the attention of the legislature in a speedy manner. Chapter 9 of the Constitution establishes a number of institutions which aid Parliament in its oversight role (the Auditor-General, the Public Protector and the South African Human Rights Commission are three of these).

(iv) Linking citizens and the legislature

Every legislature must ensure that it represents its electorate in the fullest way possible. The Constitution states this directly in section 42(3), which says that the National Assembly provides ‘a national forum for the public consideration of issues’. Legislatures must give citizens the best possible opportunities for making themselves heard. They must provide a link between government and the people. To fulfil this responsibility legislative proceedings must be accessible. In addition, legislatures may undertake a range of special activities such as public education programmes and information services that promote close contact between members and their electorate.

Obviously, the division of legislative responsibilities into these four categories is not watertight. For instance, a legislature cannot make laws in a responsible way if it does not have a clear understanding of the restraints under which the executive acts. It gathers this information from fulfilling its responsibility of scrutinising executive action. Similarly, a legislature’s responsibility in relation to the budget combines law-making and scrutiny of executive action.

Moreover, although the primary role of each of South Africa’s eleven legislative chambers is to be a representative body and although each must fulfil each of the four responsibilities listed above, the Constitution has different expectations of each. The eleven legislative bodies must play their role and fulfil their functions as partners in a single system.

PARTNERS IN A SINGLE SYSTEM

The role and responsibilities of the National Assembly mirror those of ‘lower houses’ in many other parliamentary democracies. The executive is drawn from it, it has broad legislative powers, and it bears primary responsibility for oversight of the national executive. It is also the House from which the President must be chosen. But it cannot act in isolation. It must interact with the National
Council of Provinces – the representative of the provinces at national level – in a way that ensures that provincial needs and concerns are properly reflected in national parliamentary politics.

Provincial legislatures follow the model of the National Assembly but their responsibility is limited to provincial matters. They are constitutionally mandated to deal with a specific list of issues (contained in Schedules 4 and 5 and in other specific constitutional provisions), while the national government has power over all matters except those listed in Schedule 5. Although matters outside the list may be brought to provincial legislatures, attention paid to such issues would have to supplement the fulfilment of their main functions and not displace it.

The functions of provincial legislatures also need to be understood in the context of their role in South Africa’s multi-sphere system of government. In most multilevel systems, the first responsibility of provincial legislatures is to make laws within their own jurisdiction. The model for the division of powers under the South African Constitution suggests that, initially at least, the most important law-making function of provincial legislatures is their engagement with section 76 legislation – that is, national laws that directly affect the provinces. Such legislation provides the norms and standards in terms of which provinces must fulfil their Schedule 4 responsibilities. National legislation falling within section 76 is usually to be implemented by provinces. As national policies are put in place, provincial legislatures will be able to pay more attention to developing provincial legislation if they so wish, or to initiating national legislation through the NCOP.

The role of the NCOP as a representative legislature is quite different from that of the National Assembly and the provincial legislatures. It is composed of a delegation from each of the nine provinces, each with one vote in all but
exceptional matters. A tenth local government delegation may participate in its proceedings but does not have a vote. The NCOP’s main function is to represent provinces as political entities, not to represent citizens as such. Section 42(4) states that ‘the National Council of Provinces represents the provinces to ensure that provincial interests are taken into account in the national sphere of government’. For this reason NCOP approval of national legislation concerning the provinces is required by the Constitution. On section 76 questions, on which the NCOP has the greatest influence, provincial delegations in the NCOP vote on the instruction of the provincial legislatures. This, of course, does not mean that the NCOP has no role in representing the people. The Constitution expects the NCOP to ‘facilitate public involvement in [its] legislative and other processes’ (section 72(1)). However, its role as a representative institution must be informed by its constitutional position as a body that complements rather than duplicates the National Assembly. Thus the NCOP needs to be most active in those areas in which the Constitution or national legislation expects provinces to implement legislation.

The NCOP also has a significant constitutional responsibility in intergovernmental relations. The constitutional commitment to co-operative government in Chapter 3 of the Constitution means that every state institution in South Africa is required to play a role in intergovernmental relations. In some cases, the role will be negligible. In others, it will be more substantial. However, the NCOP clearly has a special function in this regard. It is the only institution established by the Constitution in which all three spheres of government are formally linked. It is a national body; it is made up of provincial delegations; and it must provide opportunity for local government representation. The NCOP’s intergovernmental role is explicit in the Constitution.

CONCLUSION

The following chapters of this book explore how the national and provincial legislatures have fulfilled their constitutional mandate. We first consider the institutional context in which our legislatures function. Chapter 2 considers the system of representation and, in particular, the constitutional commitment to achieving what may sometimes be seen as conflicting goals – the representation of parties and the representation of diverse interests and of individual citizens. Chapter 3 looks at the resources available to the legislatures. Chapter 4 deals with the NCOP, giving it a chapter on its own because it has a special role in the system, distinct from those of the National Assembly and provincial legislatures. Then chapter 5 considers the two main forums in which legislatures conduct their business: plenary sessions and committees.

The second part of the book explores the way in which our legislatures carry out three of their four responsibilities which we have identified in this chapter: law-making (chapter 6), oversight (chapter 7) and forging links with the public (chapter 8). We do not deal specifically with the responsibility of the legislatures to elect officials as, by and large, these processes seem to work and very little information concerning this was collected in the Landscape Study.
SELECT BIBLIOGRAPHY


FOOTNOTES
1 See also section 215, which requires the budgets that are presented to legislatures to contain information that will enable the legislatures to make informed decisions.
2 See sections 1, 42(3), 56(2), 68(2), 92 and 114(2).
3 Strictly speaking the bill may become law without the approval of the NCOP if it is passed by a two-thirds majority in the National Assembly. However, rejection by the NCOP would mean that fewer than five provinces supported the bill. Under these circumstances it is very unlikely that the National Assembly would support it.