CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 12/05

DOCTORS FOR LIFE INTERNATIONAL	Applicant
versus	
THE SPEAKER OF THE NATIONAL ASSEMBLY	First Respondent
THE CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	Second Respondent
THE MINISTER OF HEALTH	Third Respondent
THE SPEAKER OF EASTERN CAPE PROVINCIAL LEGISLATURE	Fourth Respondent
THE SPEAKER OF FREE STATE PROVINCIAL LEGISLATURE	Fifth Respondent
THE SPEAKER OF GAUTENG PROVINCIAL LEGISLATURE	Sixth Respondent
THE SPEAKER OF KWAZULU-NATAL PROVINCIAL LEGISLATURE	Seventh Respondent
THE SPEAKER OF LIMPOPO PROVINCIAL LEGISLATURE	Eighth Respondent
THE SPEAKER OF MPUMALANGA PROVINCIAL LEGISLATURE	Ninth Respondent
THE SPEAKER OF NORTHERN CAPE PROVINCIAL LEGISLATURE	Tenth Respondent
THE SPEAKER OF NORTH WEST PROVINCIAL LEGISLATURE	Eleventh Respondent
THE SPEAKER OF WESTERN CAPE PROVINCIAL LEGISLATURE	Twelfth Respondent

Heard on : 23 August 2005 and 21 February 2006

Decided on : 17 August 2006

JUDGMENT

NGCOBO J:

I. Introduction

[1] This case concerns an important question relating to the role of the public in the law-making process. This issue lies at the heart of our constitutional democracy. The Court is required to answer three related questions. The first question concerns the nature and the scope of the constitutional obligation of a legislative organ of the state to facilitate public involvement in its legislative processes and those of its committees and the consequences of the failure to comply with that obligation. The second question concerns the extent to which this Court may interfere in the processes of a legislative body in order to enforce the obligation to facilitate public involvement in law-making processes. In particular, whether it is competent for this Court to interfere during the legislative process before a parliamentary or provincial bill is signed into law. The third question concerns the issue whether this Court is the only court that may consider the questions raised in this case.

[2] These issues arise out of a constitutional complaint brought directly to this

Court by Doctors for Life International, the applicant. Its complaint is that the National Council of Provinces ("NCOP"), in passing certain health bills, failed to invite written submissions and conduct public hearings on these Bills as required by its duty to facilitate public involvement in its legislative processes and those of its committees.

[3] Following a brief review of the facts, I will identify the issues for determination in this case.

II. Factual background

[4] Parliament has enacted four health statutes, namely, the Choice on Termination of Pregnancy Amendment Act 38 of 2004 ("the CTOP Amendment Act"); the Sterilisation Amendment Act 3 of 2005; the Traditional Health Practitioners Act 35 of 2004 ("the THP Act"); and the Dental Technicians Amendment Act 24 of 2004. The constitutional challenge relates to these statutes, which I shall collectively call the health legislation. The applicant's complaint is that during the legislative process leading to the enactment of these statutes, the NCOP and the provincial legislatures did not comply with their constitutional obligations to facilitate public involvement in their legislative processes as required by the provisions of sections 72(1)(a) and 118(1)(a) of the Constitution, respectively. In terms of section 72(1)(a), the NCOP "must . . . facilitate public involvement in [its] legislative and other processes . . . and [those of] its committees." Section 118(1)(a) contains a similar provision relating to a

provincial legislature.

[5] The applicant accepts that the National Assembly has fulfilled its constitutional obligation to facilitate public involvement in connection with the health legislation. This, the applicant says, was done by the National Assembly by inviting members of the public to make written submissions to the National Portfolio Committee on Health and also by holding public hearings on the legislation. That process, the applicant maintains, complied with section 59(1)(a) of the Constitution. The applicant alleges that the NCOP and the various provincial legislatures were likewise required to invite written submissions and hold public hearings on the health legislation. This is what the duty to facilitate public involvement required of them, the applicant maintains.

[6] The constitutional challenge was initially directed at the Speaker of the National Assembly and the Chairperson of the NCOP only. The Speakers of the nine provincial legislatures and the Minister of Health were subsequently joined as further respondents because of their interest in the issues raised in these proceedings. I shall refer to all respondents collectively as the respondents, unless the context requires otherwise.

[7] The respondents deny the charge by the applicant. They maintain that both the NCOP and the various provincial legislatures complied with the duty to facilitate public involvement in their legislative processes. They also take issue with the scope

of the duty to facilitate public involvement as asserted by the applicant. While conceding that the duty to facilitate public involvement requires public participation in the law-making process, they contend that what is required is the opportunity to make either written or oral submissions at some point in the national legislative process.

[8] The applicant has approached this Court directly. It alleges that this Court is the only court that has jurisdiction over the present dispute because it is one which concerns the question whether Parliament has fulfilled its constitutional obligations. The jurisdiction of this Court to consider such disputes is conferred by section 167(4)(e) of the Constitution. That section provides that "[o]nly the Constitutional Court may . . . decide that Parliament . . . has failed to fulfil a constitutional obligation". The respondents did not contest any of this. There is therefore no dispute between the parties as to whether this Court has exclusive jurisdiction in this matter under section 167(4)(e).

[9] But the question whether this Court has exclusive jurisdiction in this matter is too important to be resolved by concession.

[10] When the applicant launched the present proceedings it was under the mistaken belief that all the health legislation was still in bill form. But, as it turned out, all of the legislation except the Sterilisation Amendment Act had been promulgated when these proceedings were launched on 25 February 2005. This fact was readily

ascertainable all along. The challenge relating to the Sterilisation Amendment Act would have required this Court to intervene during the legislative process. This raised the question of the competence of this Court to intervene in the legislative process. Given the importance of this question, the Chief Justice placed it squarely on our agenda by issuing directions. The parties were thus invited to submit written argument on the question, and it was fully debated.

III. Issues presented

[11] The issues that will be considered in this judgment are therefore these:

(a) Does this Court have exclusive jurisdiction over the present dispute under section 167(4)(e) of the Constitution?

(b) Is it competent under our constitutional order for declaratory relief to be granted by a court in respect of the proceedings of Parliament?

(c) What is the nature and the scope of the duty to facilitate public involvement comprehended in sections 72(1)(a) and 118(1)(a) of the Constitution?

(d) Did the NCOP and the provincial legislatures comply with their constitutional obligations to facilitate public involvement as contemplated in section 72(1)(a) and section 118(1)(a)?

(e) If the process followed by the NCOP and the provincial legislatures fell short of that required by the Constitution, what is the appropriate relief?

[12] I now turn to consider these issues.

IV. Does this Court have exclusive jurisdiction over the present dispute?

[13] Whether the applicant is entitled to come directly to this Court in regard to its complaint against the NCOP depends on whether that complaint falls under section 167(4)(e) of the Constitution. The contention that this Court has exclusive jurisdiction under section 167(4)(e) to decide the present dispute rests on two principal propositions: first, section 72(1)(a) imposes an obligation on the NCOP to facilitate public involvement in its legislative processes and those of its committees; and second, the obligation imposed by section 72(1)(a) is of a kind contemplated in section 167(4)(e). If both of these propositions are sound in law, the applicant is entitled to come directly to this Court.

[14] The first of these propositions, namely, that the provisions of section 72(1)(a) impose an obligation, is correct. Section 72(1)(a) provides that the NCOP "must . . . facilitate public involvement in [its] legislative and other processes and [those of] its committees". The use of the word "must" in this context denotes an obligation. It is plain from the wording of section 72(1)(a) that it imposes an obligation to facilitate public involvement. Considering the provisions of section 59(1)(a), the National Assembly equivalent of section 72(1)(a), the Supreme Court of Appeal in *King and Others v Attorneys Fidelity Fund Board of Control and Another*, held that the section imposes an obligation on Parliament to facilitate public involvement in its legislative processes. This holding is plainly correct. The conclusion that section 72(1)(a)

imposes an obligation on the NCOP to facilitate public involvement in its legislative processes leads to the second proposition, namely, that the obligation to facilitate public participation is the kind of obligation contemplated in section 167(4)(e).

[15] The merits of the second proposition must be considered at some length. It raises the question of the proper meaning of the phrase "a constitutional obligation" in section 167(4)(e). This question is difficult to resolve. Section 167(4)(e) confers exclusive jurisdiction on this Court to decide disputes concerning a failure by Parliament or the President to fulfil a constitutional obligation. This provision must be construed in the light of the powers of the Supreme Court of Appeal and the High Courts to make orders "concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President". These are very wide powers indeed.

[16] The provisions of section 172(2)(a) contemplate that disputes concerning the constitutional validity of a statute or conduct of the President will be considered, in the first instance, by the High Courts or the Supreme Court of Appeal, which are given the power to declare any law or conduct that is inconsistent with the Constitution invalid, subject to confirmation by this Court. The difficulty is that a statute may be invalid for at least two reasons. It may be invalid because its provisions are in conflict with a right in the Bill of Rights. Or it may be invalid because it was adopted in a manner that is inconsistent with the provisions of the Constitution. What compounds the difficulty is that in a constitutional state like ours, where the Constitution is

supreme, the Constitution imposes certain obligations on the exercise of legislative authority.

[17] Consider, for example, section 7(2) of the Constitution, which provides that "[t]he state must respect, protect, promote and fulfil the rights in the Bill of Rights." This provision no doubt imposes an obligation on the state to respect, protect, promote and fulfil the rights in the Bill of Rights. But it can hardly be suggested that this Court has exclusive jurisdiction to decide the validity of a statute that violates those rights because in enacting that statute, Parliament has failed to fulfil its constitutional obligation to respect, protect, promote and fulfil rights in the Bill of Rights. Were this to be so, it would undermine the role of other courts. In fact it would be contrary to section 172(2)(a), which contemplates that the Supreme Court of Appeal and the High Courts have the jurisdiction to consider the validity of an Act of Parliament. The Supreme Court of Appeal or a High Court would have jurisdiction under section 172(2)(a) to consider the constitutional validity of the impugned statute.

[18] In the case of a law that infringes a right in the Bill of Rights, the primary source of the dispute is the breach of a right. This dispute flows directly from the infringement of a right in the Bill of Rights. Although, inevitably this means that Parliament has failed to comply with its constitutional obligation, this is not an obligation contemplated in section 167(4)(e). It concerns the validity of the impugned law and not the failure to fulfil an obligation. Sections 167(5) and 172(2)(a) of the

Constitution contemplate that such disputes will be considered in the first instance by the High Courts, which are given the power to declare laws invalid, subject to confirmation by this Court. In doing so the High Court would not be deciding whether Parliament has failed to fulfil an obligation, but only whether the statute is consistent with the Bill of Rights.

[19] What all of this points to is that the phrase "a constitutional obligation" in section 167(4)(e) should be given a narrow meaning. If the phrase is construed as applying to all questions concerning the constitutional validity of Acts of Parliament, it would be in conflict with the powers of the Supreme Court of Appeal and the High Courts to make orders concerning the validity of Acts of Parliament.

[20] In *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* ("*SARFU 1*"), this Court, in the context of the conduct of the President, expressed the view that the words "fulfil a constitutional obligation" in section 167(4)(e) should be given a narrow meaning because a broader meaning would result in a conflict with section 172(1)(a) which empowers the Supreme Court of Appeal and the High Courts to make orders concerning the constitutional validity of the conduct of the President. While finding it unnecessary to define the phrase "fulfil a constitutional obligation," the Court expressed the view that "[i]t may depend on the facts and the precise nature of the challenges to the conduct of the President". In my view, there is no reason why this should not apply to the phrase as it relates to

Parliament.

[21] In *King*, the Supreme Court of Appeal had to consider whether it had jurisdiction to decide a constitutional challenge to a statute where the challenge was based on the alleged failure by the National Assembly to facilitate public involvement in its legislative and other processes as envisaged by section 59(1)(a) of the Constitution. The Supreme Court of Appeal concluded that neither it nor the High Court has jurisdiction to consider a constitutional challenge to the validity of a statute where the challenge is based on the alleged failure by Parliament to fulfil an obligation envisaged in section 59(1)(a) of the Constitution. The basic reasoning of the Supreme Court of Appeal was that the question whether Parliament has fulfilled its obligation to facilitate public involvement is "pre-eminently a 'crucial political' question, and section 167(4)(e) reserves it for only the Constitutional Court to make." I agree with this reasoning and conclusion.

[22] Section 167(4)(e) must be construed purposively and consistently with the nature of the jurisdiction of this Court in our constitutional democracy. This Court occupies a special place in our constitutional order. It is the highest court on constitutional matters and is the ultimate guardian of our Constitution and its values. As this Court pointed out in *SARFU 1*, it was envisaged that this Court would be called upon "to adjudicate finally in respect of issues which would inevitably have important political consequences." Consistent with this role, section 167(4) confers

exclusive jurisdiction on this Court in a number of crucial political areas; it is given the power to decide disputes between organs of state in the national or provincial sphere, the constitutionality of any parliamentary or provincial bill, constitutional challenges brought by members of the National Assembly or the provincial legislatures, the constitutionality of any amendment to the Constitution, whether Parliament or the President has failed to fulfil a constitutional obligation and whether to certify a provincial constitution.

[23] The purpose of giving this Court exclusive jurisdiction to decide issues that have important political consequences is "to preserve the comity between the judicial branch of government" and the other branches of government "by ensuring that only the highest court in constitutional matters intrudes into the domain" of the other branches of government. And thus while vesting in the judiciary the power to declare statutes and the conduct of the highest organs of state inconsistent with the Constitution and thus invalid, the Constitution "entrusts to this Court the duty of supervising the exercise of this power and requires it to consider every case in which an order of invalidity has been made, to decide whether or not this has been correctly done."

[24] The principle underlying the exclusive jurisdiction of this Court under section 167(4) is that disputes that involve important questions that relate to the sensitive areas of separation of powers must be decided by this Court only. Therefore, the

closer the issues to be decided are to the sensitive area of separation of powers, the more likely it is that the issues will fall within section 167(4). It follows that where a dispute will require a court to decide a crucial political question and thus intrude into the domain of Parliament, the dispute will more likely be one for the exclusive jurisdiction of this Court.

[25] It seems to me therefore that a distinction should be drawn between constitutional provisions that impose obligations that are readily ascertainable and are unlikely to give rise to disputes, on the one hand, and those provisions which impose the primary obligation on Parliament to determine what is required of it, on the other. In the case of the former, a determination whether those obligations have been fulfilled does not call upon a court to pronounce upon a sensitive aspect of the separation of powers. An example of such a provision that comes to mind is a provision that requires statutes to be passed by a specified majority. The criteria set out are clear, and a failure to comply with them would lead to invalidity. When a court decides whether these obligations have been complied with, it does not infringe upon the principle of the separation of powers. It simply decides the formal question whether there was, for example, the two-thirds majority required to pass the legislation.

[26] By contrast, where the obligation requires Parliament to determine in the first place what is necessary to fulfil its obligation, a review by a court whether that

obligation has been fulfilled, trenches on the autonomy of Parliament to regulate its own affairs and thus the principle of separation of powers. This is precisely what the obligation comprehended in section 72(1)(a) does. While it imposes a primary obligation on Parliament to facilitate public involvement in its legislative and other processes, including those of its committees, it does not tell Parliament how to facilitate public involvement but leaves it to Parliament to determine what is required of it in this regard. A review by a court of whether Parliament has complied with its obligation under section 72(1)(a) calls upon a court to intrude into the domain of a principal legislative organ of the state. Under our Constitution, this intrusion is reserved for this Court only.

[27] A construction of section 167(4)(e) which gives this Court exclusive jurisdiction to decide whether Parliament has complied with its constitutional obligation to facilitate public involvement in its legislative processes is therefore consistent with the principles underlying the exclusive jurisdiction of this Court. An order declaring that Parliament has failed to fulfil its constitutional obligation to facilitate public involvement in its legislative process and directing Parliament to comply with that obligation constitutes judicial intrusion into the domain of the principle legislative organ of the state. Such an order will inevitably have important political consequences. Only this Court has this power.

[28] The question whether Parliament has fulfilled its obligation under section 72(1)

(a) therefore requires this Court to decide a crucial separation of powers question and is manifestly within the exclusive jurisdiction of this Court under section 167(4)(e) of the Constitution.

[29] Before leaving this topic, there is one matter to which I must refer. The complaint is directed at the NCOP and not at the National Assembly. 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.

[30] I am therefore satisfied that the question whether the NCOP has failed to facilitate public involvement in its legislative processes concerns a dispute over whether Parliament has fulfilled a constitutional obligation as contemplated in section 167(4)(e). Only this Court has the jurisdiction to decide such a dispute.

[31] What falls to be considered next is whether it is competent under our constitutional order for declaratory relief to be granted by this Court in respect of the proceedings of Parliament.

V. Is it competent for this Court to grant declaratory relief in respect of proceedings of Parliament?

Introduction

[32] The obligation of Parliament to facilitate public involvement in its legislative and other processes, including those of its committees, raises the question of the competence of this Court to grant relief in respect of the proceedings of Parliament. The enforcement of the obligation to facilitate public involvement in the legislative processes of Parliament invariably requires this Court to interfere with the autonomy of the principal legislative organ of the state. This interference infringes upon the principle of the separation of powers. Yet, as will appear later in this judgment, the enforcement of the obligation to facilitate public involvement in the law-making process is crucial to our constitutional democracy.

[33] In the light of this, it is important to resolve the question when this Court can and should intervene to enforce the obligation to facilitate public involvement in the law-making process. Apart from this, as pointed out earlier, when these proceedings were launched on 25 February 2005, the Sterilisation Amendment Act was still in its bill form. Parliament had passed the Bill but it had not yet been signed by the President. It is therefore necessary to consider whether this Court had jurisdiction to

consider the constitutional challenge relating to parliamentary proceedings in connection with the Sterilisation Amendment Act at the time when the constitutional challenge was launched.

[34] It was against this background that the parties were called upon to submit argument on whether it is competent for this Court under our constitutional order to grant declaratory relief in respect of the proceedings of Parliament:

(a) before Parliament has concluded its deliberations on a bill;

(b) after Parliament has passed the bill, but before the bill has been signed by the President; or

(c) after it has been signed by the President but before it has been brought into force.

[35] The national legislative process is set out in sections 73 to 82 of the Constitution. Broadly speaking it commences with the introduction of a bill in the National Assembly, consideration and passing of the bill by the National Assembly, consideration and passing of the bill by the NCOP, and consideration and signing of the bill by the President. The specific question presented in this case is whether this Court has jurisdiction to intervene in this legislative process and to grant declaratory relief to the effect that Parliament has failed to facilitate public involvement in relation to a bill.

[36] Parliament has a very special role to play in our constitutional democracy – it is the principal legislative organ of the state. With due regard to that role, it must be free to carry out its functions without interference. To this extent, it has the power to "determine and control its internal arrangements, proceedings and procedures". The business of Parliament might well be stalled while the question of what relief should be granted is argued out in the courts. Indeed the parliamentary process would be paralysed if Parliament were to spend its time defending its legislative process in the courts. This would undermine one of the essential features of our democracy: the separation of powers.

[37] The constitutional principle of separation of powers requires that other branches of government refrain from interfering in parliamentary proceedings. This principle is not simply an abstract notion; it is reflected in the very structure of our government. The structure of the provisions entrusting and separating powers between the legislative, executive and judicial branches reflects the concept of separation of powers. The principle "has important consequences for the way in which and the institutions by which power can be exercised." Courts must be conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government. They too must observe the constitutional limits of their authority. This means that the judiciary should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution.

[38] But under our constitutional democracy, the Constitution is the supreme law. It is binding on all branches of government and no less on Parliament. When it exercises its legislative authority, Parliament "must act in accordance with, and within the limits of, the Constitution", and the supremacy of the Constitution requires that "the obligations imposed by it must be fulfilled." Courts are required by the Constitution "to ensure that all branches of government act within the law" and fulfil their constitutional obligations. This Court "has been given the responsibility of being the ultimate guardian of the Constitution and its values." Section 167(4)(e), in particular, entrusts this Court with the power to ensure that Parliament fulfils its constitutional obligations. This section gives meaning to the supremacy clause, which requires that "the obligations imposed by [the Constitution] must be fulfilled." It would therefore require clear language of the Constitution to deprive this Court of its jurisdiction to enforce the Constitution.

[39] The question is whether the Constitution precludes this Court from intervening during any or all of the stages of the law-making process in order to enforce the obligation to facilitate public involvement.

[40] There are three identifiable stages in the law-making process, and these are foreshadowed in the questions on which the parties were called upon to submit argument: 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. The applicants contended that section 167(4)(e) empowers this Court to intervene during all three stages.

[41] What must be emphasised at the outset is that in this case we are concerned with a constitutional challenge based on an alleged failure to facilitate public involvement in the legislative processes of Parliament as required by section 72(1)(a) of the Constitution. The questions posed by the Chief Justice must therefore be answered with reference to this specific challenge to the extent required by the facts of this case. It will be convenient to consider, first, whether this Court can interfere with the legislative process when the bill is before the President; second, after the President has signed the bill into law but before it comes into force; and third, during the deliberative process.

Is it competent for this Court to grant declaratory relief after a bill has been passed by Parliament but before it is signed by the President?

[42] The express provision of the Constitution that is relevant in this context and which limits the jurisdiction of this Court is section 167(4)(b). That section provides:

> "(4) Only the Constitutional Court may ─
>
> . . .
>
> (b) decide on the constitutionality of any parliamentary or provincial Bill, but may do so only in the circumstances anticipated in section 79 or 121".

[43] Section 167(4)(b) confers exclusive jurisdiction on this Court to decide the constitutionality of any parliamentary or provincial bill. However, this power is expressly limited in that this Court "may do so only in the circumstances anticipated in section 79 or 121". Thus while the section confers exclusive jurisdiction on this Court to consider the constitutional validity of a national or provincial bill, this power is expressly limited to a challenge brought by the President or a Premier and in circumstances contemplated in section 79 or 121 of the Constitution. The provisions of these sections are too clear to admit of any other construction. In the *UDM* case, this Court held that the Constitution "contains clear and express provisions which preclude any court from considering the constitutionality of a Bill save in the limited circumstances referred to in sections 79 and 121 of the Constitution, respectively."

[44] Counsel for the applicant nevertheless submitted that it is competent for this Court to grant relief after Parliament has passed a bill but before the President has signed the bill. To surmount the hurdle presented by the limited power of this Court to decide the constitutionality of a parliamentary or provincial bill under section 167(4)(b), counsel for the applicant advanced two propositions. First, there was a conflict between the provisions of sub-sections 167(4)(b) and 167(4)(e). This conflict arises because section 167(4)(b) permits only the President or the Premier to approach this Court in respect of a passed bill. By contrast, it was submitted, section 167(4)(e)

is concerned with failure to fulfil a constitutional obligation, and it imposes no restriction on the identity of the applicant or the stage of the challenge. Second, this conflict, which is more apparent than real, can be removed by construing the word "constitutionality" in section 167(4)(b) as limited to the contents of the bill and not to the procedure required by the Constitution.

[45] But the narrow meaning that counsel sought to assign to the word "constitutionality" in section 167(4)(b) is neither supported by the plain meaning of that word nor by the constitutional scheme of which it is part. The submission by counsel ignores the provisions of section 79 of the Constitution to which section 167(4)(b) refers. The provisions of section 167(4)(b) must be read with section 79 in order to determine the scope of the jurisdiction of this Court to decide the constitutionality of a bill. It is plain from the provisions of section 79(3) that the President has the authority to raise the constitutionality of a bill on both procedural and substantive grounds. It provides that the NCOP must participate in the reconsideration of the bill "if the President's reservations about the constitutionality of the Bill relate to a procedural matter that involves the [NCOP]". Nothing could be clearer. The President may raise as the source of his or her reservation a procedural matter.

[46] It is necessary to stress here 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. The purpose and effect of litigation that is brought in relation to a bill after it has been passed by Parliament is therefore to render the bill passed by Parliament invalid. This is precluded by the express provisions of section 167(4)(b).

[47] The question that falls to be determined is whether the provisions of section 167(4)(e) can be invoked while the bill is under consideration by the President. It is here that the interrelation between the provisions of section 167(4)(e) and section 167(4)(b) becomes relevant. There are two principles of interpretation that are relevant in this regard.

[48] The first is that where there are provisions in the Constitution that appear to be in conflict with each other, the proper approach is to examine them to ascertain whether they can reasonably be reconciled. And they must be construed in a manner that gives full effect to each. Provisions in the Constitution should not be construed in a manner that results in them being in conflict with each other. Rather, they should be construed in a manner that harmonises them. In *S v Rens*, this Court held that "[i]t

was not to be assumed that provisions in the same constitution are contradictory" and that "[t]he two provisions ought, if possible, to be construed in such a way as to harmonise with one another."

[49] The other principle of construction to keep in mind in this regard is that where there are two provisions in the Constitution dealing with the same subject, with one provision being general and the other being specific, the general provision must ordinarily yield to the specific provision. In *Ex parte Speaker of the KwaZulu-Natal Provincial Legislature: In re Certification of the Constitution of the Province of KwaZulu-Natal, 1996*, this Court held that a "general provision . . . would not normally prevail over the specific and unambiguous provisions". The specific provision must be construed as limiting the scope of the application of the more general provision. Therefore, if a general provision is capable of more than one interpretation and one of the interpretations results in that provision applying to a special field which is dealt with by a special provision, in the absence of clear language to the contrary, the special provision must prevail should there be a conflict.

[50] The question then is whether the provisions of sections 167(4)(b) and 167(4)(e) are capable of being reconciled.

[51] Although both these provisions deal with the exclusive jurisdiction of this Court, each deals with a specific subject matter. The subject matter of section 167(4)

(e) is "a constitutional obligation". It confers jurisdiction on this Court to decide whether Parliament or the President has failed to fulfil a constitutional obligation. It regulates constitutional challenges that seek to enforce the fulfilment of constitutional obligations and contains no restrictions as to the person or the stage at which a challenge may be launched. By contrast, section 167(4)(b) confers exclusive jurisdiction on this Court to decide the constitutional validity of any parliamentary or provincial bill but expressly limits such jurisdiction to the specific instances set out in sections 79 and 121 of the Constitution. The provisions of section 167(4)(b) therefore specifically deal with challenges to a bill that has been passed by Parliament or a provincial legislature.

[52] Now I think it can fairly be accepted that section 167(4)(e) covers a wider field in that a constitutional obligation may relate to the process that Parliament is required to follow before passing a bill, such as the obligation to facilitate public involvement in its processes as contended by the applicants. By contrast, the provisions of section 167(4)(b) are specifically limited to constitutional challenges to parliamentary or provincial bills. It seems to me therefore that a constitutional challenge under section 167(4)(e) whose purpose and effect is to render invalid a bill will be barred by section 167(4)(b). In this sense, the scope of the provisions of section 167(4)(e) is circumscribed by the specific provisions of section 167(4)(b), which limit a constitutional challenge to a bill to the more specific circumstances contemplated in section 79 or 121. It follows therefore that the provisions of section 167(4)(b) and

section 167(4)(e) can be harmonised by understanding the provisions of section 167(4)(b) as limiting the scope of section 167(4)(e) when the purpose and effect of a constitutional challenge under section 167(4)(e) is to render a bill invalid.

[53] This construction of section 167(4)(e) is consistent with the scheme of the Constitution. This scheme entrusts the President with the power to raise with this Court the constitutionality of a parliamentary bill. The decision to provide the President with the power to decline to assent to a bill and to challenge its constitutionality was based on the conviction that the power to make laws must be carefully circumscribed. It is a power to be shared by the National Assembly, the NCOP, the President and the provinces. The President's role in the law-making process reflects a careful effort to ensure that the law-making process is kept under check consistent with the principle of checks and balances. The scheme is founded on the trust that our system has for the role of the President, namely, the responsibility it vests in the President to "uphold, defend and respect the Constitution as the supreme law", and thus to ensure that laws that he or she assents to and signs, conform to the Constitution.

[54] In addition, the constitutional scheme contemplates that challenges to the constitutional validity of a bill passed by Parliament must await the completion of the legislative process. During this process, the rights of the public are safeguarded by the President who has the authority to challenge the constitutionality of a bill

consistent with his or her duty to uphold, defend and respect the Constitution. Once the process is complete, the public and interested groups may challenge the resulting statute. This scheme seeks to ensure that judicial intervention in the law-making process is kept to the minimum; hence it is limited to challenges by the President.

[55] Counsel for the applicant contended that by its nature the duty to facilitate public involvement in the law-making process requires that it be enforced there and then. Its delay is its denial. The argument does not take sufficient account of the role of Parliament and the President in the law-making process. As pointed out earlier, the President has a constitutional duty to uphold, defend and respect the Constitution. The role of the President in the law-making process is to guard against unconstitutional legislation. To this end, the President is given the power to challenge the constitutionality of the bill. The President represents the people in this process. The members of the National Assembly perform a similar task and have a similar obligation. Thus during the entire process, the rights of the public are protected. The public can always exercise their rights once the legislative process is completed. If Parliament and the President allow an unconstitutional law to pass through, they run the risk of having the law set aside and the law-making process commence afresh at great cost. The rights of the public are therefore delayed while the political process is underway. They are not taken away.

[56] I conclude therefore that after Parliament has passed a bill and before the

President has assented to and signed the bill, it is not competent for this Court to grant any relief in relation to the bill, save at the instance of the President and in the limited circumstances contemplated in section 79.

[57] In its notice of motion the applicant sought an order declaring that the conduct of the NCOP and the provincial legislatures was invalid and any other consequential relief. The effect of a successful constitutional challenge to the Sterilisation Amendment Bill would be to render that Bill invalid. This Court would have been precluded by the provisions of section 167(4)(b) read with section 79 from making an order declaring the Sterilisation Amendment Bill invalid. The fact that the Bill has since been enacted into law and this Court has jurisdiction to pronounce on the constitutional validity of the Sterilisation Amendment Act matters not. The question whether this Court has jurisdiction must be determined as at the time when the present proceedings were instituted and not at the time when the Court considers the matter. The crucial time for determining whether a court has jurisdiction is when the proceedings commenced.

[58] It follows therefore that the challenge to the Sterilisation Amendment Bill as enacted into law must be dismissed. Nothing further need be said about it.

[59] That brings us to the question whether it is competent for this Court to grant relief once the President has signed a bill into law but before it has been brought into

operation. This was the position with regard to the remaining legislation when the present challenge was launched.

Is it competent for this Court to grant relief in respect of an Act of Parliament that has not yet been brought into force?

[60] The express provision of the Constitution which caters for this eventuality is contained in section 80, which provides:

> "(1) Members of the National Assembly may apply to the Constitutional Court for an order declaring that all or part of an Act of Parliament is unconstitutional.
> (2) An application –
>
> (a) must be supported by at least one third of the members of the National Assembly; and
>
> (b) must be made within 30 days of the date on which the President assented to and signed the Act.
>
> (3) The Constitutional Court may order that all or part of an Act that is the subject of an application in terms of subsection (1) has no force until the Court has decided the application if –
>
> (a) the interests of justice require this; and
>
> (b) the application has a reasonable prospect of success.
>
> (4) If an application is unsuccessful, and did not have a reasonable prospect of success, the Constitutional Court may order the applicants to pay costs."

[61] This provision must be construed in the light of the powers of this Court under section 172(2)(a), which empowers this Court to make an order concerning the constitutional validity of an Act of Parliament. These are very wide powers indeed.

[62] In *Khosa and Others v Minister of Social Development and Others; Mahlaule and Others v Minister of Social Development and Others*, this Court was concerned with, among other issues, whether it could consider a provision which had not yet been brought into operation. The Court held that it has jurisdiction to consider provisions in a statute that have not yet been brought into operation. For its holding, the Court relied upon the provisions of section 172(2)(a). The basic reasoning of the Court was that section 172(2)(a), which empowers the Court to declare Acts of Parliament invalid, does not distinguish between Acts of Parliament that have been brought into force and those which have not. It added that in the case of a provision that has not yet been brought into force, the legislative process is complete and there is a duly enacted Act of Parliament. In my view, this reasoning applies equally to a statute which has not yet been brought into force.

[63] It is true, in *Khosa*, this Court did not consider the provisions of section 80. The purpose of section 80 is to make provision for abstract review at the instance of members of the National Assembly. It merely regulates the conditions under which members of the National Assembly may challenge an Act of Parliament. It does not preclude a member of the public from challenging a provision of an Act of Parliament that has been promulgated during the period of thirty days within which members of the National Assembly are required to approach this Court to challenge all or part of the Act of Parliament.

[64] In terms of section 81, "[a] Bill assented to and signed by the President becomes an Act of Parliament". The fact that the statute may not have been brought into operation cannot deprive this Court of its jurisdiction. There is nothing in the wording of section 80 that precludes this Court or any other court from considering the validity of an Act of Parliament at the instance of the public. Nor is there anything in the scheme for the exercise of jurisdiction by this Court that precludes it from considering the constitutional validity of a statute that has not yet been brought into operation. The legislative process is complete, and there can be no question of interference in such a process. Once a bill is enacted into law, this Court should consider its constitutionality.

[65] I conclude therefore that it is competent for this Court to grant relief in respect of the proceedings of Parliament after the bill has been enacted into law but before it has been brought into force. It follows therefore that this Court has the jurisdiction to consider the constitutional challenge to the Dental Technicians Amendment Act, the CTOP Amendment Act and the THP Act.

[66] It now remains to consider the last question posed in the directions, namely, whether it is competent for this Court to grant relief in relation to the proceedings of Parliament before Parliament has passed the bill.

Is it competent for this Court to issue a declaratory relief in respect of parliamentary proceedings before Parliament has concluded its deliberations on a bill?

[67] The question whether it is competent for this Court to grant a declaratory relief to the effect that Parliament has failed to comply with its constitutional obligation to facilitate public involvement in the legislative process before the parliamentary legislative process is completed is more complex. There is no express constitutional provision that precludes this Court from doing so. On the one hand, it raises the question of the competence of this Court to interfere with the autonomy of Parliament to regulate its internal proceedings, and on the other, it raises the question of the duty of this Court to enforce the Constitution, in particular, to ensure that the law-making process conforms to the Constitution.

[68] Courts in other jurisdictions, notably in the Commonwealth jurisdictions, have confronted this question. Courts have traditionally resisted intrusions into the internal procedures of other branches of government. They have done this out of comity and, in particular, out of respect for the principle of separation of powers. But at the same time they have claimed the right as well as the duty to intervene in order to prevent the violation of the Constitution. To reconcile their judicial role to uphold the Constitution, on the one hand, and the need to respect the other branches of government, on the other hand, courts have developed a "settled practice" or general rule of jurisdiction that governs judicial intervention in the legislative process.

[69] The basic position appears to be that, as a general matter, where the flaw in the law-making process will result in the resulting law being invalid, courts take the view

that the appropriate time to intervene is after the completion of the legislative process. The appropriate remedy is to have the resulting law declared invalid. However, there are exceptions to this judicially developed rule or "settled practice". Where immediate intervention is called for in order to prevent the violation of the Constitution and the rule of law, courts will intervene and grant immediate relief. But intervention will occur in exceptional cases, such as where an aggrieved person cannot be afforded substantial relief once the process is completed because the underlying conduct would have achieved its object.

[70] The primary duty of the courts in this country is to uphold the Constitution and the law "which they must apply impartially and without fear, favour or prejudice." And if in the process of performing their constitutional duty, courts intrude into the domain of other branches of government, that is an intrusion mandated by the Constitution. What courts should strive to achieve is the appropriate balance between their role as the ultimate guardians of the Constitution and the rule of law including any obligation that Parliament is required to fulfil in respect of the passage of laws, on the one hand, and the respect which they are required to accord to other branches of government as required by the principle of separation of powers, on the other hand.

[71] That said, however, it is not necessary to reach any firm conclusion on whether it is competent for this Court to interfere in the deliberative process of Parliament to enforce the duty to facilitate public involvement. Although the parties were called

upon to address this question, none of the statutes involved in this case were at a deliberative stage of Parliament when this litigation commenced. Notwithstanding the importance of this question, I consider that it is not desirable to answer it in these proceedings. It is a question that must be answered with regard to a specific challenge raising it pertinently. This is not such a case. It is better to leave it open for consideration when an occasion to consider it arises.

[72] It now remains to consider the main item on our agenda, namely, whether the NCOP and the provincial legislatures have fulfilled their obligation to facilitate public involvement in their respective legislative processes as required by the Constitution. I have already concluded that this complaint, so far as it relates to the Sterilisation Amendment Act, must be dismissed. This leaves the Dental Technicians Amendment Act, the CTOP Amendment Act and the THP Act.

VI. Did the NCOP and the provincial legislatures facilitate public involvement in their respective legislative processes as required by the Constitution?

What do the public involvement provisions require?

[73] The requirement to facilitate public involvement in the legislative processes of the NCOP is governed by section 72, which provides:

> "(1) The National Council of Provinces must –
>
> (a) facilitate public involvement in the legislative and other processes of the Council and its committees; and
>
> (b) conduct its business in an open manner, and hold its sittings, and those of

its committees, in public, but reasonable measures may be taken –

(i) to regulate public access, including access of the media, to the Council and its committees; and

(ii) to provide for the searching of any person and, where appropriate, the refusal of entry to, or the removal of, any person.

(2) The National Council of Provinces may not exclude the public, including the media, from a sitting of a committee unless it is reasonable and justifiable to do so in an open and democratic society."

[74] Identical duties are imposed on the National Assembly by section 59 and on the provincial legislatures by section 118.

[75] The provisions of sections 72(1)(a) and 118(1)(a) ("the public involvement provisions") clearly impose a duty on the NCOP and the provincial legislatures to facilitate public involvement in their respective legislative processes. The question is what is the nature and scope of the duty comprehended by these provisions and to what extent is it justiciable.

The contentions of the parties

[76] The applicant contended that the public involvement provisions require that public hearings must be held in respect of all legislation under consideration by a legislature whether at the national or provincial level. In the alternative, it was contended that a legislature should hold public hearings whenever there is evidence that a bill under consideration is controversial. The applicant submitted that in this

case, public hearings should have been held in respect of each Bill, in each province and by the NCOP sitting in plenary session. For their part, Parliament and the provincial legislatures, as well as the Minister of Health, conceded that the public involvement provisions require public participation in the legislative process but contended that what is required is some opportunity to make either written or oral submissions on the legislation under consideration.

[77] It is therefore common cause between all the parties to these proceedings that sections 72(1)(a) and 118(1)(a) require public participation in the legislative processes of the NCOP and the provincial legislatures. However, the parties differ on the nature and scope of the duty to facilitate public involvement.

[78] The contentions of the parties require this Court to consider the meaning and scope of the duty to facilitate public involvement. This duty must be construed and understood in the light of: (a) the constitutional role of the NCOP in the national legislative process and, in particular, its relationship to the provincial legislatures; (b) the right to political participation under international and foreign law; and (c) the nature of our constitutional democracy. All of these provide the context within which to determine the meaning and scope of the duty to facilitate public involvement in legislative processes.

The role of the NCOP in the national legislative process

[79] The legislative authority is vested in Parliament, which consists of two Houses: the National Assembly and the NCOP. Section 42(4) of the Constitution defines the role of the NCOP as follows:

> "The National Council of Provinces represents the provinces to ensure that provincial interests are taken into account in the national sphere of government. It does this mainly by participation in the national legislative process and by providing a national forum for public consideration of issues affecting the provinces."

The NCOP performs functions similar to the National Assembly but from the distinct vantage point of the provinces. Its role is both unique and fundamental to the basic structure of our government. It reflects one of the fundamental premises of our government, which sees national, provincial and local governments as "spheres within a single whole," which are distinctive yet interdependent and interrelated. The NCOP ensures that national government is responsive to provincial interests while simultaneously engaging the provinces and provincial legislatures in the consideration of national policy. From this perspective, the NCOP plays a pivotal role "as a linking mechanism that acts simultaneously to involve the provinces in national purposes and to ensure the responsiveness of national government to provincial interests."

[80] The NCOP shares many of its structural characteristics with the German provincial body known as the *Bundesrat*, or council of state governments, upon which the NCOP was modelled. Like the NCOP, the *Bundesrat* represents the interests of the *Länder*, which in this context are equivalent to the provinces in our country, in the national government. Meanwhile, a second parliamentary body known as the

Bundestag, like the National Assembly, is elected to represent the people as a whole. The members of the *Bundesrat* are members of the state governments and are appointed and subject to recall by the states. They serve in the council as representatives of the *Länder*. The German Constitution provides that the *Länder* shall participate, through the *Bundesrat*, in the national legislative process. As constitutional partners, both the *Bund*, or national government, and the *Länder* have an obligation to consult, cooperate and communicate with each other, consistent with the principle of *Bundestreue*.

[81] The procedure for enacting legislation under our Constitution similarly requires institutional co-operation and communication between national and provincial legislatures. Without such co-operation, the national legislative program may be severely compromised. Indeed, the Constitution contemplates that provincial interests will be taken into account in the national law-making process. The NCOP institutionalises the principle of co-operation and communication by involving the nine provinces directly in the national legislative process and other national matters. The local government is also involved indirectly in that local government may designate up to ten part-time, non-voting representatives to participate in the NCOP proceedings. Thus the NCOP represents the concerns and interests of the provinces and as well as those of local government in the formulation of national legislation.

[82] Indeed, the principle of institutional co-operation and communication finds

expression in the principle of co-operative government to which chapter 3 of the Constitution is devoted. The role of the NCOP should be understood in the light of the constitutional principle of co-operative government, which shares similarities with the principle of *Bundestreue*. The basic structure of our government consists of a partnership between the "national, provincial and local spheres of government which are distinctive, interdependent and interrelated." The principle of co-operative government requires each of the three spheres to perform their functions in a spirit of consultation and co-ordination with the other spheres.

[83] Both the manner in which the NCOP delegates are selected and the manner in which they vote on legislation affecting the provinces provide the provinces with a significant voice in national legislation. The NCOP consists of ten delegates from each of the nine provinces, including six permanent delegates and four special delegates. The Premier of the province, or his or her designee, serves as one of the special delegates. The Premier, or his or her designee, heads the delegation. The remaining delegates are appointed by their respective provincial legislatures on a proportional basis. In the case of a bill that affects the provinces, the section 76 bill, each provincial delegation to the NCOP "has one vote, which is cast on behalf of the province by the head of its delegation". It is common cause that in these proceedings we are concerned with section 76 legislation.

[84] Each delegation votes on the basis of a mandate given by its provincial

legislature. This is clear from the Constitution, which provides that the provincial legislatures have the responsibility to confer authority on their delegations to cast votes on their behalf in the NCOP. As this Court has explained, the NCOP "is a council of provinces and not a chamber composed of elected representatives. Voting by delegation reflects accurately the support of the different provincial legislatures for a measure under consideration." In this manner the provincial legislatures are given a direct say in the national law-making process through the NCOP.

[85] The procedure stipulated in section 76 for bills that affect the provinces "gives more weight to the position of the National Council of Provinces" than does the constitutional procedure for bills that do not affect the provinces. After a bill has been passed by the National Assembly it is referred to the NCOP, which can pass the bill, pass the bill subject to amendment or reject the bill. If the NCOP and National Assembly cannot agree on a bill, it is sent to a mediation committee established to facilitate the resolution of disputes between the two houses. If the two chambers cannot reach an agreement following mediation, the original bill lapses but may still become law if it is passed again but now by two-thirds of the members of the National Assembly. In this way, although the NCOP does not wield a final veto over section 76 bills, it can delay their passage and force a two-thirds majority in the National Assembly.

The relationship between the NCOP and the provincial legislatures

[86] As pointed out earlier, in relation to section 76 bills, the NCOP delegations vote on the basis of mandates given to them by their respective provincial legislatures. Naturally, this will require provincial legislatures to study and deliberate on the bill in question so as to give informed mandates. And in doing so, provincial legislatures no doubt take part in the national legislative process. This is so because in the national legislative process, the NCOP "represents the provinces to ensure that provincial interests are taken into account in the national sphere of government." And "[i]t does this mainly by participating in the national legislative process". In this way, the provincial legislatures become involved in the national legislative process by considering how they should vote on the bill under consideration at the national level.

[87] As the provincial legislatures are involved in the legislative process, albeit at the national level, they are engaged in the "legislative [or] other processes" of the legislatures. It is in this sense that the provisions of section 118(1)(a) of the Constitution become relevant in the context of national legislation. Neither Parliament nor the nine provinces contended otherwise.

[88] The allegation by the applicant that the provinces did not comply with the provisions of section 118(1)(a) in connection with the health legislation must be understood in the light of this relationship between the NCOP and the provincial legislatures.

[89] The duty to facilitate public involvement in the legislative process is an aspect of the right to political participation. International and regional human rights instruments provide a useful guide in understanding the duty to facilitate public involvement in the context of our country. I consider it necessary therefore to refer to the right to political participation as understood in international law.

The right to political participation under international and foreign law

[90] The right to political participation is a fundamental human right, which is set out in a number of international and regional human rights instruments. In most of these instruments, the right consists of at least two elements: a general right to take part in the conduct of public affairs; and a more specific right to vote and/or to be elected. Thus article 25 of the International Covenant on Civil and Political Rights ("ICCPR") provides:

> "Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:
>
> (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
>
> (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors".

[91] Significantly, the ICCPR guarantees not only the "right" but also the "opportunity" to take part in the conduct of public affairs. This imposes an obligation

on states to take positive steps to ensure that their citizens have an opportunity to exercise their right to political participation. The right enshrined in article 25 must be understood in the light of article 19 of the ICCPR, which provides:

> "2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

[92] Both articles 19 and 25 guarantee not only the positive right to political participation, but simultaneously impose a duty on states to facilitate public participation in the conduct of public affairs by ensuring that this right can be realised. Taken together, they seek to ensure that citizens have the necessary information and the effective opportunity to exercise the right to political participation.

[93] Since the adoption of the ICCPR, various regional human rights instruments and declarations have reaffirmed the right to political participation. The relevant regional human rights instrument in the context of our country is the African [Banjul] Charter on Human and Peoples' Rights ("African Charter"), adopted on 27 June 1981, which was acceded to by our country on 9 July 1996. The African Charter is more specific than the ICCPR in spelling out the obligation of states parties to ensure that people are well informed of the rights in the African Charter. The relevant articles are articles 9, 13 and 25 which provide:

"Article 9

1. Every individual shall have the right to receive information.

2. Every individual shall have the right to express and disseminate his opinions within the law.

. . . .

Article 13

1. Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.

. . . .

Article 25

States parties to the present Charter shall have the duty to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood."

[94] Similarly, the American Convention on Human Rights provides in article 23 that all citizens shall enjoy the right and opportunity "to take part in the conduct of public affairs, directly or through freely chosen representatives". The Harare Commonwealth Declaration proclaims the "individual's inalienable right to participate by means of free and democratic processes in framing the society in which he or she lives". The Inter-American Democratic Charter re-affirms that "the participatory nature of democracy in [the American] countries in different aspects of public life contributes to the consolidation of democratic values and to freedom and solidarity in the Hemisphere". It further asserts that "[i]t is the right and responsibility of all citizens to participate in decisions relating to their own development. This is also a necessary condition for the full and effective exercise of democracy. Promoting and

fostering diverse forms of participation strengthens democracy."

Nature and scope of the right

[95] The precise nature and scope of the international law right to participate in the conduct of public affairs is a matter for individual states to determine through their laws and policies. Under article 25 of the ICCPR, states are to establish "powers and the means by which individual citizens exercise the right to participate in the conduct of public affairs protected by article 25" in national constitutions and other laws. As the Human Rights Committee has explained, "[i]t is for the legal and constitutional system of the State party to provide for the modalities of such participation."

[96] The right to political participation has been described as an open-textured "programmatic" right, which is open to experimental reformulation and which will necessarily change in the light of ongoing national experiences:

> "Fresh understandings and different institutionalizations of the right in different cultural and political contexts may reveal what an increasing number of states believe to be a necessary minimum of political participation for all states. That minimum should never require less of a government than provision for meaningful exercise of choice by citizens in some form of electoral process permitting active debate on a broad if not unlimited range of issues. But it could require much more."

[97] The idea of an evolving human right to political participation comports with this Court's view of human rights as open to elaboration, reinterpretation and expansion.

As the Court has explained, "rights by their nature will atrophy if they are frozen. As the conditions of humanity alter and as ideas of justice and equity evolve, so do concepts of rights take on a new texture and meaning." This must be particularly so for programmatic rights like the right to take part in the conduct of public affairs, which must be realised through the programs and policies of states. But more importantly, the right to political participation must be left to gather its meaning and content from historical and cultural experience. What is required is for "States to adopt such legislative and other measures as may be necessary to ensure that citizens have an effective opportunity to enjoy the rights it protects."

[98] The right to political participation includes but is not limited to the right to vote in an election. That right, which is specified in article 25(b) of the ICCPR, represents one institutionalisation of the right to take part in the conduct of public affairs. The broader right, which is provided for in article 25(a), envisages forms of political participation which are not limited to participation in the electoral process. It is now generally accepted that modes of participation may include not only indirect participation through elected representatives but also forms of direct participation.

[99] According to the Inter-Parliamentary Union, an international organisation of Parliaments of sovereign States, which serves as a focal point for worldwide parliamentary dialogue, "[d]irect participation means that not only elected representatives, but citizens too are able to participate directly in public affairs, either

through public debate and dialogue with elected representatives, referendums and popular initiatives or through self-organisation, guaranteed under the freedoms of expression, assembly and association." In this regard the Human Rights Committee has explained that:

> "Citizens participate directly in the conduct of public affairs when they exercise power as members of legislative bodies or by holding executive office. This right of direct participation is supported by paragraph (b). Citizens also participate directly in the conduct of public affairs when they choose or change their constitution or decide public issues through a referendum or other electoral process conducted in accordance with paragraph (b). Citizens may participate directly by taking part in popular assemblies, which have the power to make decisions about local issues or about the affairs of a particular community and in bodies established to represent citizens in consultation with government.
>
> . . . .
>
> Citizens also take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves. This participation is supported by ensuring freedom of expression, assembly and association."

[100] The right to political participation can therefore be realised in many ways. As one commentator has observed of article 25 of the ICCPR:

> "[T]he right to political participation can be realized in multiple ways, and it is not possible to derive from this provision one single means of realizing it. In this context, the heterogeneity of the parties' political systems and the different degrees of political participation provided for, even in democratic states, should not be overlooked. Democratic systems and theories may be more or less focused upon representation and may balance the division of powers between central and local authorities differently. For some theories on democracy, the right to vote for representatives is satisfactory. Other theories are more expansive and place a higher value on

> participatory elements in society. The latter approach suggests citizens' participation before local authorities with decentralized power and public involvement in local government."

[101] The idea of allowing the public to participate in the conduct of public affairs is not a new concept. In this country, the traditional means of public participation is imbizo/lekgotla/bosberaad. This is a participatory consultation process that was, and still is, followed within the African communities. It is used as a forum to discuss issues affecting the community. This traditional method of public participation, a tradition which is widely used by the government, is both a practical and symbolic part of our democratic processes. It is a form of participatory democracy.

[102] Neither is the idea of allowing the public to participate in the parliamentary decision-making process a new concept. The right to political participation has deep historical roots, dating back to the Middle Ages. The Magna Carta guaranteed the right to petition the government for the redress of grievances, and over time this right became a central part of English constitutionalism, whereby "the disenfranchised joined the enfranchised in participating in English political life." The English colonists to the United States brought with them an understanding of petitioning as the foundation of public participation in politics, and the right to petition the government is now protected by the First Amendment to the U.S. Constitution. Likewise, Article 17 of the Basic Law for the Federal Republic of Germany guarantees the right of

every citizen to present written requests or complaints to Parliament or other appropriate authorities. Members of the public exercise this right individually and collectively in substantial numbers, and a petitioner is generally entitled to have his or her petition examined on its merits and to be informed of the decision taken and the reasons for that decision.

[103] More recently, a growing number of national Constitutions, in particular those adopted since the entry into force of the ICCPR, expressly embrace the principle of participatory democracy. Several, like our Constitution, include provisions that promote participation in law-making, whether through written petitions, oral hearings or other mechanisms of public involvement. For example, the Constitution of Tanzania provides that "[e]very citizen has the right and the freedom to participate fully in the process leading to the decision on matters affecting him, his well-being or the nation." Citizens of Portugal have the right to submit petitions, representations or complaints to governmental institutions, and the law must determine conditions under which the National Assembly, sitting in plenary session, will consider these submissions.

[104] The Constitution of Colombia includes as one of the essential goals of the state, the goal "to facilitate the participation of everyone in the decisions that affect them and in the economic, political, administrative, and cultural life of the nation." More specifically, it provides that "[a]ny citizen has the right to participate in the

establishment, exercise, and control of political power. To make this decree effective the citizen may . . . [p]articipate in elections, plebiscites, referendums, popular consultations, and other forms of democratic participation." Other jurisdictions also provide for the direct involvement of their citizens in the law-making process.

Conclusions from international law and foreign law

[105] The international law right to political participation encompasses a general right to participate in the conduct of public affairs and a more specific right to vote and/or be elected into public office. The general right to participate in the conduct of public affairs includes engaging in public debate and dialogue with elected representatives at public hearings. But that is not all; it includes the duty to facilitate public participation in the conduct of public affairs by ensuring that citizens have the necessary information and effective opportunity to exercise the right to political participation.

[106] While the right to political participation in international law can be achieved in multiple ways, it is clear that this right does not require less of a government than provision for meaningful exercise of choice in some form of electoral process and public participation in the law-making process by permitting public debate and dialogue with elected representatives. In addition, this right is supported by the right to freedom of expression which includes the freedom to seek, receive and impart information. In our country, the right to political participation is given effect not only

through the political rights guaranteed in section 19 of the Bill of Rights, as supported by the right to freedom of expression but also by imposing a constitutional obligation on legislatures to facilitate public participation in the law-making process.

[107] The duty to facilitate public involvement in the legislative process under our Constitution must therefore be understood as a manifestation of the international law right to political participation. Public involvement in the legislative and other processes of legislatures of our country is a more specific form of political participation than the participation in the conduct of public affairs that is contemplated by article 25 of the ICCPR.

[108] Thus the Constitutional Assembly, in framing our Constitution, was not content only with the right to vote as an expression of the right to political participation. It opted for a more expansive role of the public in the conduct of public affairs by placing a higher value on public participation in the law-making process. As Ms N Mokonyane, a Gauteng member of the NCOP, has recently noted:

> "Our struggle against apartheid was necessitated not just by our hatred of the apartheid system, and the suffering and the injustice it inflicted on the people of our country; it was also inspired by our vision of a democratic alternative as opposed to a system based on an institutionalised racialism and exploitation.
>
> Our struggle was inspired in particular by our vision of a nonracial and democratic South Africa in which the people shall govern.
>
> . . . .
>
> A key aspect of our vision of democracy was obviously the right to vote. The idea that every citizen, regardless of their race, colour or creed, was entitled to stand for

> elections and to vote in them. But our vision of democracy also went beyond simply voting every five years.
>
> We were also inspired by the idea of a participatory democracy as well as a system in which the people of our country would on an on-going basis participate in and have a say in every aspect of the lives in workplaces, communities, streets and schools."

[109] This is reflected in the very nature of our constitutional democracy.

The nature of our constitutional democracy

[110] The international law right to political participation reflects a shared notion that a nation's sovereign authority is one that belongs to its citizens, who "themselves should participate in government – though their participation may vary in degree." This notion is expressed in the preamble of the Constitution, which states that the Constitution lays "the foundations for a democratic and open society in which government is based on the will of the people." It is also expressed in constitutional provisions that require national and provincial legislatures to facilitate public involvement in their processes. Through these provisions, the people of South Africa reserved for themselves part of the sovereign legislative authority that they otherwise delegated to the representative bodies they created.

[111] Our Constitution was inspired by a particular vision of a non-racial and democratic society in which government is based on the will of the people. Indeed, one of the goals that we have fashioned for ourselves in the Preamble of the

Constitution is the establishment of "a society based on democratic values, social justice and fundamental human rights." The very first provision of our Constitution, which establishes the founding values of our constitutional democracy, includes as part of those values "a multi-party system of democratic government, to ensure accountability, responsiveness and openness." Commitment to principles of accountability, responsiveness and openness shows that our constitutional democracy is not only representative but also contains participatory elements. This is a defining feature of the democracy that is contemplated. It is apparent from the preamble of the Constitution that one of the basic objectives of our constitutional enterprise is the establishment of a democratic and open government in which the people shall participate to some degree in the law-making process.

[112] The nature of our democracy must be understood in the context of our history. As has been observed, during the struggle against apartheid, a system that denied the majority of the people a say in the making of the laws which governed them, the people developed the concept of the people's power as an alternative to the undemocratic system of apartheid. This concept ensured that the people took part in community structures that were set up to fight the system of apartheid. But as has been observed, the significance of these "organs of the people's power" went beyond their intended purpose:

> "They were also seen as crucial in laying the foundation for the future participatory democracy that [the people] were fighting for and that we are operating under. This emphasis on democratic participation that was born in the struggle against injustices

is strongly reflected in our new democratic Constitution and the entrenchment of public participation in Parliament and the legislatures."

[113] Consistent with the participative nature of our democracy, Parliament has developed the notion of a People's Assembly, which is a joint venture between Parliament and the provincial legislatures. The purpose of the Peoples' Assembly was "to enable the public to impact on decision-making with regard to laws affecting them and give meaning to the notion of a Peoples' Parliament that strives to improve the quality of life of all South Africans and to strengthen democracy." The objectives of the Peoples' Assembly included, among others, the creation of an opportunity for the public, particularly the most marginalised communities, to engage with Parliament and the provincial legislatures, to build on the legacy of active participation by the public which is reflected in the Kliptown gathering of 1955 and the writing of the democratic Constitution, and to provide a vehicle for people's voices to be heard on issues affecting them.

[114] As part of its proceedings, the Peoples' Assembly 2005 set up workshops that focused on four commissions, which included a commission on public participation. The Commission on Public Participation reiterated, through the voices of the people of South Africa, the meaning and importance of public participation in the context of our constitutional democracy. The Commission noted that

"one of the distinctive features of public participation processes in South Africa has

> always been that it is firmly grounded in the constitutional imperative of democratic participation and keeping society involved in legislative, policy and other decision-making processes. The Constitution makes Parliament and the provincial legislatures, as well as municipal councils, the primary democratic institutions in South Africa. The people have a voice in these institutions, not only through elected representatives, but also through access to committee meetings and deliberations. The people also have the right to speak and make representations to committees and meetings, which is in line with the Constitution, which states that all people shall be entitled to take part in the administration of the country."

[115] In the overall scheme of our Constitution, the representative and participatory elements of our democracy should not be seen as being in tension with each other. They must be seen as mutually supportive. General elections, the foundation of representative democracy, would be meaningless without massive participation by the voters. The participation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of government and become familiar with the laws as they are made. It enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people. Finally, because of its open and public character it acts as a counterweight to secret lobbying and influence peddling. Participatory democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of

wealth and influence exist.

[116] Therefore our democracy includes as one of its basic and fundamental principles, the principle of participatory democracy. The democratic government that is contemplated is partly representative and partly participatory, is accountable, responsive and transparent and makes provision for public participation in the law-making processes. Parliament must therefore function in accordance with the principles of our participatory democracy.

[117] It is against this background that the nature and scope of the duty to facilitate public involvement must be construed and understood. And it is to that question that I now turn.

The meaning and scope of the duty to facilitate public involvement

[118] Public involvement is not a uniquely South African concept. In other countries, notably, in the United States, it is a concept that is used in the context of rule-making by administrative agencies. It is one of the requirements of the rule-making process by these agencies. In the international terrain, there is a growing number of instruments that make provision for the principle of public participation, in particular, in the context of environmental issues. It is commonly used to refer to the active participation of the public in the decision-making processes. The words "public involvement" and "public participation" are often used interchangeably.

[119] The phrase "facilitate public involvement" is a broad concept, which relates to the duty to ensure public participation in the law-making process. The key words in this phrase are "facilitate" and "involvement". To "facilitate" means to "make easy or easier", "promote" or "help forward". The phrase "public involvement" is commonly used to describe the process of allowing the public to participate in the decision-making process. The dictionary definition of "involve" includes to "bring a person into a matter" while participation is defined as "[a] taking part with others (in an action or matter); . . . the active involvement of members of a community or organization in decisions which affect them".

[120] According to their plain and ordinary meaning, the words public involvement or public participation refer to the process by which the public participates in something. Facilitation of public involvement in the legislative process, therefore, means taking steps to ensure that the public participate in the legislative process. That is the plain meaning of section 72(1)(a).

[121] This construction of section 72(1)(a) is consistent with the participative nature of our democracy. As this Court held in *New Clicks*, "[t]he Constitution calls for open and transparent government, and requires public participation in the making of laws by Parliament and deliberative legislative assemblies." The democratic government that is contemplated in the Constitution is thus a representative and participatory

democracy which is accountable, responsive and transparent and which makes provision for the public to participate in the law-making process.

[122] Our constitutional framework requires the achievement of a balanced relationship between representative and participatory elements in our democracy. Section 72(1)(a), like section 59(1)(a) and section 118(1)(a), addresses the vital relationship between representative and participatory elements, which lies at the heart of the legislative function. It imposes a special duty on the legislature and pre-supposes that the legislature will have considerable discretion in determining how best to achieve this balanced relationship. The ultimate question is whether there has been the degree of public involvement that is required by the Constitution.

[123] It is apparent that the Constitution contemplates that Parliament and the provincial legislatures would have considerable discretion to determine how best to fulfil their duty to facilitate public involvement. Save in relation to the specific duty to allow the public and the media to attend the sittings of the committees, the Constitution has deliberately refrained from prescribing to Parliament and the provincial legislatures what method of public participation should be followed in a given case. In addition, it empowers Parliament and the provincial legislatures to "determine and control [their] internal arrangements, proceedings and procedures" and to make their own rules and orders concerning their businesses.

[124] It follows that Parliament and the provincial legislatures must be given a significant measure of discretion in determining how best to fulfil their duty to facilitate public involvement. This discretion will apply both in relation to the standard rules promulgated for public participation and the particular modalities appropriate for specific legislative programmes. Yet however great the leeway given to the legislature, the courts can, and in appropriate cases will, determine whether there has been the degree of public involvement that is required by the Constitution.

[125] What is required by section 72(1)(a) will no doubt vary from case to case. In all events, however, the NCOP must act reasonably in carrying out its duty to facilitate public involvement in its processes. Indeed, as Sachs J observed in his minority judgment in *New Clicks*:

> "The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case."

[126] The standard of reasonableness is used as a measure throughout the Constitution, for example in regard to the government's fulfilment of positive obligations to realise social and economic rights. It is also specifically used in the context of public access to and involvement in the proceedings of the NCOP and its committees. Section 72(1)(b) provides that "reasonable measures may be taken" to

regulate access to the proceedings of the NCOP or its committees or to regulate the searching of persons who wish to attend the proceedings of the NCOP or its committees, including the refusal of entry to or removal from the proceedings of the NCOP or its committees. In addition, section 72(2) permits the exclusion of the public or the media from a sitting of a committee if "it is reasonable and justifiable to do so in an open and democratic society."

[127] Reasonableness is an objective standard which is sensitive to the facts and circumstances of a particular case. "In dealing with the issue of reasonableness," this Court has explained, "context is all important."

[128] Whether a legislature has acted reasonably in discharging its duty to facilitate public involvement will depend on a number of factors. The nature and importance of the legislation and the intensity of its impact on the public are especially relevant. Reasonableness also requires that appropriate account be paid to practicalities such as time and expense, which relate to the efficiency of the law-making process. Yet the saving of money and time in itself does not justify inadequate opportunities for public involvement. In addition, in evaluating the reasonableness of Parliament's conduct, this Court will have regard to what Parliament itself considered to be appropriate public involvement in the light of the legislation's content, importance and urgency. Indeed, this Court will pay particular attention to what Parliament considers to be appropriate public involvement.

[129] What is ultimately important is that the legislature has taken steps to afford the public a reasonable opportunity to participate effectively in the law-making process. Thus construed, there are at least two aspects of the duty to facilitate public involvement. The first is the duty to provide meaningful opportunities for public participation in the law-making process. The second is the duty to take measures to ensure that people have the ability to take advantage of the opportunities provided. In this sense, public involvement may be seen as "a continuum that ranges from providing information and building awareness, to partnering in decision-making." This construction of the duty to facilitate public involvement is not only consistent with our participatory democracy, but it is consistent with the international law right to political participation. As pointed out, that right not only guarantees the positive right to participate in the public affairs, but it simultaneously imposes a duty on the State to facilitate public participation in the conduct of public affairs by ensuring that this right can be realised. It will be convenient here to consider each of these aspects, beginning with the broader duty to take steps to ensure that people have the capacity to participate.

The duty to take steps to facilitate public involvement

[130] The Constitutional Assembly was acutely aware that our legacy of racial discrimination, which was still fresh in their minds, could undermine the national effort to construct "a democratic and open society in which government is based on

the will of the people." A majority of the people had, for many years, been denied the right to influence those who ruled over them. They had been discriminated against in almost every sphere of life. The result was gross inequality in education, financial resources, access to knowledge and other areas that are crucial for effective participation in the law-making process**. Merely to allow public participation in the law-making process is, in the prevailing circumstances, not enough. More is required. Measures need to be taken to facilitate public participation in the law-making process.**

[131] Thus, Parliament and the provincial legislatures must provide notice of and information about the legislation under consideration and the opportunities for participation that are available. To achieve this, it may be desirable to provide public education that builds capacity for such participation. Public involvement in the legislative process requires access to information and the facilitation of learning and understanding in order to achieve meaningful involvement by ordinary citizens. In this regard, article 25 of the African Charter imposes an obligation on states parties to "promote and ensure through teaching, education and publication" the right to political participation. As the U.N. Human Rights Committee has asserted in interpreting the international law right to political participation, "[w]hatever form of constitution or government is in force, the [ICCPR] requires States to adopt such legislative and other measures as may be necessary to ensure that citizens have an *effective* opportunity to enjoy the rights it protects." (The emphasis is mine.)

[132] The NCOP and provincial legislatures should create conditions that are conducive to the effective exercise of the right to participate in the law-making process. This can be realised in various ways, including through road shows, regional workshops, radio programs and publications aimed at educating and informing the public about ways to influence Parliament, to mention a few. Indeed, Parliament has done much to facilitate public involvement as recognised in the report by the Inter-Parliamentary Union on Parliamentary Involvement in International Affairs. This report places our country at the top of the list of countries that involve the public in their legislative processes.

[133] The report says the following of this country:

> **"**The South African Constitution states that parliament must facilitate public involvement in the legislative and other processes of parliament and its committees. A whole set of activities has been developed. First, a public education office has been established which has developed 'democracy road shows', aimed at taking parliament to the people and informing them how they can influence and partake in legislative work. So far, 16,000 persons have participated in these events. Similarly, it has set up sessions where members of parliament can dialogue directly with communities, to elicit input from the public on matters that are before Parliament.
>
> Perhaps the most ambitious project involves the use of broadcasting. It is aimed at educating and informing the public on what happens in parliament, how laws are passed and how people can influence the outcome of parliament's work through broadcasts on the twelve South African Broadcasting Corporation radio service stations in all the official languages, reaching a national audience of 35 million. An accompanying television programme consisting of ten episodes provided information to 6 million citizens on democracy and the Constitution, the three branches of

Government and the functioning of Parliament.

More targeted information campaigns are also carried out on key bills before the parliament. Parliament also targets certain population groups. For example, it has organised civic education workshops for rural women in several provinces. It has organised a conference on enhancing the participation of women in law-making, and another addressing the need to enhance public participation. The parliament is currently developing a civic education programme that targets youth and which hopefully will soon be incorporated in the national school curriculum.

The Parliament of South Africa has also used its web site to reach out to the public, allowing for interactive communications. For example, public submissions can be made on legislation electronically, and voluntary registration services can also be provided electronically. Parliament has issued several publications as well, including a book on women in law-making, a newsletter entitled *In Session*, a bulletin called *NCOP News* and an award-winning comic book written for young readers called *A day in parliament*, which has been distributed in every school in the country."

[134] Such measures provide the information, education and opportunities necessary to enable citizens to participate effectively.

Public participation in the law-making process

[135] It is implicit, if not explicit, from the duty to facilitate public participation in the law-making process that the Constitution values public participation in the law-making process. The duty to facilitate public participation in the law-making process would be meaningless unless it sought to ensure that the public participates in that process. The very purpose in facilitating public participation in legislative and other processes is to ensure that the public participates in the law-making process consistent

with our democracy. Indeed, it is apparent from the powers and duties of the legislative organs of state that the Constitution contemplates that the public will participate in the law-making process.

[136] Insofar as these powers relate to the NCOP, they include the power to summon any person to appear before it to give evidence or produce documents; require any institution or person to report to it; and receive petitions, representations or submissions from any interested person or institution. In addition, when it makes rules and orders, it must do so with due regard to the representative and participatory elements in our democracy, accountability, transparency and public involvement; it must conduct its business in an open manner and hold its sittings and those of its committees in public; it must provide public access to its proceedings and those of its committees; and may not exclude the public from the sittings of its committees "unless it is reasonable and justifiable to do so in an open and democratic society." Similar provisions apply to the National Assembly and the provincial legislatures. These provisions facilitate public participation.

[137] Public access to Parliament is a fundamental part of public involvement in the law-making process. It allows the public to be present when laws are debated and made. It enables members of the public to familiarise themselves with the law-making process and thus be able to participate in the future. The opportunity to submit representations and submissions ensures that the public has a say in the law-

making process. In addition, these provisions make it possible for the public to present oral submissions at the hearing of the institutions of governance. All this is part of facilitating public participation in the law-making process.

[138] In *New Clicks*, Chaskalson CJ, in another context, commented and said the following of and concerning section 59(1), the equivalent of section 72(1):

> "The preamble of the Constitution sets as a goal the establishment of 'a society based on democratic values, social justice and fundamental human rights' and declares that the Constitution lays 'the foundation for a democratic and open society'. Section 1 of the Constitution which establishes the founding values of the State, includes as part of those values 'a multi-party system of democratic government, to ensure accountability, responsiveness and openness'. It is apparent from section 57(1)(b) that the democratic government that is contemplated is a participatory democracy, which is accountable, transparent and makes provision for public involvement. Consistently with this, section 59(1) of the Constitution provides:
>
> > 'The National Assembly must –
> >
> > (a) facilitate public involvement in the legislative and other processes of the Assembly and its committees; and
> >
> > (b) conduct its business in an open manner, and hold its sittings, and those of its committees, in public.'
>
> Similar provisions are also made in respect of the National Council of Provinces, provincial legislatures and local government.
>
> . . . .
>
> The Constitution calls for open and transparent government, and requires public participation in the making of laws by Parliament and deliberative legislative assemblies."

[139] Similarly, in the *King* case, the Supreme Court of Appeal, in dealing with the concept of public involvement made the following observation:

> "Public involvement might include public participation through the submission of commentary and representations: but that is neither definitive nor exhaustive of its content. The public may become 'involved' in the business of the National Assembly as much by understanding and being informed of what it is doing as by participating directly in those processes. It is plain that by imposing on Parliament the obligation to facilitate public involvement in its processes, the Constitution sets a base standard, but then leaves Parliament significant leeway in fulfilling it."

[140] I agree with this observation.

[141] In my judgment, public participation in the law-making processes of the NCOP is the goal of the duty to facilitate public involvement comprehended in section 72(1)(a). Participation is the end to be achieved. To hold otherwise would be contrary to the participative nature of our democracy and the Constitution's commitment to the principles of accountability, responsiveness and openness. Parliament and all nine provinces therefore, in my view, properly conceded that the duty to facilitate public involvement contemplates public participation in the law-making process.

[142] The conventional method of public participation in the law-making process is through the submission of written or oral representations on the bill under consideration by Parliament or through a combination of both written and oral

submissions. This method of facilitating public participation in the legislative process is consistently followed by both Parliament and the provincial legislatures, as evidenced by their respective rules. As the Parliamentary Workshop on Public Participation observed, "[i]nstruments of public participation include public hearings" and the "constitutional obligation to ensure that the views of the broader public are heard by conducting public hearings about draft legislation and amendments to legislation is vigorously implemented at both national and provincial levels." It is also consistent with the powers of the NCOP to summon or require people to appear before it to give evidence and to "receive petitions, representations or submissions from any interested persons or institutions."

[143] Indeed, as the Human Rights Committee has observed, "prior consultations, such as public hearings or consultations with the most interested groups . . . have evolved as public policy in the conduct of public affairs" under article 25(a) of the ICCPR. In addition, it has explained that "[c]itizens also take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves." The Inter-Parliamentary Union has cited "public debate and dialogue with elected representatives" as a key form of direct political participation, and in a number of jurisdictions, legislatures have increasingly held public hearings and consultations with civil society organisations and citizens in order to facilitate participation in their law-making processes.

[144] The parties in this matter, correctly in my view, approached the matter on the footing that public participation can be achieved through the submission of either written or oral representations on a bill under consideration. Indeed, Parliament and the provincial legislatures could hardly contend otherwise. Rule 6 of the Joint Rules of Parliament deals specifically with public participation and provides that members of the public may participate in the joint business of the Houses by attending the sittings of the Houses and their committees; by commenting in writing on bills or other matters before joint committees or giving evidence or making representations or recommendations on a bill before the House. The NCOP has rules that are substantially the same as the Joint Committee rules.

[145] To sum up, the duty to facilitate public involvement must be construed in the context of our constitutional democracy, which embraces the principle of participation and consultation. Parliament and the provincial legislatures have broad discretion to determine how best to fulfil their constitutional obligation to facilitate public involvement in a given case, so long as they act reasonably. Undoubtedly, this obligation may be fulfilled in different ways and is open to innovation on the part of the legislatures. In the end, however, the duty to facilitate public involvement will often require Parliament and the provincial legislatures to provide citizens with a meaningful opportunity to be heard in the making of the laws that will govern them. Our Constitution demands no less.

[146] In determining whether Parliament has complied with its duty to facilitate public participation in any particular case, the Court will consider what Parliament has done in that case. The question will be whether what Parliament has done is reasonable in all the circumstances. And factors relevant to determining reasonableness would include rules, if any, adopted by Parliament to facilitate public participation, the nature of the legislation under consideration, and whether the legislation needed to be enacted urgently. Ultimately, what Parliament must determine in each case is what methods of facilitating public participation would be appropriate. In determining whether what Parliament has done is reasonable, this Court will pay respect to what Parliament has assessed as being the appropriate method. In determining the appropriate level of scrutiny of Parliament's duty to facilitate public involvement, the Court must balance, on the one hand, the need to respect parliamentary institutional autonomy, and on the other, the right of the public to participate in public affairs. In my view, this balance is best struck by this Court considering whether what Parliament does in each case is reasonable.

[147] The question in this case is therefore whether the NCOP and the provincial legislatures complied with their constitutional obligation to facilitate public participation in their legislative processes. It is to that question that I now turn.

Did the NCOP and the provinces comply with the public involvement provisions?

[148] The record reflects that the procedure that was followed by the NCOP to secure voting mandates in respect of the health legislation was the following. The Bills were sent to the chairperson of the NCOP. The Select Committee of the NCOP met to receive briefings from the Department of Health, this being the Department responsible for the health Bills, and thereafter the Committee decided on the course to be followed in referring the Bills to the provinces for the purposes of securing the required mandates. Once that course was determined, the Bills were then sent to the Speakers of the nine provinces.

[149] Upon receipt of the health Bills, the Speakers of the various provinces forwarded the Bills to their respective provincial committees of the NCOP, generally known as NCOP Standing Matters Committee or NCOP Business Matters Committee. These committees worked with the relevant provincial committees, generally the provincial health committee or some other committee responsible for dealing with health matters. This was to determine the mandates to be given by the provinces on each Bill. The first mandates that were given were negotiating mandates to enable the NCOP delegations to deliberate at the NCOP Select Committee meetings. These mandates were followed by final mandates instructing the delegations how to vote on the Bills.

[150] Two matters must be mentioned in regard to this process. The first is that the Constitution contemplates national legislation that must "provide for a uniform

procedure in terms of which provincial legislatures confer authority on their delegations to cast votes on their behalf." No such legislation has been enacted as yet. As a result, the provinces follow different but substantially similar procedures. Whatever procedures the provinces follow, to the extent they are engaged in a legislative process in considering and conferring mandates on their delegations, they are required to comply with section 118(1)(a), which requires provincial legislatures to facilitate public involvement in their legislative processes and those of their committees. The complaint by the applicant that the provinces did not comply with the provisions of section 118(1)(a) must be understood in this context.

[151] The second is that it appears that when the Bills were referred to the NCOP, representations that had been received by the National Assembly were also forwarded to the NCOP. This was done presumably for the information of the NCOP and to enable it to determine how best to represent the provincial interests in the national law-making process. The NCOP, however, cannot as a matter of course have regard to these representations only in complying with its duty to facilitate public involvement in its legislative processes and those of its committees. The same is true of the provincial legislatures. Both the NCOP and the provincial legislatures have a crucial constitutional role in our democracy; they must ensure that the provincial interests are represented in the national law-making process. To this extent they must give the people in the provinces the opportunity to participate in their respective legislative processes.

[152] It is against this background that the steps taken by the NCOP and the various provinces to facilitate public involvement in the processes by which they considered and voted upon the health legislation should be reviewed.

The NCOP Select Committee

[153] At the outset, it is necessary to comment on the evidence presented by the respondents. The respondents' evidence includes several broad and sweeping claims, amongst other things, that the NCOP Select Committee and the respective provincial portfolio committees "have conformed with the requirements of sections 59, 72 and 118 of the Constitution by holding public hearings . . . [,] by inviting members of the public to participate either by making oral or written submissions, and by extensively advertising and publicising the fact that the relevant committees would be meeting in relation to one or more of the contested Bills."

[154] These allegations are largely unsupported by any documentary evidence. In addition, some of the allegations are inconsistent with the documents furnished by the respondents and with what this Court was told in the course of oral argument was common cause between the parties. There is no suggestion on the record that the NCOP held public hearings or invited written representations on any of the Bills. Insofar as the provincial legislatures are concerned, some but not all of the provinces held hearings in respect of some but not all of the Bills. Some provincial legislatures

considered written representations that had been submitted to the National Assembly but it is not clear on the record whether any of them invited new or supplementary representations from the public.

[155] In the result, this Court has had to work with evidence that leaves a great deal to be desired and to speculate on what may have happened. It is not desirable that this should have happened in a case such as this, where the facts are crucial to determining whether the NCOP complied with its constitutional obligations.

[156] That said, on the record, it is clear that the NCOP took a view that public hearings should be held on at least some aspects of the Bills and that these hearings should be held in the provinces. In the course of briefings by the Department of Health on the CTOP Amendment Bill, the Chairperson of the NCOP Select Committee informed the Committee that she had received requests for public hearings from interested parties and that she would be responding and urging them to make submissions in the provinces where public hearings would be held. During the briefings on the THP Bill, Committee members raised several concerns including reservations about certain exclusions from the Bill, and it was "agreed that the matter would be dealt with in more depth at the provincial hearings and briefings".

[157] In addition, the unofficial minutes put up by the applicant indicate that "[t]he Chairperson declared that public hearings [on the CTOP Amendment Bill] would

occur in the near future and submissions would be incorporated into the final deliberations." The respondents sought to dispute the accuracy of the unofficial minutes. However, in their answering affidavit they alleged that the Chairperson of the Committee urged the provincial legislatures to hold public hearings in relation to some of the Bills.

[158] On any view of the record, it can fairly be accepted that the NCOP Select Committee took the view that it would be desirable to hold public hearings in respect of the CTOP Amendment Bill and the THP Bill. It decided that the hearings should be held in the provinces and advised the interested groups of this decision.

[159] This raises a question as to whether the duty of the NCOP to facilitate public involvement in its legislative process may be met through public hearings that are conducted by the provincial legislatures. There are both functional and practical considerations that weigh in favour of holding public hearings in the provinces rather than at the seat of the NCOP in Cape Town.

[160] In the first place, there is an identity of interests between the NCOP and the provinces in legislation that affects the provinces. Both have a constitutional role to ensure that provincial interests are taken into account in the national legislative process. At least three members of each provincial delegation are members of the provincial legislatures and are therefore eligible to sit and take part in the proceedings

of the various provincial committees of their respective legislatures. These committees are the engine rooms of the provincial legislatures; they are the committees that consider legislation, including voting mandates to be conferred on the NCOP delegations, and thus are where hearings are held and submissions considered.

[161] There are also practical considerations that are relevant in this regard. If the NCOP is to conduct provincial hearings, it must allocate substantial time and money to send its committee members to each province. On the other hand, ordinary people may be unable to attend hearings of the NCOP that are conducted in Cape Town due to financial and other constraints. Holding hearings in the provinces has great value for the provincial community; it provides its members with the opportunity to be present when laws are made and to take part in the law-making process. But it would be wasteful of the government's limited resources if both the NCOP and the provinces were to hold separate public hearings in the provinces.

[162] It may well be appropriate and indeed desirable for the provincial legislatures to conduct public hearings on legislation that is before the NCOP, in order to avoid duplication of efforts and unnecessary expenditure. Citizens who have difficulty participating in the national legislative process in Cape Town can much more easily convey their views about national legislation through their provincial legislatures. Members of the NCOP may attend those hearings or, at a minimum, read the reports of the hearings prepared by the provincial portfolio committees. In this manner, both

the NCOP and the provincial legislatures hear the views of the people of the respective provinces and facilitate public involvement in their processes.

[163] Whether public hearings conducted by provincial legislatures are sufficient to satisfy the obligation of the NCOP under section 72(1)(a) ultimately depends on the facts and the nature of the process of facilitating public involvement that has occurred in the provinces, including the extent to which NCOP delegations were involved in and have access to the information gathered during that process. Where the process involves consideration of a bill affecting the provinces, the ultimate question is whether the provincial interests on the legislation under consideration were taken into account in the national legislative process.

[164] In the result, I am satisfied that it was reasonable for the NCOP to take a decision that public hearings should be held in the provinces on the health legislation, provided that the provinces in fact held those hearings and that those proceedings were attended by members of the NCOP or that members of the NCOP had access to the reports of those proceedings.

[165] However, once the NCOP has decided on a particular mode of involving the public in its legislative process and has communicated its decision to do so to interested parties, it must be held to its decision unless there is sufficient explanation for failure to give effect to that decision. The question is whether, viewed in their

totality, the processes that were followed by the NCOP and the provincial legislatures in relation to the three health Bills satisfied the NCOP's duty to facilitate public involvement in its legislative processes and those of its committees.

[166] In what follows, I will consider whether and to what extent the provincial legislatures and the NCOP facilitated public involvement in relation to each Bill.

THP Act

[167] The THP Bill was intended to bring about new dispensation of regulating traditional health healers. It makes provision for the recognition and regulation of traditional health healers. As its preamble declares, its purpose is "[t]o establish the Interim Traditional Health Practitioners Council of South Africa; to provide for a regulatory framework to ensure the efficacy, safety and quality of traditional health care services; to provide for the management and control over the registration, training and conduct of practitioners, students and specified categories in the traditional health practitioners profession; and to provide for matters connected therewith." The Minister of Health, the third respondent in these proceedings, speaking at the official opening of the Conference on Traditional Medicine, explained that

> "South Africa has embarked on the process of formally recognising traditional medicine and traditional health practitioners through the drafting of the Traditional Health Practitioners Bill. The Bill provides for the establishment of a Traditional Health Practitioners Council, which should guide us in ensuring quality of traditional health care services and provide for the control over the registration, training and practice of traditional health practitioners."

[168] The importance of the THP Bill in the context of our country cannot be gainsaid, in particular, in the health care delivery system. As the Minister of Health explained:

> "The important role of traditional medicines in the health care delivery systems of many developing countries cannot be overemphasised. Traditional systems of medicine have become a topic of global importance. Traditional medicine is ceasing to be an obscure practice of so-called quacks and witches. This rare discipline is fast becoming a name to be reckoned with in our struggles to fight diseases and ensure the health of our people. This revolution is not only taking place in developing countries but also in the developed world. Traditional medicine has become a global phenomenon.
>
> The World Health Organization estimates that up to 80% of the people in Africa use traditional medicine. In Sub-Saharan Africa, the ratio of traditional health practitioners to the population is approximately 1:500, while the medical doctors have a 1:40 000 to the rest of the population. It is clear that traditional health practitioners have an important role to play in the lives of African people and have the potential to serve as a critical component of a comprehensive health care strategy.
>
> In South Africa alone, it is estimated that we have approximately 200 000 traditional health practitioners. These health practitioners are the first health care providers to be consulted in up to 80% of cases, especially in rural areas, and are deeply interwoven into the fabric of cultural and spiritual life. It is for this reason that there has been recognition of traditional medicine practice in South Africa."

[169] At least six provinces considered that public hearings were necessary in relation to the THP Bill. Of these, only Mpumalanga, North West and Limpopo held

hearings. Indeed, in the course of oral argument, the parties informed us that it was common cause that only three provinces held public hearings in respect of the THP Bill.

[170] Gauteng did not submit a negotiating mandate on the THP Bill because it felt that the time afforded to it by the NCOP was too short to enable it to study the Bill and consult with relevant stakeholders. Faced with an impending NCOP deadline for submitting a final mandate on the Bill, Gauteng invited representatives from traditional healers' organisations to attend a last-minute committee meeting on the Bill. However, the representatives were given a day's notice, at most, that the meeting was to be held. They did not have time to study the Bill or to consult with their members in advance of the meeting. This evoked strong protest from some leaders of the traditional healers who protested that the oral hearings were a "very critical submission" to their cause and they should have been given sufficient time "to study, understand, get the comments and ensure that [they] have all [the] facts together" before attending the hearing. What happened in the Gauteng legislature cannot be said to amount to an adequate opportunity to participate in the legislative process.

[171] The Northern Cape conducted a hearing only after it had conferred a final mandate on its delegation, when the legislature's decision-making could no longer be informed by the input of the public. This too cannot amount to facilitating public involvement in the law-making process. Legislatures must facilitate participation at a

point in the legislative process where involvement by interested members of the public would be meaningful. It is not reasonable to offer participation at a time or place that is tangential to the moments when significant legislative decisions are in fact about to be made. Interested parties are entitled to a reasonable opportunity to participate in a manner which may influence legislative decisions. The requirement that participation must be facilitated where it is most meaningful has both symbolic and practical objectives: the persons concerned must be manifestly shown the respect due to them as concerned citizens, and the legislators must have the benefit of all inputs that will enable them to produce the best possible laws.

[172] The Eastern Cape and KwaZulu-Natal wished to hold public hearings but could not do so because of insufficient time. This was conveyed to the NCOP through their permanent delegates. In addition, the Eastern Cape requested an extension of time to enable it to conduct proper hearings. No extension was granted. Despite this and the NCOP's decision that public hearings should be held on the Bill, the NCOP did not create the conditions that would have enabled the provinces to hold public hearings.

[173] The Free State and the Western Cape did not hold hearings. The provincial legislature of the Free State resolved to invite stakeholders to submit written submissions on all the Bills but there is no indication that such invitations were in fact extended. The Standing Committee on Social Development of the Western Cape legislature requested its provincial Department of Health to ask for information on the

Bills from relevant stakeholders for presentation to the Committee. Again, it is not clear on the record whether this was done.

[174] The question whether the NCOP complied with its duty to facilitate public involvement in relation to the THP Bill must be viewed against this background. This was a Bill that was intended to regulate traditional medicine and traditional healing, areas that had been the subject of discrimination in the past. People who practice this branch of medicine were previously marginalised and received no recognition; they were referred to as "witchdoctors". Having regard to the history of discrimination against traditional healers, legislation of this nature requires adequate consultation with the traditional healers themselves, lest they feel they are being marginalised again.

[175] From the beginning, the THP Bill was the subject of intense public interest, particularly among traditional health practitioners. When the government published the Bill for comment, numerous organisations submitted written representations, including the Traditional Health Practitioners Forums of Gauteng, the Eastern Cape, the Free State, KwaZulu-Natal and the Northern Cape. Yet these groups were denied a meaningful opportunity to participate in the processes by which their own provinces deliberated and voted upon the Bill. The applicant has made it clear in its founding papers that it was interested in this Bill as well.

[176] It is thus understandable that the leaders of the traditional healers in Gauteng should call for respect for their professions and express their frustration at being summoned to make submissions on such a critical Bill on an extremely short notice. In this regard, Ms P Maseko of the Traditional Healers Organisation is recorded as having told the Health Portfolio Committee in Gauteng:

> "[W]e need to make sure, we need to definitely ensure that traditional healing, as much as the Bill is here, but we are not continuously taken for granted. I was very angry this morning when we were called past nine, something to ten, that we have to come for this submission. This is a very critical submission to our own cause, we are supposed to be told well in time and as traditional health practitioners we are known to ─ you know we are not educated and even that is not excuse enough though but then we need to get time like any other professions, to study, understand, get the comments and ensure that we have all our facts together, not to be said to fail.
>
> So now today, we are just informed today, this morning, to come here to make this critical submission. It is very unfair to our profession, we need to definitely respect this profession, MEC".

[177] Also speaking before the Gauteng Health Portfolio Committee, the MEC for Health in Gauteng emphasised the need for consultations and sensitivity in the province's deliberations on the THP Bill. She expressed her concerns about the lack of opportunity for public participation at the provincial level, explaining that

> "the NCOP is a representative of province[s], it's a forum that is made up of provinces and I think before they process any legislation they must consult each province to find out whether each province has consulted the public. I think that must be a fundamental principle, that especially in legislation like this I think the NCOP has to look at such principles and I would agree quite fully that it has to be sensitive

> to that, that we would like to bring, through the NCOP, the voices of [the] people, of [the] residents, to the national level and I hope that we will not be subjected again to having to call people at the last minute."

[178] The impact of the THP Bill therefore goes beyond traditional healers; it affects the vast majority of people who rely on the services of traditional healers for their medical care. According to the Minister of Health, it is estimated that in this country, there are about 200 000 traditional health practitioners. Of these, approximately 50 000 practice in Gauteng. And "these health practitioners are the first health care providers to be consulted in up to 80 % of cases, especially in rural areas, and are deeply interwoven into the fabric of cultural and spiritual life." According to the Minister, studies show that in many developing countries, a large proportion of the population relies on traditional practitioners and medicinal plants to meet their primary health care needs. This is the case, notwithstanding the availability of modern medicine. Traditional medicines have maintained popularity for historical and cultural reasons. It is said that traditional medicines play a significant role in the treatment and management of life-threatening diseases, particularly in the developing world. This too is true of our country. And for this reason "there has been [a] recognition of traditional medicine practice in South Africa."

[179] I agree with the Gauteng MEC that the NCOP and the provincial legislatures have a duty to bring the voices of the people, as residents of the province, to the

national level. This duty was of particular importance in relation to the THP Bill, a new piece of legislation that would have a substantial impact on the provinces and the people who live within them.

[180] The nature and importance of the Bill must be viewed against the decision of the NCOP that public hearings would be held in the provinces and the view of most provincial legislatures that public hearings were required on the Bill. In addition, the interested groups were given an undertaking that public hearings would be held in the provinces where they would be given the opportunity to make representations. As pointed out earlier, in determining what is reasonable in facilitating public involvement in a given case, this Court will pay considerable respect to what the legislature considers to be the appropriate method of facilitating public involvement. In this case, it is clear that the NCOP and the majority of the provinces considered that public hearings were the appropriate method of facilitating public involvement in relation to the THP Bill. I am therefore satisfied that it was necessary to hold public hearings in relation to the THP Bill.

[181] On the record, six of nine provinces did not hold public hearings on this Bill nor did they invite written representations on it. In these circumstances, failure by the NCOP to hold public hearings on the THP Bill was unreasonable. In the result, I conclude that the NCOP did not comply with its obligation to facilitate public involvement in relation to the THP Bill as required by section 72(1)(a).

CTOP Amendment Act

[182] The CTOP Amendment Bill concerned the termination of pregnancy. This is not an uncontroversial matter. The Bill makes provision for registered nurses, other than midwives, to perform termination of pregnancies at certain public and private facilities. As its preamble declares, its purpose is to "empower a Member of the Executive Council to approve facilities where a termination of pregnancy may take place; to exempt a facility offering a 24-hour maternity service from having to obtain approval for termination of pregnancy services under certain circumstances". There was great interest in this Bill as demonstrated by the requests for public hearings by interested groups. The NCOP responded to these requests by informing the interested groups that hearings would be held in the provinces. The NCOP itself considered that public hearings were desirable on the Bill. So too did the majority of provinces.

[183] As reflected in the requests for public hearings received by the NCOP Chairperson, the CTOP Amendment Bill was of particular concern to the applicant and other interested parties. These requests led to the NCOP's decision that hearings on the Bill should be held at the provincial level. However, while it appears that four provinces – Gauteng, KwaZulu-Natal, Limpopo and Northern Cape – wished to hold public hearings on the Bill, only Limpopo conducted a hearing.

[184] As it did with the other health Bills, the Gauteng provincial legislature wrote to

the NCOP requesting more time and declined to submit a negotiating mandate on the CTOP Amendment Bill because it felt that it was not given enough time to consult with interested groups. In the end, it conferred a final mandate in favour of the Bill, but noted that the legislature had been unable to consult with stakeholders due to time constraints. The Health Portfolio Committee of KwaZulu-Natal also communicated to the NCOP its concern about the time period within which it was to consider the CTOP Amendment Bill and the other health Bills, which did not give it time to hold public hearings. Apart from the time constraints, the Northern Cape abandoned its plan to conduct a public hearing on the CTOP Amendment Bill due to budgetary constraints.

[185] The Eastern Cape decided that there was no need for public hearings on the CTOP Amendment Bill because it was an amendment and extensive consultations had taken place when the principal Act was considered. The Western Cape considered written representations on the Bill, which appear to have been submitted directly to the legislature. In addition, the applicant, on its own initiative, submitted a last minute representation on the CTOP Amendment Bill to the Chairperson of the KwaZulu-Natal Health Portfolio Committee.

[186] On the record, I am satisfied that of the provincial legislatures, only Limpopo and the Western Cape held public hearings or invited written submissions in respect of the CTOP Amendment Bill. It is true that the applicant was permitted to make a submission to the KwaZulu-Natal legislature. However, the applicant contacted the

Chairperson of the Health Committee on its own initiative, and no other members of the public were invited or given an opportunity to make submissions. Moreover, it is clear that both the NCOP and a majority of the provinces considered that it was necessary to conduct public hearings, or at least invite written submissions, in relation to the CTOP Amendment Bill. In these circumstances, KwaZulu-Natal cannot be said to have acted reasonably in facilitating public participation in relation to the CTOP Amendment Bill. In the event, it did not comply with its duty to facilitate public involvement in relation to this Bill.

[187] As with the THP Bill, the question whether the NCOP complied with its duty to facilitate public involvement in relation to the CTOP Bill must be considered in the light of its own conduct viewed in the light of that of the provinces in relation to this Bill. The consideration that led to the conclusion that it was necessary to hold public hearings in relation to the THP Bill equally apply to the CTOP Bill. In the light of the nature of the Bill and the importance that was accorded to it by both legislators and members of the public, the need for public hearings was manifest. This must be viewed in the light of the decision of the NCOP that public hearings were necessary and that they would be held in the provinces. There was an express promise to interested groups that public hearings would be held in the provinces where they could make representations on this Bill. As with the THP Bill, the NCOP considered public hearings to be the appropriate method of facilitating public involvement in relation to the CTOP Amendment Bill.

[188] Once it was conveyed to the NCOP that, contrary to its decision, a majority of the provinces did not hold public hearings, it was incumbent upon it to hold such hearings. The NCOP is not a rubber stamp of the provinces when it comes to the duty to facilitate public involvement. It is required by the Constitution to provide "a national forum for public consideration of issues affecting the provinces." These considerations, in my judgment, lead to the conclusion that the NCOP and the provinces failed in their duty to facilitate public involvement in their legislative and other processes in relation to the CTOP Amendment Bill.

[189] In all the circumstances, I am satisfied that the NCOP acted unreasonably in failing to hold public hearings on the CTOP Amendment Bill. In the event, the NCOP failed to comply with its obligation to facilitate public involvement in relation to this Bill as required by section 72(1)(a).

Dental Technicians Amendment Act

[190] The Dental Technicians Amendment Act makes provision for persons who have been employed as dental laboratory assistants for a period of not less than five years under the supervision of a dentist or dental technician and who have been trained by these professionals to perform the work of a dental technician. To this extent, it defines an "informally trained person" and regulates the registration of such persons and the conditions under which they may practice. In addition it makes direct billing

by a dental technician contractor discretionary and restricts the performance of certain acts by members of certain juristic persons.

[191] The Dental Technicians Amendment Bill did not elicit public interest as did the THP and CTOP Amendment Bills. When the Bill was first published for public comment, no submissions were received. In addition, only Limpopo province conducted public hearings in respect of this Bill. It did this probably because it conducted hearings in respect of all four Bills. Gauteng Province wished to consult with members of the public on the Bill but did not do so because of time constraints. The Eastern Cape Province did not hold public hearings on the Dental Technicians Amendment Bill because of its nature.

[192] Having regard to the nature of the Bill and the views of the majority of the provinces and the NCOP on it, I am unable to conclude that the NCOP and the provinces acted unreasonably in not inviting written representations or holding public hearings on this Bill. There is a further consideration that fortifies this view. When the Bill was first published for comment, it did not generate any interest. In all these circumstances, I am satisfied that the NCOP and the provinces did not breach their duty to facilitate public involvement in relation to the Dental Technicians Amendment Bill. The challenge relating to this Act must therefore fail.

Conclusion

[193] To sum up, in facilitating public involvement, the NCOP must do so with a view to ensuring that issues affecting the provinces in relation to legislation under consideration are heard and considered. On the papers, it is clear that the CTOP Amendment Bill and the THP Bill generated a huge interest at the NCOP. This is evidenced by the requests for public hearings by the interest groups. In the light of these requests, the NCOP decided that public hearings should be held in relation to these Bills but that these hearings should be held in the provinces. This was conveyed to the interest groups who made these requests. In these circumstances, public hearings were the appropriate method of facilitating public involvement in relation to the CTOP Amendment Bill and the THP Bill. But as it turned out, neither the NCOP nor a majority of the provinces held the promised public hearings.

[194] It is true, as discussed previously, that time may be a relevant consideration in determining the reasonableness of a legislature's failure to provide meaningful opportunities for public involvement in a given case. There may well be circumstances of emergency that require urgent legislative responses and short timetables. However, the respondents have not demonstrated that such circumstances were present in this case. When it comes to establishing legislative timetables, the temptation to cut down on public involvement must be resisted. Problems encountered in speeding up a sluggish timetable do not ordinarily constitute a basis for inferring that inroads into the appropriate degree of public involvement are reasonable. The timetable must be subordinated to the rights guaranteed in the

Constitution, and not the rights to the timetable.

[195] Having regard to the nature of the CTOP Amendment Bill and the THP Bill, the request for public hearings by interested groups, the determination by the NCOP that the appropriate method of facilitating public involvement in relation to these Bills was to hold public hearings, the express promise to hold public hearings and the subsequent failure to hold public hearings, the failure by the NCOP to hold public hearings was, in the circumstances of this case, unreasonable. The NCOP therefore failed to comply with its obligation to facilitate public involvement in relation to these Bills as contemplated in section 72(1)(a) of the Constitution. In the event, the challenge relating to the CTOP Amendment Act and the THP Act must accordingly be upheld.

[196] However, in relation to the Dental Technicians Amendment Bill, I am satisfied that in all the circumstances of this case, the failure by the NCOP to hold public hearings was not unreasonable. In the result, the challenge relating to this Act must fail.

[197] It now remains to consider the question of the remedy.

VII. Remedy

[198] I have found that the NCOP failed to fulfil its constitutional obligation

comprehended in section 72(1)(a) in relation to the CTOP Amendment Bill and the THP Bill. Pursuant to section 172(1)(a) of the Constitution, this Court is obliged to declare that the conduct of the NCOP in this regard is inconsistent with the Constitution and is therefore invalid. The respondents did not contend otherwise. A declaration to that effect must accordingly be made. The question which was debated in the Court is whether the CTOP Amendment Act and the THP Act must as a consequence be declared invalid. Counsel for the respondents contended that this Court has no power to declare the resulting statute invalid. To do so, it was submitted, would infringe upon the doctrine of separation of powers.

[199] This Court has emphasised on more than one occasion that although there are no bright lines that separate its role from those of the other branches of government, "there are certain matters that are pre-eminently within the domain of one or other of the arms of government and not the others. All arms of government should be sensitive to and respect this separation." But at the same time, it has made it clear that this does not mean that courts cannot or should not make orders that have an impact on the domain of the other branches of government. When legislation is challenged on the grounds that Parliament did not adopt it in accordance with the provisions of the Constitution, courts have to consider whether in enacting the law in question Parliament has given effect to its constitutional obligations. If it should hold in any given case that Parliament has failed to do so, it is obliged by the Constitution to say so. And insofar as this constitutes an intrusion into the domain of the legislative

branch of government, that is an intrusion mandated by the Constitution itself. What should be made clear is that when it is appropriate to do so, courts may – and if need be must – use their powers to make orders that affect the legislative process.

[200] Therefore, while the doctrine of separation of powers is an important one in our constitutional democracy, it cannot be used to avoid the obligation of a court to prevent the violation of the Constitution. The right and the duty of this Court to protect the Constitution are derived from the Constitution, and this Court cannot shirk from that duty. As O'Regan J explained in a recent minority judgment, "the legitimacy of an order made by the court does not flow from the status of the institution itself, but from the fact that it gives effect to the provisions of our Constitution." In order for the founding values that lie at the heart of our Constitution to be made concrete, it is particularly important for this Court to afford a remedy, which is not only effective, but which should also be seen to be effective.

[201] The provisions of section 172(1)(a) are clear, and they admit of no ambiguity; "[w]hen deciding a constitutional matter within its power, a court . . . must declare that any law or conduct that is inconsistent with the Constitution is invalid". This section gives expression to the supremacy of the Constitution and the rule of law, which is one of the founding values of our democratic state. It echoes the supremacy clause of the Constitution, which declares that the "Constitution is supreme . . . ; law or conduct inconsistent with it is invalid". It follows therefore that if a court finds that

the law is inconsistent with the Constitution, it is obliged to declare it invalid.

[202] As I see the question therefore, it is not whether we have the constitutional authority to declare invalid these two statutes. The power to do so is there. The specific question presented in this case is whether the failure by the NCOP to comply with the provisions of section 72(1)(a) in relation to the CTOP Amendment Act and the THP Act renders these statutes invalid. This case presents a unique question. It is not concerned with the substance of the legislation. It is concerned with the process by which the legislation was adopted. The answer to this question depends, among other things, upon the importance that the Constitution attaches to the requirement of public participation in the law-making process.

[203] In the clearest and most unmistakeable language possible, the Preamble to our Constitution declares the intention to establish "a democratic and open society in which government is based on the will of the people." Consistent with this goal, the Constitution: (a) establishes as part of the founding values "a multi-party system of democratic government, to ensure accountability, responsiveness and openness;" (b) embraces a democracy that has both representative and participatory elements; and (c) makes provision for public involvement in the processes of the legislative organs of state.

[204] Thus in peremptory terms, section 72(1)(a) imposes an obligation on the NCOP

to facilitate public participation in its legislative and other processes including those of its committees. And the supremacy clause of the Constitution requires that this "obligation [which is] imposed by [the Constitution] must be fulfilled." Public involvement provisions therefore give effect to an important feature of democracy: its participative nature. The "participation of citizens in government . . . forms the basis and support of democracy, which cannot exist without it; for title to government rests with the people, the only body empowered to decide its own immediate and future destiny and to designate its legitimate representatives."

[205] Public participation in the law-making process is one of the means of ensuring that legislation is both informed and responsive. If legislation is infused with a degree of openness and participation, this will minimise dangers of arbitrariness and irrationality in the formulation of legislation. The objective in involving the public in the law-making process is to ensure that the legislators are aware of the concerns of the public. And if legislators are aware of those concerns, this will promote the legitimacy, and thus the acceptance, of the legislation. This not only improves the quality of the law-making process, but it also serves as an important principle that government should be open, accessible, accountable and responsive. And this enhances our democracy.

[206] What is significant in the context of the present case is the legislative scheme contemplated by our Constitution. That scheme envisages that the provinces will

participate in the proceedings of the NCOP and thus in the national legislative process "in a manner consistent with democracy". The purpose of this participation is "to ensure that provincial interests are taken into account in the national sphere of government." The provincial interests must of course be determined in a manner that is consistent with our democracy, in particular, in a manner that complies with the duty to facilitate public participation in the law-making process. Permitting the public to participate in the law-making process ensures that the provincial interests are taken into consideration in a manner that is consistent with the Constitution.

[207] Under our Constitution, therefore, the obligation to facilitate public involvement is a requirement of the law-making process.

[208] It is trite that legislation must conform to the Constitution in terms of both its content and the manner in which it was adopted. Failure to comply with manner and form requirements in enacting legislation renders the legislation invalid. And courts have the power to declare such legislation invalid. In *Harris and Others v Minister of the Interior and Another*, the Appellate Division, in declaring the Separate Representation of Voters Act 46 of 1951 invalid, held:

> "If Act 46 of 1951 had been passed before the Statute of Westminster, it is clear from the reasons given in the decision of this Court in *Rex v Ndobe*, supra, that the Act would not have been a valid Act, as it was not passed in accordance with the procedure prescribed by sections 35(1) and 152 of the South Africa Act. That decision was not questioned on behalf of the respondents and there is no reason to doubt its soundness. The Court in declaring that such a Statute is invalid is exercising

> a duty which it owes to persons whose rights are entrenched by Statute; its duty is simply to declare and apply the law and it would be inaccurate to say that the Court in discharging the duty is controlling the Legislature."

[209] The obligation to facilitate public involvement is a material part of the law-making process. It is a requirement of manner and form. Failure to comply with this obligation renders the resulting legislation invalid.

[210] There is support for this view in other jurisdictions.

[211] In my judgment, this Court not only has a right but also has a duty to ensure that the law-making process prescribed by the Constitution is observed. And if the conditions for law-making processes have not been complied with, it has the duty to say so and declare the resulting statute invalid. Our Constitution manifestly contemplated public participation in the legislative and other processes of the NCOP, including those of its committees. A statute adopted in violation of section 72(1)(a) precludes the public from participating in the legislative processes of the NCOP and is therefore invalid. The argument that the only power that this Court has in the present case is to issue a declaratory order must therefore be rejected.

[212] In the result, the Traditional Health Practitioners Act and the Choice on Termination of Pregnancy Amendment Act must be declared invalid.

[213] It is true, the defect lies in the conduct of the NCOP. However, the national legislative authority is vested in Parliament in terms of section 44(1). And if an Act of Parliament is declared unconstitutional, Parliament must deal with the matter. As pointed out earlier, where either the NCOP or the National Assembly fails to fulfil its constitutional obligation in relation to the law-making process, the result is that Parliament has failed to fulfil its obligation in respect of the resulting statute. The consequence is that the matter must be remitted to Parliament for it to re-enact the law in a manner that is consistent with this judgment.

[214] However, these two statutes have come into operation. Members of the public may have already taken steps to regulate their conduct in accordance with these statutes. An order of invalidity that takes immediate effect will be disruptive and leave a vacuum. In terms of section 172(1)(b)(ii), this Court has discretion to make an order that is just and equitable, including an order suspending the declaration of invalidity. Parliament must be given the opportunity to remedy the defect. In these circumstances, I consider it just and equitable that the order of invalidity be suspended for 18 months to enable Parliament to enact these statutes afresh in accordance with the provisions of the Constitution.

[215] Before addressing the issue of costs, it is necessary to address the issue of standing in matters involving challenges based on an alleged failure to facilitate public

involvement.

Standing

[216] In this case, the applicant actively sought to obtain an opportunity to be heard on the Bills both at the NCOP and in the provincial legislatures, as I have described above. The attempts though repeated and persistent were in vain. As soon as possible after the Bills had been promulgated, the applicant approached this Court for relief. In my view, this Court will only consider an application to declare legislation invalid on the grounds set out in this judgment in circumstances where the applicant has sought and been denied an opportunity to be heard on the Bills and where the applicant has launched his or her application for relief in this Court as soon as practicable after the Bills have been promulgated.

[217] It is true that such a standing requirement is different to that contemplated by section 38 of the Constitution in respect of the alleged infringement or threatened infringement of rights in the Bill of Rights. We are not, of course, in this case directly concerned with the provisions of the Bill of Rights but with section 72 of the Constitution. There are powerful reasons why a restricted approach to standing of litigants is appropriate in cases such as this.

[218] The Court has to find a balance between on the one hand, avoiding improper intrusions into the domain of Parliament, and, on the other, ensuring that a

constitutional provision which requires Parliament to facilitate public involvement in the law-making process is sufficiently justiciable to ensure that the commitment to facilitating public involvement that it represents is not rendered nugatory. In my view, only those applicants who have made diligent and proper attempts to be heard by the NCOP should be entitled to rely on any failure to observe section 72 of the Constitution. Similarly applicants who have not pursued their cause timeously in this Court may well be denied relief.

[219] Rules of standing of this sort will prevent legislation being challenged on the ground of non-compliance with section 72 many years after the event by those who had no interest in making representations to Parliament at the time the legislation was enacted. It will thus discourage opportunist reliance by those who cannot show any interest in the duty to facilitate public involvement on that duty. In my view, this restricted form of standing further reflects this Court's concern to protect the institutional integrity of Parliament, while at the same time seeking to ensure that the duty to facilitate public involvement is given adequate protection.

[220] An additional point should be added on this score. Where Parliament has held public hearings but not admitted a person to make oral submissions on the ground that it does not consider it necessary to hear oral submissions from that person, this Court will be slow to interfere with Parliament's judgment as to whom it wishes to hear and whom not. Once again, that person would have to show that it was clearly

unreasonable for Parliament not to have given them an opportunity to be heard. Parliament's judgment on this issue will be given considerable respect. Moreover, it will often be the case that where the public has been given the opportunity to lodge written submissions, Parliament will have acted reasonably in respect of its duty to facilitate public involvement, whatever may happen subsequently at public hearings.

[221] However, for citizens to carry out their responsibilities, it is necessary that the legislative organs of state perform their constitutional obligations to facilitate public involvement. The basic elements of public involvement include the dissemination of information concerning legislation under consideration, invitation to participate in the process and consultation on the legislation. These three elements are crucial to the exercise of the right to participate in the law-making process. Without the knowledge of the fact that there is a bill under consideration, what its objective is and when submissions may be made, interested persons who wish to contribute to the law-making process may not be able to participate and make such contributions.

Costs

[222] The applicant has asked for costs. The respondents have taken the view that an order for costs is not warranted in these proceedings. In my view, that order is warranted in this case. The applicant has urged in this Court constitutional issues of great moment. These issues go to the very heart of our constitutional democracy. And the applicant has been successful in that regard. The general rule that the costs should

follow the result must be applied in this case.

[223] When the applicant approached the Court, it did not join the Speakers of the various provinces, although the order that it sought would have had an impact on the provincial legislatures. This resulted in an abortive hearing on 23 August 2005 and the costs of joining the Speakers of the various provinces. Justice demands that these costs should not be borne by the respondents. Another factor to be taken into account is that the applicant has only been successful in respect of two statutes. This too must be reflected in the order for costs.

[224] In all the circumstances, I consider that justice in this case demands that the respondents should pay sixty percent of the costs of the applicant, which costs must exclude costs of the hearing on 23 August 2005 and those costs connected with the joinder of the various Speakers of the provinces.

Order

[225] In the event, I make the following order:

(a) It is declared that Parliament has failed to comply with its constitutional obligation to facilitate public involvement before passing the Choice on Termination of Pregnancy Amendment Act 38 of 2004 and the Traditional Health Practitioners Act 35 of 2004 as required by section 72(1)(a) of the Constitution.

(b) The Choice on Termination of Pregnancy Amendment Act, 2004 and the Traditional Health Practitioners Act, 2004 were, as a consequence, adopted in a manner that is inconsistent with the Constitution and are therefore declared invalid.

(c) The order declaring invalid the Choice on Termination of Pregnancy Amendment Act, 2004 and the Traditional Health Practitioners Act, 2004 is suspended for a period of 18 months to enable Parliament to re-enact these statutes in a manner that is consistent with the Constitution.

(d) The constitutional challenges relating to the Dental Technicians Amendment Act 24 of 2004 and the Sterilisation Amendment Act 3 of 2005 are dismissed.

(e) The respondents are ordered to pay sixty percent of the applicant's costs, which costs shall exclude the costs occasioned by the joinder of the Speakers of the nine provincial legislatures and the costs incurred during the hearing on 23 August 2005.

Langa CJ, Moseneke DCJ, Madala J, Mokgoro J, Nkabinde J, O'Regan J and Sachs J concur in the judgment of Ngcobo J.

SACHS J:

[226] I support the judgment by Ngcobo J, and add observations on two matters. The first concerns the special meaning that participatory democracy has come to assume in South Africa. The second relates to what I consider to be the need for caution when developing remedies in this area.

[227] I believe that it would be gravely unjust to suggest that the attention the Constitutional Assembly dedicated to promoting public involvement in law-making represented little more than a rhetorical constitutional flourish on its part. The Assembly itself came into being as a result of prolonged and intense national dialogue. Then, the Constitution it finally produced owed much to an extensive countrywide process of public participation. Millions of South Africans from all walks of life took part. Public involvement in our country has ancient origins and continues to be a strongly creative characteristic of our democracy. We have developed a rich culture of imbizo, lekgotla, bosberaad, and indaba. Hardly a day goes by without the holding of consultations and public participation involving all ‘stakeholders’, ‘role-players’ and ‘interested parties’, whether in the public sector or the private sphere. The principle of consultation and involvement has become a distinctive part of our national ethos. It is this ethos that informs a well-defined normative constitutional structure in terms of which the present matter falls to be

decided.

[228] This constitutional matrix makes it clear that although regular elections and a multi-party system of democratic government are fundamental to our constitutional democracy, they are not exhaustive of it. Their constitutional objective is explicitly declared at a foundational level to be to ensure accountability, responsiveness and openness. The express articulation of this triad of principles would be redundant if it was simply to be subsumed into notions of electoral democracy. Clearly it is intended to add something fundamental to such notions.

[229] It should be emphasised that respect for these three inter-related notions in no way undermines the centrality to our democratic order of universal suffrage and majority rule, both of which were achieved in this country with immense sacrifice over generations. Representative democracy undoubtedly lies at the heart of our system of government, and needs resolutely to be defended. Accountability of Parliament to the public is directly achieved through regular general elections. Furthermore, we live in an open and democratic society in which everyone is free to criticise acts and failures of government at all stages of the legislative process. Yet the Constitution envisages something more.

[230] True to the manner in which it itself was sired, the Constitution predicates and incorporates within its vision the existence of a permanently engaged citizenry alerted

to and involved with all legislative programmes. The people have more than the right to vote in periodical elections, fundamental though that is. And more is guaranteed to them than the opportunity to object to legislation before and after it is passed, and to criticise it from the sidelines while it is being adopted. They are accorded the right on an ongoing basis and in a very direct manner, to be (and to feel themselves to be) involved in the actual processes of law-making. Elections are of necessity periodical. Accountability, responsiveness and openness, on the other hand, are by their very nature ubiquitous and timeless. They are constants of our democracy, to be ceaselessly asserted in relation to ongoing legislative and other activities of government. Thus it would be a travesty of our Constitution to treat democracy as going into a deep sleep after elections, only to be kissed back to short spells of life every five years.

[231] Although in other countries nods in the direction of participatory democracy may serve as hallmarks of good government in a political sense, in our country active and ongoing public involvement is a requirement of constitutional government in a legal sense. It is not just a matter of legislative etiquette or good governmental manners. It is one of constitutional obligation.

[232] Furthermore, although the way in which the public is involved in legislative processes will inevitably have a programmatic dimension and grow over time, the use of peremptory language in the Constitution, read in the light of the foundational

principles and the national ethos of consultation referred to above, indicates that the section is intended to have immediate operational effect. The constantly evolving means used to facilitate public involvement are therefore to be seen as the product of a constitutional duty placed on the National Council of Provinces (NCOP), not as its creators.

[233] The need to prioritise mainstream concerns in a country that still cries out for major transformation, in no way implies that only the most numerous and politically influential voices of our diverse society are entitled to a hearing. There will be many individuals and groups who in general might support the transformative programmes of the ruling majority of the time, but who might disagree on this or that aspect of a proposed law. Others might have more fundamental objections to the policies of the ruling parties. All will for differing reasons wish to have a say in connection with proposed legislation.

[234] A vibrant democracy has a qualitative and not just a quantitative dimension. Dialogue and deliberation go hand in hand. This is part of the tolerance and civility that characterise the respect for diversity the Constitution demands. Indeed, public involvement may be of special importance for those whose strongly-held views have to cede to majority opinion in the legislature. Minority groups should feel that even if their concerns are not strongly represented, they continue to be part of the body politic with the full civic dignity that goes with citizenship in a constitutional democracy.

Public involvement will also be of particular significance for members of groups that have been the victims of processes of historical silencing. It is constitutive of their dignity as citizens today that they not only have a chance to speak, but also enjoy the assurance they will be listened to. This would be of special relevance for those who may feel politically disadvantaged at present because they lack higher education, access to resources and strong political connections. Public involvement accordingly strengthens rather than undermines formal democracy, by responding to and negating some of its functional deficits.

[235] A long-standing, deeply entrenched and constantly evolving principle of our society has accordingly been subsumed into our constitutional order. It envisages an active, participatory democracy. All parties interested in legislation should feel that they have been given a real opportunity to have their say, that they are taken seriously as citizens and that their views matter and will receive due consideration at the moments when they could possibly influence decisions in a meaningful fashion. The objective is both symbolical and practical: the persons concerned must be manifestly shown the respect due to them as concerned citizens, and the legislators must have the benefit of all inputs that will enable them to produce the best possible laws. An appropriate degree of principled yet flexible give-and-take will therefore enrich the quality of our democracy, help sustain its robust deliberative character and, by promoting a sense of inclusion in the national polity, promote the achievement of the goals of transformation.

[236] I turn now to the question of remedy. I agree with Ngcobo J that the facts in the present matter call for invalidation of the two statutes in question. The NCOP established the framework for public involvement and then, simply because of time-tabling difficulties, reneged on its commitments. Though there was no question of intentional exclusion or other form of bad faith, the objective result was that sections of the public relying on those commitments were unreasonably deprived of a promised opportunity. The applicant had assiduously expressed an interest in making representations in relation to both Acts. The Choice on Termination of Pregnancy Amendment Act raised questions of intense concern to it. The applicant had a right to be heard in the manner originally established by the NCOP. As far as the Traditional Health Practitioners Act is concerned, applicant's interest might have been relatively tangential, but the record makes it clear that many traditional healers themselves objected strongly to granting to and then the withholding from them of a reasonable opportunity to have their say.

[237] For decades, even centuries, traditional healers have been ignored and even persecuted by various legislatures. If the stated purpose of the measure was to rescue them from marginalisation, their right to an audience with the law-makers would have been particularly pronounced. More than just their dignity was involved. The subject matter of the Act was new and they were peculiarly well-situated to make inputs that could have had a direct effect on policy, structures and implementation. Their

involvement in law-making would have been a precursor to their later working together as recognised health agents with hospitals and state scientific bodies. Moreover, the nature of their work was closely tied to the topography, flora and fauna of the areas in which they lived. They were in a position to contribute strong local dimensions to the ideas and information being considered. Consultation was especially called for at the provincial level, where they would have the time and comfort to express themselves fully and in a manner that appropriately conveyed regional particularities to the legislators. This was legislative terrain that clamoured for participatory democracy.

[238] On the facts of this case I accordingly agree with the orders of invalidation made by Ngcobo J, subject to the terms of suspension he provides for. In doing so I do not find it necessary to come to a final conclusion on the question of whether any failure to comply with the constitutional duty to involve the public in the legislative process, must automatically and invariably invalidate all legislation that emerges from that process. It might well be that once it has been established that the legislative conduct was unreasonable in relation to public involvement, all the fruit of that process must be discarded as fatally tainted. Categorical reasoning might be unavoidable. Yet the present matter does not, in my view, require us to make a final determination on that score.

[239] New jurisprudential ground is being tilled. Both the principle of separation

(and intertwining) of powers in our Constitution, and the notions underlying participatory democracy, alert one to the need for a measured and appropriate judicial response. I would prefer to leave the way open for incremental evolution on a case by case in future. The touchstone, I believe, must be the extent to which constitutional values and objectives are implicated. I fear that the virtues of participatory democracy risk being undermined if the result of automatic invalidation is that relatively minor breaches of the duty to facilitate public involvement produce a manifestly disproportionate impact on the legislative process. Hence my caution at this stage. In law as in mechanics, it is never appropriate to use a steam-roller to crack a nut.

[240] Having made the above observations, I concur in the monumental judgment of Ngcobo J, with which I am proud to be associated.

VAN DER WESTHUIZEN J:

[241] Having read the judgments produced by my colleagues Ngcobo J, Sachs J and Yacoob J, I concur in the judgment of Yacoob J. I wish to very briefly state my reasons for doing so.

[1] [242] The judgment of Ngcobo J is comprehensive, detailed and impressive in many ways. I am deeply grateful for and appreciative of the massive amount of work he has done, with contributions from other colleagues. I hesitate to characterise or summarise the work of a colleague – especially a judgment of this length – yet I

appreciate the broad and wide ranging approach followed in the judgment. Against the background of the role and function of Parliament, and of the National Council of Provinces (NCOP) in particular, the right to political participation under foreign and international law and the nature of our constitutional democracy, it investigates the meaning and scope of the duty to "facilitate public involvement", as captured in the words of section 72(1)(a) of the Constitution. It states that Parliament must be given a significant measure of discretion in determining how best to fulfil the duty to facilitate public involvement and proposes the standard of reasonableness as the yardstick to test the conduct of Parliament. It stresses that reasonableness is an objective standard which is sensitive to the facts and circumstances of each case. After thoroughly sifting through facts, it concludes that Parliament has failed to comply with its constitutional obligation to facilitate public involvement before passing the Choice on Termination of Pregnancy Act 38 of 2004 and the Traditional Health Practitioners Act 35 of 2004 and that these two Acts are thus invalid.

[243] The sentiments expressed by Sachs J in support of the judgment by Ngcobo J are indeed seductive because the judgment is so characteristically well-written. Sachs J emphasises the special meaning that participatory democracy has come to assume in South Africa and relies on the constitutional matrix as justification for his views. He issues a welcome word of caution against automatic invalidation of legislation though, because it is never appropriate to use a steam-roller to crack a nut.

[244] As opposed to the majority approach, the judgment of Yacoob J focuses more narrowly on the wording and structure of the Constitution, but also on historical, international and other contextual factors. My reasons for agreeing with the approach of Yacoob J may amount to repetition and perhaps over-simplification of some of the contents of his judgment, but include the following:

(1) I whole-heartedly and enthusiastically agree with the majority position on the enormous desirability and importance of public involvement for our democracy. I am moved by Sachs J's references to its ancient origins in our country and to its creative potential. Regular elections and a multi-party system of government are indeed fundamental for but not exhaustive of our constitutional democracy. In short, I strongly believe that section 72(1)(a) (as also sections 59(1)(a) regarding the National Assembly and 118(1)(a) regarding provincial legislatures) has to mean something concrete. I am convinced that section 72(1)(a) creates a constitutional obligation, which must be fulfilled. However, all of this does not mean that the provision is constitutionally intended to result in specific legislation being declared invalid by this Court. The wording of subsection (1)(a), the structure of section 72 as a whole, and its location within the broader constitutional scheme strongly suggest otherwise. I have to interpret the Constitution, contextually and purposively of course, but on the basis of what it says, as far as I am

able to ascertain this, untainted by my own creative vision of our democracy, or any scepticism I might have concerning politicians in South Africa and elsewhere in the world, or any other perhaps justifiable or understandable ideal or ideology.

(2) First, I have regard to the structure of the Constitution. Section 72 is not located under the very clear heading "National Legislative Process" in Chapter 4 of the Constitution, in which all Bills, constitutional amendments, Bills affecting and not affecting provinces and money Bills are dealt with, together with assent to Bills and the publication and safekeeping of Acts (in sections 73 to 82). It appears under the general provisions regarding for example the composition of the NCOP, its sittings and its internal arrangements (as does section 59 with regard to the National Assembly). As is stated in the judgment of Yacoob J, it is indeed inexplicable why, if the constitutional purpose was to include a specific requirement of public involvement as part of the legislative process, this measure was not built into the legislative process. Why would all other steps in the legislative process be clearly set out in detailed provisions under the appropriate heading, but not this one? The obligation stated in section 72 is thus not a step in the legislation process, or a specific requirement for the passing of every Bill.

(3) Next, there is the wording of section 72(1)(a). The presumably conscious choice of the words "facilitate" (which means to enable or make easier), instead of for example "is required to take into account" or "ensure" or even "promote", and of "public involvement" instead of specifically referring to "proposals" or "submissions from the public" or "public hearings", clearly implies a considerable degree of generality and softness, rather than a specific requirement. Section 69 in any event deals with evidence or information before the NCOP and states amongst other things that the NCOP or any of its committees may receive petitions, representations or submissions from any interested persons or institutions.

(4) As pointed out in the judgment by Yacoob J, it may not be very helpful to theorise about the exact meaning of labels like "participatory" as opposed to "representative" democracy. (It reminds one of the debate about whether our Constitution is "egalitarian" or "libertarian" in nature, in view of the fact that both equality and freedom are recognised in the Bill of Rights and in section 36 in particular.) Characterising and labelling a dispensation is to a large extent the function of academics and other analysts. Most modern democracies have both representative and participatory elements, often inter-twined and overlapping, and so does ours.

(5) The right of every citizen to vote for representatives in Parliament and in provincial legislatures in regular elections in a multi-party system of democratic government is of paramount importance in present-day democratic states, including ours. Therefore it is recognised not only in section 19 as a fundamental right, but also in section 1 as a founding value. For all its known flaws, parliamentary representation based on regular elections is the basis of government's authority to legislate. Both the majority and minority positions refer to our shameful apartheid past to justify the historical importance of participatory and representative elements in our democracy. Socially, economically and otherwise apartheid was of course the exclusion of the majority of South Africans from meaningful participation in virtually every sphere of life; indeed from recognition as human beings with inherent dignity. Therefore they were excluded from decision-making processes. But legally, constitutionally and politically apartheid was above all the denial of the right to vote for representatives of one's choice in general elections. The apartheid rulers could still afford to have imbizos, lekgotlas, bosberade and indabas with traditional leaders and interest groups and, in fact, had some. They could, after all, ignore the inputs made. They could never afford to have fair and free general elections.

(6) The proposed standard of reasonableness as a measure for a court to judge parliamentary processes is a matter of some concern. First – as pointed out in the judgment by Ngcobo J – the concept of reasonableness expressly appears in a number of provisions of the Constitution. It features in section 36 as a part of the test for the limitation of rights. With regard to the socio-economic rights recognised in sections 26 and 27 "reasonable legislative and other measures" have to be taken by the state. This phrase is of course linked to others in the same provisions, namely "within [the state's] available resources" and "progressive realisation" and accords with international human rights law. Administrative action also has to be reasonable (section 33). Reasonableness even appears in sections 72(1)(b) and 72(2) to describe the measures that may be taken to regulate access to and provide for security at NCOP sittings. For this very reason its absence in section 72(1)(a) cannot be ignored. Secondly, it is one thing to utilise and develop reasonableness as a test in, for example, the law of delict and other private law areas, where concepts such as the reasonable person and objective reasonableness are well known, with a jurisprudence of many years behind them. It is another to create it as a test which a court applies to judge the conduct of Parliament, based on a constitutional provision which does not mention it. As a yard-stick for the concrete and formal process of passing legislation it is too open to

different interpretations, and not specific enough. It may just leave too much to judicial discretion. In this matter Ngcobo J holds that the failure by the NCOP to hold public hearings was unreasonable, in view of the fact that hearings were determined to be appropriate and expressly promised. This regrettable conduct on the part of the NCOP rendered it not difficult to arrive at a negative conclusion, but the principle remains bothersome.

(7) It follows from the above that I am concerned about the separation of powers, which is crucial in any democracy and probably more so in a young one. Judicial restraint is important for the preservation of democracy and constitutionalism, as judicial activism also is under circumstances when it is called for. The judgment of Ngcobo J recognises the importance of the separation of powers and I am in agreement with much of what is said in this regard. It is stated that when it is appropriate to do so, courts may – and indeed must – use their powers to make orders that affect the legislative process. I agree. But I am not persuaded that it is either necessary or appropriate to do so in this case. If the approach in the minority judgment is logically and constitutionally at least as defensible as the majority approach, the former must perhaps be preferred, out of respect for the separation of powers.

(8) The interpretation proposed by the minority does not amount to a weak and deferential view of public involvement. It does not suggest that the attention dedicated by the Constitutional Assembly to promoting public involvement in law-making represented little more than a rhetorical flourish on its part. It rather represents a realistic view of meaningful public involvement, based on the wording and structure of the Constitution, interpreted not only literally, but also contextually and purposively.

(9) It does not render section 72(1)(a) and its sister provisions meaningless, or not enforceable. They are clearly justiciable. The justiciability is dealt with in the judgment by Yacoob J. In short, the rules of the NCOP (as also the National Assembly and provincial legislatures) must firstly "facilitate public involvement". If not, there would indeed be a failure to fulfil a constitutional obligation on the part of the relevant institution. The rules would be unconstitutional and this Court will declare as much. (I am not sure that it would be necessary to search for a standard or test, now or on another day, and in any event end up with a term like reasonableness, which we will again have to interpret. The Court has to interpret the phrase "facilitate public involvement", as courts have to interpret language all the time to the best of its ability.) Secondly, if an

individual seeks to be heard or to be otherwise involved in the legislative process, within the scope of the rules, and is barred in breach of the rules, she or he would certainly be able to approach a court for appropriate (even urgent when necessary) relief.

(10) The minority position is not only justified by the interpretation of the Constitution, but also preferable for the ideal of democracy, and specifically for a meaningful and practically achievable understanding and harmonisation of the participatory and representative components of our democracy. While I recognise the considerable scope perhaps left by the majority for discretion on the part of legislatures, I would prefer not to have to judge whether the refusal of members of Parliament – in their deliberation of any particular piece of legislation – to afford a specific individual or organisation an opportunity to be heard was reasonable, and to do so in view of a range of factors, including the importance of legislation (presumably measured against other legislation, raising the question whether any legislation is unimportant) and the intensity of its impact on the public, or the monetary affordability of certain measures. I do not necessarily know how I might respond if members of the legislature decide to pursue the policies of their political party and in the process reject or ignore submissions made to them by a member of the public, which I may regard as

> eminently more reasonable. If the will of the Parliamentary majority will in the end mostly prevail in any event, and all that is required is to "involve" the public by for example mechanically holding public hearings for every piece of legislation – or to make sure that hearings are not promised as in this case – participatory democracy would appear to be quite cosmetic and empty, in spite of any idealistic and romantic motivation for promoting it.

[245] Therefore I am regrettably unable to support the judgment of Ngcobo J in which the majority of my colleagues concur.

YACOOB J:

Introduction

[246] I had the benefit and pleasure of reading the comprehensive and ground-breaking judgment of Ngcobo J. I regret however that I find myself unable to agree. It is unfortunately not possible to summarise our differences in any meaningful way. Our respective approaches are so different that it is advisable that I set out my reasons for the conclusion that section 72(1)(a) of the Constitution does not require that there be public involvement as a prerequisite to the validity of legislation passed pursuant to

section 76 of the Constitution. The reasoning and conclusion will be set out without referring to any specific parts of the judgment of Ngcobo J with which I disagree.

[247] This case raises fundamental and difficult issues. They concern the nature of the democracy created by our Constitution, the respective constitutionally appropriate roles and powers of duly elected legislators and the public in general in the process of enacting a law, as well as the nature of the public involvement component and this Court's role in relation to it. It is necessary, in particular, to decide whether the National Council of Provinces (NCOP) and some provincial legislatures are in default of their duty to "facilitate public involvement" in their legislative processes because they failed to give to the public an opportunity to comment on certain Bills before they were passed. There is also, however, a preliminary matter of jurisdiction concerned with whether the case raises an issue which only this Court can decide. The issue arises because it is alleged that Parliament failed to fulfil constitutional obligations imposed upon it by section 167(4)(e) of the Constitution. It is also necessary to pay some attention to the circumstances in which this Court will make an order that Parliament has failed to comply with its constitutional obligations.

[248] Doctors for Life International (DFL) applies to this Court:

> "for a declaration (pursuant to sections 167(4)(e), 167(6)(a) and 172(1)(a) of the Constitution that:
>
> > Parliament has failed to fulfil its constitutional obligations pursuant to sections 72(1)(a) and 118(1)(a) in that the National Council of Provinces and the nine Provincial Legislatures have failed properly

> or at all to facilitate public involvement in their legislative and other processes in respect of the following four Bills which the Council purported to pass in plenary session on the 2nd and 4th days of November 2004".

The four Bills in respect of which the failure to facilitate public involvement is the cause of complaint are concerned with certain health matters and are referred to collectively as the Health Bills. DFL also requests this Court to make

> "such other order or orders as shall be just and equitable including an order for costs."

[249] DFL is described in the founding affidavit as a non-profit organisation with a large membership of medical professionals. It is active in various humanitarian projects concerned with HIV AIDS sufferers, harmful substance abuse and victims of abuse and prostitution. In additions the affidavit points out that the "association is also committed to upholding the Constitution and the law in all matters relating to health."

[250] The Minister of Health (Minister) was joined in the proceedings shortly after they were instituted. None of the speakers of the provincial legislatures had however been joined in the proceedings although non-compliance by the provincial legislatures with section 118(1)(a) of the Constitution had been raised. In the result, the case was adjourned at the first hearing on the basis that the speakers of the relevant legislatures should be joined and given the opportunity to take part in the proceedings.

Ultimately, the Minister, the speaker of the National Assembly as well as all the speakers of the provinces opposed the application. They are collectively referred to as respondents. Several sets of directions were issued and the parties were in the end required in addition to making submissions on the merits of the matter to furnish argument concerning the following questions:

(a) whether the obligation to "facilitate public involvement" was an obligation within the meaning of section 167(4)(e) of the Constitution;

(b) whether any relief other than a declaration of invalidity would be competent if the process followed was inconsistent with the Constitution;

(c) when it would be appropriate for a court to intervene in a case where the process followed by Parliament is inconsistent with the Constitution.

[251] Issue (a) in the previous paragraph was relevant in relation to jurisdiction because section 167(4)(e) of the Constitution provides that only this Court may decide whether Parliament has failed to fulfil a constitutional obligation. As will more fully appear from this judgment, because of the view I take in this matter it is unnecessary for this judgment to make any finding in relation to issue (c).

[252] As I have already mentioned, the merits of the case are concerned with whether the NCOP complied with the duty to facilitate public involvement in its legislative and other processes. The factual basis for DFL's claim is the failure of the NCOP and the

provincial legislatures to have public hearings as part of the process by which each of the Bills was passed. It became common cause that neither the NCOP nor the majority of the provincial legislatures have held public hearings in relation to any of the Bills. Accordingly there is no factual dispute. The following issues are therefore considered in this judgment:

(a) whether this is the only court with jurisdiction;

(b) whether the provisions of section 72(1)(a) were contravened; and, if so

(c) whether the health legislation should be declared invalid.

Is this the only Court with jurisdiction?

[253] Section 167(4) of the Constitution reserves certain matters for the exclusive jurisdiction of this Court. Subsection (e) provides that only this Court may "decide that Parliament or the President has failed to fulfil a constitutional obligation". This would be the only court with jurisdiction therefore if this case is about the fulfilment of a constitutional obligation. The Constitution imposes a duty on Parliament and the President to act lawfully. A broad construction of this phrase would result in this Court being the only court with jurisdiction in all cases in which Parliament or the President act in a manner that is inconsistent with any law including the Constitution. Furthermore, a broad approach to the interpretation of section 167(4)(e) has implications for the way in which the tension between this subsection and those provisions that empower the Supreme Court of Appeal and the High Court to decide on the constitutional validity of an Act of Parliament is resolved. A broad meaning

might include all constitutional obligations including those that must be complied with for validity and would negate or improperly attenuate the jurisdiction of the Supreme Court of Appeal and the High Court to decide on the constitutional validity on Acts of Parliament. It is for these reasons that this approach was roundly rejected in *Sarfu 1* in which it was held that the term "constitutional obligation" should be given a narrow meaning so as to avoid a conflict between section 167(4)(e) and the provisions which confer jurisdiction on the Supreme Court of Appeal and the High Court to adjudicate upon questions concerning the validity of an Act of Parliament. The exact limits of the meaning of the phrase was left undetermined in *Sarfu 1*. To ascertain the meaning to be ascribed to this term it is necessary to go back to section 2 of our Constitution which provides:

> "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

[254] It is apparent that the Constitution makes reference to three ways in which its provisions may be infringed. The first is law which is inconsistent with the Constitution. All law which is inconsistent with the Constitution is invalid. The second refers to conduct. All conduct inconsistent with the Constitution is also invalid. The third is a failure to fulfil the obligations imposed by it. No invalidity is expressly provided for consequent upon the failure to fulfil a constitutional obligation, and the provision implies that where obligations are not complied with the appropriate relief would ordinarily entail fulfilment of these obligations. In broad terms, this

provision of the Constitution makes a clear distinction between law and conduct on the one hand and obligations on the other. This is an indication that the use of the phrase "constitutional obligation" in section 167(4)(e) is a reference to obligations that must be fulfilled and not to law or conduct that is invalid.

[255] This distinction is followed through elsewhere in the Constitution. As I have already pointed out, the Constitution empowers the Supreme Court of Appeal, a High Court or a court of similar status to make an order concerning the constitutional validity of an Act of Parliament, a Provincial Act, or any conduct of the President subject to confirmation of orders of invalidity by this Court but requires only this Court to determine whether Parliament or the President has fulfilled a constitutional obligation. Any court with jurisdiction "must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of the inconsistency". At the textual level, therefore the distinction between law or conduct on the one hand and the fulfilment of obligations on the other implies a distinction between obligations that are a pre-requisite to the validity of law or conduct and those obligations that are not necessarily so.

[256] The fulfilment of an obligation is a pre-requisite to validity only if the failure to fulfil that obligation will necessarily result in the invalidity of the law or conduct concerned. If, for example, a court holds that an obligation that has not been fulfilled is essential to the validity of some conduct or a particular law, it cannot simply direct

that the obligation must be fulfilled. A court has no power to do anything but to declare the law or conduct in issue invalid. On the other hand, if the obligation concerned is not essential to the validity of law or conduct, the fact that the obligation is not fulfilled does not lead inexorably to the invalidity of the provision concerned. A court may decide that the obligation has not been fulfilled and may direct that the obligation be fulfilled in compliance with section 2 of the Constitution. A court has no discretion to declare law or conduct inconsistent with the Constitution if the failure of the obligation does not result in invalidity. Law or conduct is either constitutionally valid or constitutionally invalid. Courts can neither refrain from declaring a law or conduct invalid when it is nor declare law or conduct invalid when it is in fact not.

[257] There is an inter-relationship between the invalidity of conduct and the invalidity of law. Conduct that is inconsistent with the Constitution and invalid can result in an invalid law. That would happen where for example the Constitution requires certain conduct in order to pass a law validly. If the conduct of Parliament falls short of what is required by the Constitution, the conduct and the resultant law would be invalid. Here too the court has no choice but to declare the conduct invalid for lack of consistency with the Constitution. The law itself though will not be inconsistent with the Constitution as envisaged by section 172(1) of the Constitution. The law will be invalid because the conduct that produced it is invalid. An important issue connected with the relationship between the invalidity of conduct and the invalidity of law is whether conduct that is inconsistent with the Constitution may be

so grave and may be connected to the fulfilment of an obligation of such importance that a court has the power to declare invalid the consequent law even though the conduct by which the law was adopted cannot be said to be invalid. This issue will arise later in this judgment.

[258] The judgment of the Supreme Court of Appeal in *King* must be considered against this background. The appellants in that case challenged the validity of an Act of Parliament on the basis that the National Assembly failed to comply with the constitutional public involvement provision imposed upon it because it had not consulted with the public sufficiently. The judgment makes it clear that the appeal in that court focused "only on statutory invalidity alleged to arise from breach of a constitutional obligation. We are thus not asked to consider any questions concerning the breach of a constitutional obligation falling short of this consequence." I might explain that the appellant in *King* did not require fulfilment of a constitutional obligation. The Supreme Court of Appeal recognised the tension between section 167(4)(e) and those provisions which empower the High Court and the Supreme Court of Appeal to consider the validity of an Act of Parliament and acknowledged the statement in *Sarfu 1* that the exclusive jurisdiction provision is aimed at preserving comity between the courts on the one hand and the legislature and executive on the other. It concluded however that an approach that renders all claims of invalidity, regardless of their basis subject to the jurisdiction of the High Court and the Supreme Court of Appeal "impermissibly attenuate[s] the jurisdictional exclusion in s 167(4)"

and found it necessary to distinguish between different ways in which invalidity might result in order to resolve the invalidity obligation tension in the Constitution.

[259] Three possible ways in which invalidity might result were then traversed in the judgment.

(a) The first was where the content of the constitutional provision was inconsistent with the Constitution as for example where a provision of the Bill of Rights was infringed. The court held that in that kind of case, even if the invalidity was the result of the failure of Parliament to comply with a constitutional obligation, the High Court and Supreme Court of Appeal were empowered to make an order of constitutional invalidity.

(b) The second category concerned invalidity as a result of the fact that the manner and form provisions of the Constitution have not been complied with. The Supreme Court of Appeal reasoned that although manner and form provisions will in the most instances be those that define conditions for the exercise of power (capacity-defining), they could also impose obligations that must be complied with as pre-requisites to validity (obligation driven). It concluded in this regard however that the Supreme Court of Appeal and the High Courts have the power to make declarations of invalidity consequent upon manner and form

deficiencies regardless of whether these deficiencies were capacity-defining or obligation driven.

(c) The Court went on to "accept that a third route might also lead to invalidity where Parliament so completely fails to fulfil the positive obligation the Constitution imposes on it that its purported legislative acts are invalid". The Supreme Court of Appeal conceived that this category might exist but distinguished this kind of invalidity from manner and form invalidity. The hypothetical posed by that court was defined in this way:

> "if . . . members of the National Assembly were to convene in secret or at an undisclosed venue, it is not hard to imagine that it might be held that this was not Parliament functioning as contemplated in the Constitution at all, and that consequently 'legislation' the persons so assembled purported to adopt lacked constitutional validity."

[260] I agree with the Supreme Court of Appeal that that court and all High Courts have jurisdiction in all cases of invalidity of statutory provisions based on the contention that their content is inconsistent with the Constitution. Subject to a qualification, I also agree that this Court does not have exclusive jurisdiction in terms of section 167(4)(e) in cases that require consideration of validity on the basis that the manner and form provisions of the Constitution have not been complied with and that it does not matter whether manner and form provisions are capacity-defining or

obligation driven. My reservation is that invalidity of legislation in fact results from the invalidity of conduct of Parliament or the President when manner and form provisions are involved.

[261] Implicit in the judgment of the Supreme Court of Appeal is the proposition that, subject to the hypothetical situation referred to in the third category described above, the obligation imposed by section 59(1)(a) while an obligation within the meaning of section 167(4)(e) is not an obligation that can properly be classified as a pre-requisite for the validity of legislation. In other words it is not a manner and form provision. I agree with this proposition but have considerable difficulty with the contemplated hypothetical that might constitute the third category. It will be necessary to elaborate on this later but it is enough to say at this stage that the hypothetical is a clear contravention of the provisions that require both the National Assembly and the National Council of Provinces to "conduct its business in an open manner, and hold its sittings and those of its committees in public" subject to reasonable measures regulating access. In my view, this is a manner and form provision and all laws adopted without complying with these provisions would be necessarily invalid consequent upon the invalidity of the conduct of the National Assembly or the National Council of Provinces that passed these laws. It is however not necessary to decide in this part of the judgment whether there are constitutional provisions that impose obligations on Parliament which might result in certain circumstances in the invalidity of legislation even though they are not manner and form provisions in the

sense of being pre-requisites to the validity of conduct of a legislative body in passing a law.

[262] In my view, the question whether a particular case is governed by section 167(4)(e) or section 172(2) is in essence determined by the nature of the case the applicant makes out or the primary focus of that case. If the primary focus is the invalidity of the legislation and the non-fulfilment of an obligation is no more than the route to get there - in other words if the case made out is that a law is invalid because an obligation-driven pre-requisite for the valid passing of legislation has not been complied with or the failure to fulfil an obligation results in the law being inconsistent with the Constitution - then the focus of the case is the constitutional validity of the conduct of Parliament. This Court will in that event not be charged with exclusive jurisdiction. If on the other hand the essence of the applicant's case is that a constitutional obligation has not been complied with, this will be the only Court that will have jurisdiction. This does not mean that this Court is the only Court with jurisdiction to decide whether a case falls within the bounds of section 167(4)(e) or not. If, for example, an applicant asks the High Court to declare conduct invalid on the basis that some obligation has not been complied with and the defendant raises the point that the applicant's case is in fact caught by section 167(4)(e), the High Court may determine the issue. The position is however different where the applicant starts a case on the basis that section 167(4)(e) has not been complied with. This is the only Court that has jurisdiction to determine that issue.

[263] And this is so regardless of the nature of the obligation. It can make no difference logically or otherwise whether the obligation imposed upon Parliament is readily ascertainable or whether Parliament must in the first instance determine its reach. The Constitution imposes an obligation on Parliament to pass legislation in relation to certain matters. Although the content of the legislation is within Parliament's discretion the obligation to pass that law is readily ascertainable. In these circumstances it is my view that, this Court will be the only Court with jurisdiction to order that Parliament must fulfil that obligation or to declare that Parliament has not fulfilled the obligation to pass the legislation. If, however, legislation is passed by Parliament to comply with the relevant provision, even though Parliament must make the first determination in relation to what the content of that legislation should be, this will not be the only court with jurisdiction in a claim for invalidity of the law concerned based on content inconsistency. The only material distinction is whether the case is about the invalidity of law or conduct or whether it is about the fulfilment of an obligation that is not necessarily concerned with the invalidity of law or conduct. Only this Court can make an order either declaring that Parliament has not fulfilled a constitutional obligation or ordering Parliament to fulfil that obligation. The sensitive political area is the finding that Parliament has not fulfilled an obligation imposed upon it by the Constitution. Invalidity of law or conduct is not as sensitive.

[264] It is necessary therefore to look at the nature of the case made out by DFL. The starting point of that case is the order sought, which is repeated for convenience:

> "for a declaration (pursuant to sections 167(4)(e), 167(6)(a) and 172(1)(a) of the Constitution that:
>
> > Parliament has failed to fulfil its constitutional obligations pursuant to sections 72(1)(a) and 118(1)(a) in that the National Council of Provinces and the nine Provincial Legislatures have failed properly or at all to facilitate public involvement in their legislative and other processes in respect of the following four Bills which the Council purported to pass in plenary session on the 2nd and 4th days of November 2004".

As appears from the order sought by DFL, its claim is limited to a declaration that Parliament has failed to comply with its section 167(4)(e) obligation. There is no claim for any declaration of invalidity of the conduct of Parliament, nor any claim that the resultant law is on that basis invalid. It is true that section 172(1)(a) of the Constitution is referred to in the order but the reference to that section is in my view a patent error being intended as a reference to section 72(1)(a) of the Constitution which is a pillar of the case contended for by DFL and which is not mentioned in the order sought at all. Indeed the reference to "public involvement" in the order is a reference to section 72(1)(a) and not to section 172(1)(a). Secondly the prayer for a "just and equitable order" cannot be a claim for invalidity. Invalidity has nothing to do with a just and equitable order; if a law is invalid it must be declared to be invalid.

[265] The affidavits filed on behalf of DFL do not make out a case for invalidity

either. The thrust of their case is that the constitutional obligations must be fulfilled. The directions issued by this Court including the following question on which the parties were asked to present argument:

> "if the process followed by Parliament is inconsistent with the Constitution, what is the appropriate relief, in particular, is there appropriate relief other than a declaration of invalidity?"

The argument submitted by DFL pursuant to these directions took the view, in support of the contention that a court should and could intervene at any time during the legislative process in relation to a failure during that process that the absence of "public involvement" would result in inevitable invalidity. The approach taken in argument softened somewhat and conceded that

> "this is a case where the public interest and the interests of justice require that the declaration *simpliciter* should be granted if the Court does not strike down the Act."

[266] Despite this the notice of motion was never amended. This is accordingly a case in which apart from suggestions in argument about invalidity, the applicant required an order declaring that the obligations had not been fulfilled. It was therefore never an invalidity case. In any event, only this Court can make an order to the effect that Parliament has not fulfilled the obligations imposed upon it by the Constitution. Section 167(4)(e), in my view, prohibits any other court from doing this. This Court would therefore be the only court with jurisdiction even if an order of invalidity was sought in addition to a declaration in relation to the failure to fulfil a constitutional

obligation. There was no order requiring fulfilment of the obligations of the National Assembly in *King* and it is therefore arguable that *King* was in reality not a section 167(4)(e) obligation case but a validity case. This judgment must not be understood to approve the conclusion in that case that only this Court had the power to adjudicate it.

[267] A literal approach to constitutional interpretation might yield the result that the obligation in question here is not covered by section 167(4)(e). The argument would proceed: that section 167(4)(e) refers to obligations imposed on Parliament while section 72(1)(a) which is central to the applicant's case, as I have already said, imposes obligations on the National Council of Provinces. But the National Council of Provinces is part of Parliament and in a political hierarchical sense no different from Parliament. The contention that only this Court may pronounce upon whether Parliament as a whole has fulfilled its obligations and that all other courts may decide this question if it concerns the National Assembly or the National Council of Provinces makes little sense in relation to the purpose of the provision. I conclude therefore that no other court has jurisdiction to determine this case which requires a decision whether Parliament has fulfilled the constitutional obligation contemplated in section 167(4)(e) and imposed upon the National Council of Provinces by section 72(1)(a).

The obligation to facilitate public involvement

[268] The applicant requires an order to the effect that the NCOP has failed to fulfil the obligation to facilitate public involvement in the process of the passage of the Health Bills. A declaration to this effect can be made with justification only if DFL establishes that the section, properly interpreted, obliges the NCOP to have a public hearing either in the NCOP or in the provinces or to give the public an opportunity to comment on each Bill at some stage before it is passed. If this is established, the applicant must succeed. The question would then arise whether an appropriate order is simply a declarator or whether invalidity should follow. I may say at this stage that invalidity would follow only if it can be said that it is a pre-requisite to constitutional validity for the public to be heard or to be given an opportunity to comment.

[269] I must clarify the nature of the enquiry before us. We are concerned neither with the merits or demerits of participatory or representative democracies, nor with what in our view would be the ideal balance between participation and representation in our democracy. This Court must determine what the Constitution requires. Equally this case has nothing to do with the views of the members of this Court in relation to whether public involvement is necessary in a democracy, that public participation would lead to better legislation, that it would be unfair to pass legislation without public hearings or that it is desirable for the public to be given an opportunity to be consulted. I may have answered many of these questions in the affirmative but all we must decide is what our Constitution requires in relation to public involvement. It is true that the Constitution must be interpreted in relation to the international context

but the words of the Constitution must not be lost sight of within that context.

[270] The provisions must be interpreted in their textual and historical context. The characteristics of the democracy contemplated by our Constitution fall to be considered first. I then consider the meaning and effect of the public involvement provision in our Constitution and refer to the historical context where appropriate.

Our constitutional democracy: characteristics

[271] It is necessary to be acutely aware in the process of this analysis that it is not concerned with the investigation of a democracy at the level of abstraction but rather to determine the place of "public involvement" within our constitutional democracy. This is a different enquiry than one into the place of "public involvement" in theory in relation to the concept of democracy.

[272] It is perhaps an oversimplification to speak of a participatory democracy on the one hand and a representative democracy on the other. Our democracy can be described neither as participatory nor representative. It has, like most democracies both participatory and representative elements. It would also be a mistake, in my view, to conclude that a democracy has participatory elements only if it permits a level of direct public involvement in the legislative process. In other words, democracies that permit a measure of direct public involvement are not the only democracies with participatory elements in them. The place of public involvement in our democracy

can be ascertained by looking at the relationship between representative and participatory elements in our constitutional democracy. The meaning of public involvement must be determined in that context.

[273] The starting point in determining the balance in our constitutional democracy between participatory and democratic elements is section 1 of the Constitution which provides:

> "1. 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."

[274] South Africa is a democratic state founded on certain values. The only value which provides information about the participatory and representative elements of our democracy and public involvement is the value set out in section 1(d). Four ingredients of democracy are mentioned: universal adult suffrage, a national common voters' roll, regular elections and a multi-party system of democratic government. The object of all these elements of democracy is to ensure accountability, responsiveness and openness. The first three elements emphasise a participatory

aspect of democracy. They imply that every person should have the right to vote in elections held regularly and to be registered on a national voters' roll precisely for the purpose of being able to exercise that right. The multi-party democracy aspect is the first pointer to the representative nature of the democracy contemplated in our Constitution. It implies that our democracy requires citizens to vote for members of a political party who would represent them.

[275] Public involvement in the legislative process is not mentioned at all as an essential principle of the Constitution. It has been suggested that the phrase "to ensure accountability, responsiveness and openness" entrenches some public involvement element. I do not agree. The phrase simply signifies the broad objective of having a universal franchise, a national voters' roll, regular elections and a multi-party system of democracy. The phrase certainly does not add any public participation component or public involvement element. It does however require all representatives to be accountable, responsive to peoples' needs, and open in the way in which they perform their representative functions. Moreover these elements of democracy have been entrenched in the Constitution to the extent where they may only be altered by a seventy five percent vote in the National Assembly and a positive vote of six provinces. No element of democracy concerning public involvement has been entrenched in this way.

[276] The participatory and representative elements suggested in section 1 of our

Constitution are meaningfully reinforced by the way in which political rights are entrenched in section 19 of the Constitution. Section 19 provides:

> "(1) Every citizen is free to make political choices, which includes the right-
>
> (a) to form a political party;
>
> (b) to participate in the activities of, or recruit members for, a political party; and
>
> (c) to campaign for a political party or cause.
>
> (2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.
>
> (3) Every adult citizen has the right-
>
> (a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and
>
> (b) to stand for public office and, if elected, to hold office."

[277] Subsection (1) contains decisive participatory elements. It emphasises the importance of the fundamental freedom to make political choices and gives all citizens the right to join political parties and to participate in their activities, as well as to recruit membership and campaign for them. Every citizen also has the right to campaign for any cause outside a political party.

[278] These rights must be understood against the background of the fact that our Constitution at the national and provincial level, generally speaking embodies a system of political representation in terms of which political parties are the only entities represented in national and provincial legislatures. The citizen's right to participate in the activities of a political party is the route by which any citizen would,

in a real way, be able to bring influence to bear on the way in which that representative performs her functions in the relevant legislature. In this sense the right places an obligation on political parties to ensure that they take account of what members say within their structures. This is how a multi-party system of democracy ensures accountability, responsiveness and openness. I emphasise again that the use of this phrase has little to do with public involvement: it is pre-eminently concerned with accountability within the multi-party framework. Section 19(1) demonstrates this conclusively.

[279] Subsections (2) and (3) emphasise the importance of elections, the right to vote, and the right to stand for and hold public office. They demonstrate again that a person has the right to participate by voting and standing for public office, that the voter has the right to be represented and that the person who stands for public office has the duty to represent.

[280] The importance of voting and appropriate representation is also emphasised by the establishment of an Electoral Commission as a constitutional institution "SUPPORTING CONSTITUTIONAL DEMOCRACY". The purpose of the Electoral Commission is to strengthen constitutional democracy in our country. The Commission does this by managing all elections for legislative bodies and by ensuring that the elections are free and fair. Members of the Commission are appointed by the President on the recommendation of the majority of the members of the National

Assembly and nominated by a committee of the Assembly proportionally composed of members of all political parties represented in it. The Commission must be independent and impartial, being obliged to perform its functions without fear, favour or prejudice. What is more all other organs of state are obliged to protect this institution to ensure its independence, impartiality and effectiveness. Finally, no person or organ of state may interfere with the functioning of the Commission.

[281] In my view these provisions underline the constitutional importance of ensuring that the right to vote is exercised in free elections and that the representatives chosen in consequence of elections are, as far as is practicable, truly representative. This is because the heart of the political system entails participation by representatives of the South African people in the process of decision-making. The existence of the Commission emphasises that representation is fundamental.

[282] The role of the National Assembly must be considered next. The Constitution says:

> "The National Assembly is elected to represent the people and to ensure government by the people under the Constitution. It does this by choosing the President, by providing a national forum for public consideration of issues, by passing legislation and by scrutinizing and overseeing executive action."

[283] The National Assembly must do two things: it must represent the people and

ensure government by the people. The Constitution specifies how these results are to be achieved. It is to be noted that government by the people is not achieved by public involvement in law-making. One way in which government by the people is achieved is by choosing the President. This means that the National Assembly in choosing the President ensures government by the people. The fact that the members of the National Assembly choose the President, constitutionally speaking, means that the people have chosen the President. The National Assembly also achieves government by the people by providing a national forum for the public consideration of issues. This does not mean that the public must be allowed to participate in debates in the National Assembly and that the National Assembly must provide a forum for members of the public to consider issues. When matters are debated in the National Assembly, in public, amongst members of the Assembly they represent the people and ensure government by the people. The National Assembly is a forum for those debates.

[284] Of great importance is the fact that the National Assembly, by passing laws, also represents the people and ensures government by the people. In our constitutional scheme, laws passed by representatives of the people must be regarded as government by the people and as laws passed by the people. This is a vital contextual factor in determining what "public involvement" in the Constitution means.

[285] The way in which the role of the NCOP is defined also does not point in the direction of the constitutional necessity of public hearings in the making of legislation.

The Constitution provides:

> "The National Council of Provinces represents the provinces to ensure that provincial interests are taken into account in the national sphere of government. It does this mainly by participating in the national legislative process and by providing a national forum for public consideration of issues affecting the provinces."

[286] Again "public involvement" is not mentioned. The NCOP represents provincial interests. It ensures that the provincial legislatures have a say in national legislation. Although the Constitution does not say so, provincial legislators, like members of the National Assembly also represent the people of the province and ensure government of the province by the people of the province. In these circumstances, any mandate given by provincial legislatures to delegates at the NCOP is given by them as representatives of the people of the province, and indeed, must be taken to have been given by the people of the province themselves.

[287] The obligations placed upon legislative bodies in relation to their rule-making power are also significant in the investigation of the kind of democracy we have and the place of "public involvement" within it. Like in relation to "public involvement" there are three identical provisions concerned with internal arrangements, proceedings and procedures of the National Assembly, the NCOP as well as each provincial legislature. The provision in relation to the NCOP provides:

> "(1) The National Council of Provinces may-

(a) determine and control its internal arrangements, proceedings and procedures; and

(b) make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement.

(2) The rules and orders of the National Council of Provinces must provide for-

(a) the establishment, composition, powers, functions, procedures and duration of its committees;

(b) the participation of all the provinces in its proceedings in a manner consistent with democracy; and

(c) the participation in the proceedings of the Council and its committees of minority parties represented in the Council, in a manner consistent with democracy, whenever a matter is to be decided in accordance with section 75."

[288] The section permits the NCOP to determine its own arrangements, proceedings and procedures. It also authorises the Council to make rules and places certain constraints on that rule-making power and, in that way, limits the freedom of the NCOP to determine and control its own internal arrangements, proceedings and procedures. There are two kinds of limitation on the rule-making power. The first is contained in subsection (1)(b) and the second is contained in subsection (2). Subsection (1)(b) limits the NCOP's rule-making power only to the extent that the rules must be made "with due regard to certain matters." Subsection (2) refers to matters which the rules of the NCOP "must provide for". If the purpose was to create the kind of democracy that required a measure of public involvement as essential in the process of each law that is made one would have expected the Constitution to oblige the NCOP to provide for public involvement. One would have expected to find

public involvement mentioned in subsection (2). Far from it.

[289] Subsection (1)(b) says that the NCOP may make rules and orders concerning its business with due regard to representative and participatory democracy, accountability, transparency and public involvement. It is significant that subsection (2)(b) requires the rules of the NCOP to provide for the participation in its proceedings and those of its committees, of minority parties represented in the NCOP in a manner consistent with democracy.

[290] Finally it must be mentioned that there are two "public involvement" or participatory elements suggested in the Constitution in relation to the work that legislators do. The first of these is the "public involvement" provisions under discussion here; while the second is those provisions that empower the National Assembly, the National Council of Provinces and the provincial legislatures respectively to receive petitions.

[291] I conclude the above analysis by re-stating the broad elements of our democracy and elaborating on them slightly. The right to vote is a participatory element which is both essential to our democracy and fundamental to it and must not be undermined. This Court has pronounced on the significance of the right to vote in this country. In the *NNP* case it was emphasised that:

> "a free, fair and credible election is both essential and fundamental to the continued

deepening of the new South African democracy."

It was also stressed that:

> "The Constitution takes an important step in the recognition of the importance of the right to exercise the vote by providing that all South African citizens have the right to
>
> free, fair and regular elections. It is to be noted that all South African citizens irrespective of their age have a right to these elections. The right to vote is of course indispensable to, and empty without, the right to free and fair elections; the latter gives content and meaning to the former. The right to free and fair elections underlines the importance of the exercise of the right to vote and the requirement that every election should be fair has implications for the way in which the right to vote can be given more substantive content and legitimately exercised."

Sachs J described the right in most appropriate terms:

> "Universal adult suffrage on a common voters roll is one of the foundational values of our entire constitutional order. The achievement of the franchise has historically been important both for the acquisition of the rights of full and effective citizenship by all South Africans regardless of race, and for the accomplishment of an all-embracing nationhood. The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts. In a country of great disparities of wealth and power it declares that whoever we are, whether rich or poor, exalted or disgraced, we all belong to the same democratic South African nation; that our destinies are intertwined in a single interactive polity."

[292] Citizens of this country cast their votes in favour of political parties represented in the National Assembly and the provincial legislatures. They have the right to become members of political parties, to campaign for them, to take part in their

activities and to call them to account. It is these elected representatives that govern the people and their representative activities are activities of the people. In passing legislation or in conducting any other activity, members of provincial legislatures and the National Assembly do not act on their own whims but represent the people of this country. To undermine these representatives is to undermine the political will of the people and to negate their choice at free and fair elections. Provincial representatives on the NCOP are mandated by the provincial legislatures in their capacities as representatives of the people. They are therefore mandated by the people in the same way as the President is elected by the people when the National Assembly elects him. Constitutionally speaking, it is the people of our country who, through their elected representatives pass laws.

[293] The Constitution deals extensively with voting, free and fair elections, multi-party democracy, a voters' roll and the means by which decisions may be taken in Parliament. The provisions are detailed and specific. By contrast and leaving aside the provisions for public access, there are only two references to public involvement in relation to each of the National Assembly, the NCOP and the provincial legislatures. First, each of them is required to facilitate public involvement in their legislative and other processes. Second, each of them must have "due regard" to "public involvement" when making their rules.

[294] The oppression and exploitation of people in apartheid was not the result of the

absence of public participation in government processes in the sense in which it is used in the Constitution. Oppression and exploitation during apartheid was the result of the painful fact that the majority of people had no vote and were not represented in Parliament. Millions of people suffered, tens of thousands of people were tortured and even died and millions of people struggled against the apartheid regime. Any suggestion that the struggle and sacrifice of the past was predominantly aimed at securing public participation in the making of laws represents, in my view, a cynical denial of the phenomenal extent of apartheid devastation and pain. The failure to accord due weight to the actions and decisions of the representatives of the people of South Africa would demean the very struggle for democracy. In the circumstances it would, in my view, require the clearest language to justify the construction of any "public involvement" provision to mean that these elected representatives exercising the power of the people consequent upon their vote cannot pass a law unless they have public hearings or give the public an opportunity to make written or oral submissions before that law can be validly passed.

[295] I now examine the public involvement provision against this background in order to determine whether the provision places a duty upon the NCOP to give the public an opportunity to be heard in the process of passing each law.

The section 167(4)(e) obligation

[296] DFL requires an order in terms of section 167(4)(e) which requires only this

Court to pronounce on whether Parliament has fulfilled a constitutional obligation. Something therefore needs to be said about this section. The jurisdiction to make a section 167(4)(e) order is given to this Court because it is a very serious matter for one branch of government to say to another that the latter has not complied with its constitutional obligations. The making of such an order has immense separation of powers implications and cannot be made lightly. There must be the clearest of evidence that the obligation has not been complied with before any order can be made.

[297] This Court has not yet had occasion to determine under what circumstances an order of this kind with grave separation of powers implications should be made. In my view section 167(4)(e) orders can only be made when it is in the interests of justice and good government to do so. Circumstances that come into the equation when determining whether an order must be made cannot be exhaustively defined. They do include the following: the nature of the obligation; the importance of its performance to a society based on dignity, equality and freedom; whether the obligation emerges sufficiently clearly from the Constitution so as to draw the inference that Parliament, that is to say, the majority of legislators in the legislative body concerned, would have understood the nature of the obligation and would have known that they had to perform it and whether there had been sufficient time after the knowledge and understanding by the relevant legislators to facilitate compliance with the obligation.

Public involvement in the Constitution

[298] The whole of section 72 must be set out:

> "(1) The National Council of Provinces must-
>
> (a) facilitate public involvement in the legislative and other processes of the Council and its committees; and
>
> (b) conduct its business in an open manner, and hold its sittings, and those of its committees, in public, but reasonable measures may be taken-
>
> (i) to regulate public access, including access of the media, to the Council and its committees; and
>
> (ii) to provide for the searching of any person and, where appropriate, the refusal of entry to, or the removal of, any person.
>
> (2) The National Council of Provinces may not exclude the public, including the media, from a sitting of a committee unless it is reasonable and justifiable to do so in an open and democratic society."

[299] An identical section is applicable to the National Assembly and each provincial legislature. The section must be interpreted as a whole. The section is headed "Access to and involvement in the National Council of Provinces" and concerns itself with two distinct topics: public access to the National Council of Provinces and public involvement in the National Council of Provinces. As foreshadowed by this heading this dichotomy is continued in the section itself. Subsections (1)(a) and (1)(b) of section 72 are concerned with public involvement and public access respectively and therefore define the obligation imposed on the legislative entity concerned differently. Subsection (2) like subsection (1)(b) is also concerned with public access, not public

involvement. It is convenient to start our analysis with an examination of the obligation imposed by subsection (1)(b).

[300] In contrast with subsection (1)(a) this subsection is specific. It requires the NCOP to conduct its business in an open manner and hold its sittings and those of its committees in public. This is a basic provision which entitles the public to access the proceedings of the NCOP and its committees. Its meaning is plain and clear. Access of the public and the media must be allowed. However, the exception to this general rule permits the NCOP to take reasonable measures to regulate public access and to provide for the searching of people and, where appropriate, the refusal of entry to or the removal of any person. Subject to these measures therefore the public is entitled to access to the NCOP. In my view, this is a clear specific self-contained provision enforceable in itself and not susceptible to the vagaries of differing interpretations and is a provision binding upon the NCOP. Indeed non-compliance with this provision would have grave implications for the validity of any conduct that passes a law. It is a manner and form provision equivalent to the provision for a quorum, and the number of votes required to take a decision.

[301] Subsection (2) must be considered before subsection (1)(a) because it throws some light on the construction of the latter and because it like subsection (1)(b) is concerned with public access. It does not concern the NCOP itself but refers only to sittings of its committees. The public may not be excluded from the sittings of

committees unless it is reasonable and justifiable to do so in an open and democratic society. The provisions relating to public access to the NCOP are different from the conditions upon which public access to the NCOP's committees may be limited. Access to the NCOP may only be regulated in certain respects and cannot be limited as provided for in subsection (2) for committees of the NCOP. In other words access to the NCOP can only be regulated in terms of subsection (1)(b) but access to committees may, in addition to being regulated also be limited in terms of subsection (2). The point to be emphasised is that subsection (2) has no application to the NCOP sitting in plenary session. It applies only to the committees of the NCOP. Although, as suggested by the heading to the section, subsection (1)(a) and (2) deal with the same broad matter of public involvement and public access they are concerned with different elements. It would therefore be a mistake to apply subsection (2) to the provisions of subsection 1(b).

[302] It is now time to examine subsection (1)(a) more carefully. The first point to be made is that subsection (1)(a) like subsection (1)(b) creates obligations. But the obligations they create are different. The obligations created by subsection (1)(a) is to "facilitate public involvement in the legislative and other processes of the Council and its committees". At first blush it seems that this provision uses words that are less precise and more general in their nature. The phraseology is not of the kind one would expect to find in the wording of an obligation in respect of which the order in relation to specific fulfilment could easily be made. By contrast the obligations

imposed by subsection (1)(b) are sufficiently specific to render it susceptible to an order requiring fulfilment. Finally the concept of "reasonableness" while employed in subsection (1)(b) and subsection (2) is absent from subsection (1)(a). Indeed the absence of the concept of reasonableness or any other measure contributes to the lack of specificity of the subsection. Before I examine each of the concepts in subsection (1)(a) in some detail, it must be emphasised that the section, while placing certain specific obligations on the NCOP, places no express obligation on the NCOP to give the public an opportunity to be heard before any legislation is passed.

(a) Facilitate

[303] The word "facilitate" is crucial to an assessment of the nature of the obligation imposed. Before going to any dictionary definition of the word it must be emphasised that "facilitate" is in essence what may be described as "softer" than words such as "require" or "ensure". The word is used in two other places in the Constitution. There is a provision which requires an Act of Parliament to establish or provide for structures and institutions to promote and facilitate inter-governmental relations. Here, promote and facilitate apparently have different meanings. The second provision requires an Act of Parliament to provide for appropriate mechanisms and procedures to facilitate settlement of inter-governmental disputes. In these two settings "facilitate" probably means to enable or to make easier. An obligation to "require" public involvement or to "ensure" public involvement is a more onerous obligation than one which demands facilitation alone.

[304] The word "ensure" is used at many points in the Constitution. Some examples would suffice. In the process of defining the right to education the Constitution provides that "[e]veryone has the right to receive education in the official language or languages of their choice in public educational institutions where that is reasonably practicable." The section proceeds to say "in order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable alternatives…". The Constitution also says that the National Assembly is elected to represent the people and to "ensure government by the people …" In the same vein the NCOP is obliged to "ensure" that provincial interests are taken into account in the national sphere of government. The final example to which I will refer is the provision that requires the National Assembly to provide for mechanisms to "ensure" that certain organs of state are accountable to it.

[305] Nor is the National Assembly, the NCOP or any provincial legislature enjoined to require public involvement in the legislative and other processes. They are required to facilitate to public involvement. I accordingly respectfully disagree with the statement of Chaskalson CJ in *New Clicks* that the National Assembly equivalents of sections 72(1)(a) and 70(1)(b) require the National Assembly to ensure public involvement.

[306] The word "facilitate" implies that the NCOP as well as the National Assembly

and all provincial legislatures are required to be facilitators of public involvement. In other words they are required to engage in the process of facilitation. The fact that we speak here of a "process" and not an event implies that the process must be a continuing one. There is no qualification in the section as to the way in which public involvement is facilitated. That is left to the relevant legislative body to determine. Each legislative body must engage in the process of facilitating public involvement in its legislative and other processes. The subsection does not even require the NCOP to take reasonable measures to facilitate public involvement unlike the many instances in our Constitution in which the state is obliged or permitted to take reasonable legislative measures to achieve a particular result, there is no such stipulation here. The absence of the concept of "reasonableness" or any other standard is all the more remarkable when it is borne in mind that it is employed twice in the same section and in close proximity to the words with which we are now concerned.

[307] I conclude therefore that the NCOP is obliged to put in place a process by which public involvement in legislative and other processes is facilitated. In this context, "facilitate" cannot be equated to "promote". If the word "promote" had been used, a greater burden might well have been placed on the NCOP.

(b) Public involvement

[308] What does public involvement mean? Perhaps it will be better to start by determining what the term cannot mean in our constitutional context. Public

involvement cannot be equated to public participation. This is because the Constitution uses the word participate in context which lend an interesting colour to the relative meaning of the words "involvement" and "participat (e) (ing) (ion)". Our Constitution uses the word "participate" in the Bill of Rights on three occasions. The concept of participation is first employed in the Constitution in the Bill of Rights which guarantees the rights of citizens to participate in the activities of or recruit members for a political party. It is next used in a similar way guaranteeing the right of workers and employers to participate in the activities and programmes of a trade union and employers' organisations respectively. Thirdly our Constitution gives everyone the right to participate in the cultural life of their choice.

[309] The concept of participation is employed in the context of the legislative process in very interesting ways. First, the National Assembly and the NCOP participate in the legislative process. The Constitution requires that the rules and orders of the National Assembly, the NCOP and the provincial legislatures must provide for the participation in their proceedings and those of their committees of minority parties, and for the participation of provinces in the NCOP in a manner consistent with democracy. Furthermore, the role of the National Executive and local government representatives in the NCOP is described as participation even though none of them has any vote in the NCOP.

[310] There is no need to give further examples. The pattern is clear. Citizens

participate in the activities of political parties; elected representatives, minority parties, and certain others participate in the processes of the National Assembly, the NCOP and the provincial legislatures; public involvement must be facilitated in the National Assembly, the NCOP and the provincial legislatures. Citizens have the right to participate in political parties. There is a duty to facilitate public involvement of all people including citizens in the legislative and other processes of the NCOP. Involvement must mean something less than participation.

[311] Public involvement is in any event a wide term. There are a myriad ways of facilitating public involvement in certain processes. If as is the case with many people in our country, most members of the public are unable to speak English, conducting of English classes will facilitate public involvement. A certain level of education and understanding is important. Indeed the greater the level of education and understanding the better the public involvement. This means that increasing the educational levels of children will also facilitate public involvement; increasing an understanding of the ways in which the National Assembly and the NCOP work will also facilitate public involvement.

[312] It is impermissible to conclude that the term "public involvement" at the level of interpretation postulates as a minimum that the public must be given an opportunity to comment on draft legislation. The term is not capable of that construction. To interpret the phrase in this way would amount to re-drafting the Constitution. The

facilitation of public involvement would in general therefore mean the putting in place a process which is necessarily long term ensuring that more and more people and a wider range of people become involved in a wider range of ways as time progresses. But a wide general meaning of "public involvement" is not very helpful. It becomes possible to ascertain a narrower contextual meaning of public involvement if we have regard to the activity in relation to which "public involvement" is to be facilitated by the NCOP and the two other legislative bodies to which the duty to "facilitate public involvement" applies.

(c) In the legislative and other processes

[313] What is the activity that the public must be involved in? The National Assembly, the NCOP and the provincial legislatures must facilitate public involvement in their legislative and other processes. The reference to "legislative and other processes" means that no process is excluded. All legislative bodies at the national and provincial level are required to facilitate public participation in all their processes. The generality of this provision implies that the legislative body concerned is not required to do anything specific in relation to specific processes. The notion that the legislative bodies concerned are required by this section to do something specific that is, give the public an opportunity to be heard, in the process of making every law is, at best strained.

[314] We are concerned here though with the contention that national and provincial

legislative bodies are obliged to provide the public with an opportunity to comment in relation to legislation to be passed. We are therefore concerned with "public involvement" in relation to the legislative process. Section 72(1)(a) and its equivalent provisions certainly require the facilitation of public involvement in the national and provincial legislative process. We are not concerned with the provincial legislative process but the process that must be complied with in the making of national laws.

The facilitation of public involvement in the national legislative process

[315] The question we have to answer here is whether section 72(1)(a) requires that the process of passing national legislation must have built into it the obligation to give the public an opportunity to be heard before national legislation is passed and as a pre-requisite to national legislation being properly passed. The national legislative process is described in detail in the Constitution under that heading. This part of the Constitution describes the process to be followed in the passing of legislation step by step in specific terms. These sections cover the whole process from the time legislation is introduced into the National Assembly or the NCOP until the Bill lapses at some stage in the process or, if it does not lapse, until it is passed by Parliament, signed by the President and becomes an Act of Parliament. We are not concerned with the process of the preparation of the Bill or with publication of policy papers in relation to the Bills. Although the Constitution does not say so, we can take judicial notice of the fact that Bills are ordinarily prepared by the Executive and the administration. The relevant government department is largely responsible for

determining whether a particular law is necessary and for determining the process by which the law will be prepared.

[316] The process by which legislation is passed is crucial to a constitutional order. It must be clear, specific and sufficiently comprehensible to enable legislators to know exactly what steps they need to pass any legislation. Moreover, as I have said earlier, due regard to the value of the vote requires that acts of elected legislators be set aside only if the pre-requisites not complied with are stated in the clearest possible terms. It is therefore not surprising that the process in the Constitution is set out step by step in a defined way. In so far as it is concerned with legislation other than legislation amending the Constitution the process contains no express provision to the effect that the public must be given any opportunity at all to comment or to be heard as a pre-requisite for the valid adoption of any law. The question is whether such a provision is implied. I have grave doubts as to whether it is permissible for courts to determine implied terms in relation to the process by which national legislation is to be passed but I will assume for the purposes of this judgment in favour of DFL that processes by which national legislation is to be passed can be interpreted by the courts to include implied terms. I would say however that if this be the case it must be required that the only possible inference that can be drawn from all the circumstances is that the term was necessarily implied and that the inference is so compelling that the reasonable legislator would doubtless have understood the implication. The question to be asked therefore is whether an additional step is necessarily implied and is so compelling that

it must be read into the national legislative process in so far as it does not concern constitutional amendments by reason of the provisions of section 72(1)(a).

[317] It has been contended that section 72(1)(a) obliges the National Council of Provinces to ensure that reasonable steps are taken to facilitate public involvement in the national legislative process. This means that it is implicit in sections 75 and 76 read with section 72(1)(a) of the Constitution that reasonable steps must be taken to facilitate public involvement before the legislation can be said to be valid. The suggestion has no merit for at least six reasons.

(a) Firstly, as has already been pointed out, section 72(1(a) does not employ the concept of reasonableness. It is impossible to explain, if the constitutional purpose is to oblige Parliament to take reasonable measures to facilitate public involvement in all its processes, why the section does not say so in so many words. It seems that the concept of reasonableness is deliberately employed twice in other parts of section 72. This points strongly to a conclusion that a deliberate choice was made and a deliberate decision taken to employ the words in two other parts of the section but not to employ them in subsection (1)(a). Subsections (1)(b) and (2) are self-contained and concern themselves with matters different from subsection (1)(a) and it would be artificial to apply the concept of reasonableness to subsection (1)(a) in the circumstances. There is in any event no warrant for doing so.

(b) Secondly, if the correct meaning of section 72(1)(a) is that Parliament must take reasonable measures, one would have expected the provision concerned with the internal arrangements and procedures of the NCOP and its rule-making power to oblige the NCOP to make rules that must provide for reasonable steps to be taken to facilitate public involvement. The relevant subsection requires merely that the NCOP make its rules with "due regard" to "public involvement".

(c) Thirdly, the provision in the Constitution concerned with the joint rules and orders and joint committees of both the National Assembly and the NCOP is also inconsistent with the idea that reasonable steps to facilitate public involvement are implied in the national legislative process set out in sections 75 and 76. The section concerning the joint rules specifically authorises a joint committee to make rules and orders, amongst other things, "to determine procedures to facilitate the legislative process including setting a time limit to complete any step in the process". There is not a word about public involvement in the section.

(d) Fourthly, it is inexplicable why, if the constitutional purpose was to include reasonable public involvement as part of the national legislative process, this measure was not built into the national legislative process.

The drafters must be taken to have been aware of the fact that all steps in the national legislative process should be clearly set out.

(e) Fifthly, implying a step in the process to the effect that the NCOP is obliged to take reasonable measures to ensure public involvement in the process of passing each Bill would introduce a formidable difficulty which ought to be avoided in any constitution. It builds into the process of making national legislation a provision that is not sufficiently clear and specific in relation to that process. There may be huge differences of opinion within Parliament in relation to whether the nature of the public involvement required in relation to particular Bills is reasonable. If those debates remain unresolved, this Court will have to determine whether the public involvement steps are reasonable in a particular case. This Court will then finally determine whenever there is a dispute whether the national legislative process has been complied with. It will be this Court and not the Constitution which will effectively determine an element of the national legislative process. This is in my view inconsistent with the very spirit of constitutionalism. By way of example, if Parliament made a rule to the effect that reasonable steps must be taken to bring the legislation to the attention of the public at some stage in the legislative process the constitutionality of such a rule would be highly questionable.

(f) Sixthly, a further difficulty with the reasonableness criterion being applicable in this context is concerned with the requirement or at least the desirability of ensuring that, as far as is possible, all Bills of a similar kind are passed utilising a consistent procedure. The reasonableness proposition produces the consequence that different processes may be applicable depending on the legislation concerned and the circumstances.

[318] All the arguments mentioned in the preceding paragraph apply with equal if not greater force to the suggestion that the NCOP was obliged, at the very least, to give the public a reasonable opportunity to comment on the Bills. There are however five additional factors that militate against the correctness of this proposition.

(a) The first is that the Constitution expressly defines minimum levels of public involvement in sections 72(1)(b) and 72(2). Again it would seem that there was a deliberate decision to define the minimum in a very limited way and leave the rest to Parliament.

(b) The drafters of the Constitution expressly considered the issue of public involvement in relation to constitutional amendments. The national legislative process to be followed includes an interesting provision. The person or committee intending to introduce a Bill amending the

Constitution is required to publish particulars of the proposed amendment in the national Government Gazette, and to submit those particulars to provincial legislatures for their views.

(c) Thirdly, Parliament is expressly empowered to determine its own internal arrangements and procedures. Whether the public is given an opportunity by the NCOP to be heard on legislation which is to be passed by it is an internal procedure. Parliament was left to determine the parameters subject to the limitations and conditions prescribed. A court's determination of a minimum in these circumstances is an intrusion into the domain of Parliament which is unauthorised and objectionable.

(d) Fourthly, the idea that the section requires at least that the public be heard in respect of each law that is made carries with it other difficulties. The difficulties arise principally from the possible consequence that the public must be given an opportunity to comment or be involved in relation to every process of the various legislative bodies. I mention a few of the processes that may be implicated: the election of the President, the Premier, the respective speakers, and other office-bearers; votes of no confidence and the appointment of provincial delegates to the NCOP. The suggestion is untenable.

(e) Fifthly, to read the relevant provisions in this fashion would be to elevate section 72(1)(a) and its cousin provisions to manner and form provisions in the Constitution. But manner and form provisions must be clear and straightforward.

[319] I therefore conclude that Parliament has to decide how public involvement must be facilitated in the national legislative process and that Parliament is not obliged to ensure that reasonable steps to facilitate public involvement in that process are taken. It is by no means clear or necessarily implied that a public opportunity to be heard or comment on legislation is a pre-condition to validity of legislation according to the Constitution. Nor in my view is it appropriate to expect of the reasonable member of Parliament to understand the relevant constitutional provisions in this way. The effect of reading the relevant provisions in such a way that they oblige legislative bodies to give the public a reasonable opportunity to be heard or consulted before legislation is adopted for it to be valid constitutes a limitation on the power of elected representatives of the people to make law. That limitation is an impermissible intrusion and has a fundamental impact on the value of the right to vote acquired through bitter struggle. The approach undermines the right substantially.

[320] I have thus far considered whether section 72(1)(a) results in the implicit prescription of manner and form provisions into the national legislative process and

have concluded that it does not. This could lead to an enquiry in relation to whether there are other reasons concerning process in which legislation may be regarded as having been adopted inconsistently with the Constitution and therefore invalid. In other words, it could bring to the fore whether the "third possibility" conceived by the Supreme Court of Appeal or any other such possibility might be relevant to the validity of legislation. I do not think it is necessary to decide this question.

The obligations of legislative bodies and the powers of this Court

[321] The conclusion in the preceding paragraph may be criticised by some on the basis that its correctness would result in the unhappy circumstance that the sufficiency of parliamentary action in relation to public involvement could never be tested. Parliament could do what it liked and the requirement to facilitate public involvement in the legislative process would mean nothing at all. Parliament could ignore the provision altogether. If this were to be so there would be much force in the contention that an interpretation that renders a constitutional provision nugatory must be avoided if it can be. However I am of the view that this conception of the consequences of the conclusion to which I have come are without merit.

[322] Sections 72(1)(a) and 70(1)(b) must be read together in relation to the National Council of Provinces as must sections 59(1)(a) and 57(1)(b) in relation to the National Assembly. It will be recalled that both the NCOP and the National Assembly are required to facilitate public involvement in the national legislative process while these

legislative bodies are also required to make their rules with due regard to public involvement. In my view the phrase "public involvement" in the rule-making provision is in each case an attenuated reference to the public involvement provision with which it must be paired. I would read both sections together. The rule-making provision informed by the obligation to facilitate public involvement would oblige the NCOP and the National Assembly to make rules with due regard to the obligation to facilitate public involvement in the national legislative process.

[323] The national legislative process must be clear, specific and beyond debate in the sense that it must be capable of generating a common understanding of what is required. It is permissible for the NCOP to make rules which require manner and form provisions additional to those prescribed by the national legislative process in the Constitution provided they are consistent with the latter. Indeed the only acceptable practicable way of ensuring that the national legislative process did have within it elements that facilitated the involvement of the public in that process is for the National Assembly or the NCOP to make rules that are clear, specific and certain, and that add requirements in relation to the passage of legislation with regard to the facilitation of public involvement. If for example the rules made no provision at all for any public involvement in that process it will be difficult if not impossible to contend that the rules were made with due regard to public involvement.

[324] If the rules were not made with due regard to facilitating public involvement in

the national legislative process, Parliament would have failed to fulfil a constitutional obligation within the meaning of section 167(4)(e). In these circumstances, this Court, and only this Court, will have the power to decide that Parliament has failed to fulfil a constitutional obligation and make an appropriate order. The Court might either:

(a) declare that the constitutional obligations have not been fulfilled as required by section 2 of the Constitution or, if appropriate circumstances exist,

(b) order Parliament or the relevant legislative body to fulfil this constitutional obligation.

[325] This approach is consistent with the view that it is Parliament that must first decide how participation in the national legislative process is to be facilitated. That decision would be reflected in the rules. If Parliament does not make any decision as it is obliged to do, it will have failed to fulfil an obligation imposed upon it by the Constitution. The NCOP and the National Assembly are both deliberative legislative bodies. All their decisions are deliberative in nature. The only way in which any of these legislative bodies could make a decision that would add requirements that must be complied with for a valid national legislative process would be to make rules or to pass legislation. There is no evidence in this case that Parliament has made any decision in connection with public involvement in the national legislative process. An appropriate decision by Parliament is a pre-condition to review by this Court of the

decision in relation to whether it constitutes fulfilment of the constitutional obligation.

[326] It follows that there is judicial control in relation to the implementation of the requirement of the Constitution that public involvement must be facilitated in the national legislative process and that rules of national and provincial legislative bodies must be made with due regard to that requirement. It is not appropriate to discuss here the standard by which the relevant rules must be evaluated. This may have to be done on another day.

International law and foreign law

[327] International law is in perfect harmony with the conclusion that our Constitution does not require the public to be heard as a pre-requisite to national legislation being validly passed. Relevant provisions in international instruments are concerned with public rights. The International Covenant on Civil and Political Rights (ICCPR) provides:

> "Every citizen shall have the right and the opportunity, without any distinctions mentioned in Article 2 and without unreasonable restrictions:
>
> (a) To take part in the conduct of public affairs, directly or through their freely chosen representatives;
>
> (b) To vote and to be elected at genuine period elections which shall be by universal suffrage and shall be held by secret ballot, guaranteeing the free expression of electors."

[328] This provision dictates a very low threshold. In the first place its requirements are satisfied even if the law in a particular country allows for citizens to take part in public affairs through freely chosen representatives alone. But this is not the minimum requirement of the ICCPR. The section renders it legitimate even for this low threshold to be subject to further reasonable restriction. It is true that many agencies and writers have said that in terms of their conception of public participation, improved public participation requires more to be done. South Africa requires more in relation to public involvement and participation in its Constitution than the ICCPR does. Any contention that the ICCPR, on any interpretation requires member countries to ensure that it is essential for the public to be consulted before legislation is adopted and the legislation to be invalid absent consultation would, in my view, be liable to rejection with the ridicule it deserves. Nor can it be said that the addition of the word "opportunity" in the introduction to the section improves the position. The kind of right contemplated would have to be facilitated by a government whether the word "opportunity" was in the text of the document or not. The hard fact is though that the provisions of the ICCPR are satisfied by indirect participation reasonably restricted; DFL wants unrestricted indirect participation as well as substantial direct participation. It is not necessary to go through any of the other international instruments. All of them are understandably satisfied with indirect participation without any direct component.

[329] I have examined many constitutions. None of them properly read provide that

legislation will be invalid unless some generally stated unspecific requirement of public involvement is fulfilled. Many have manner and form provisions that are clear and specific and that facilitate a measure of public involvement. I have found no judgment of any court anywhere in which a legislative provision properly adopted in an open legislature and having been read through in the way required by the relevant instrument has been found to have been inconsistent with the constitution on the basis of non-compliance with some generalised public involvement provision even if the prescribed manner and form provisions have all been complied with.

Provincial participation in the national legislative process

[330] The reliance by DFL on section 118(1)(a) of the Constitution which obliges provincial legislatures to facilitate public involvement in their legislative and other processes necessitates a brief enquiry into the role of the provinces in the national legislative processes in relation to ordinary Bills affecting the provinces. Each province has one vote to be cast on behalf of its delegation in relation to all section 76 matters. At least five provinces must vote in favour of a decision concerning section 76 legislation. If each province has a single vote, and that vote is to be cast on behalf of the provincial legislature, the question of the authorisation of the delegation to cast a particular vote on behalf of a particular legislature arises. The provincial legislature must be duly authorised by the province to vote in a particular way before that vote can be counted. For a decision to be carried in relation to section 76(1) legislation, at least five provinces must not only vote for that decision but must be authorised to vote

for it.

[331] The Constitution provides that an Act of Parliament must provide for a uniform procedure in terms of which provincial legislatures confer authority on their delegations to cast votes on their behalf. National legislation pursuant to this section has not been enacted and it is fortunately not necessary to determine whether this constitutes a failure by Parliament to comply with a constitutional obligation within the meaning of section 167(4)(e). This is so because the national legislation is required only in the interests of consistency. In the absence of national legislation therefore provincial legislatures can make their own decisions as to how mandates are to be given by provincial legislatures to the NCOP.

[332] The casting of votes by provincial delegations in the NCOP is part of the national legislative process. The process by which the provincial legislature confers a mandate on its delegation is not part of the national legislative process. It is a provincial process that is relevant to the national process because unless the provincial process properly confers the mandate on the delegation, the vote of the delegation cannot count.

[333] Section 118(1)(a) of the Constitution is therefore engaged because the process of mandating a provincial delegation is a process of the provincial legislature determined by that legislature. But the process is not a legislative one. At best, the

process falls within the "other processes" mentioned in section 118(1)(a). The appropriate question is therefore whether section 118(1)(a) of the Constitution requires that the members of public in the province must be given an opportunity to comment on a mandate before the mandate is given to the provincial delegation in the NCOP as a pre-condition to the validity of the authorisation.

[334] Before considering this question I must point out that it is doubtful whether anyone other than the provincial legislature has any capacity to question the validity of the authority given by the provincial legislature to the delegation. I assume in favour of DFL that it does have the capacity to attack the validity of authority. DFL did not expressly attack the validity of the authority conferred on the provincial delegations, however the contention that section 118(1)(a) has not been complied with in my view necessarily entails the proposition that absent the compliance with the public involvement provision authority will not have been validly conferred.

[335] The reasoning applicable to the finding in this judgment that the public involvement provision in the national legislative sphere does not require the public to be given an opportunity to be heard or to comment as a pre-requisite to the validity of legislation applies equally to the public involvement based contention in relation to the provincial legislatures. There is no requirement that a mandate cannot be given without an opportunity to be consulted.

Is a section 167(4)(e) order justified?

[336] Attention must finally be given as to whether a section 167(4)(e) order is justified in the circumstances. No order to the effect that Parliament has failed to fulfil a constitutional obligation is appropriate because no breach of section 72(1)(a) has been established.

[337] It is nonetheless desirable that I say something more on this point. I do not think that an order of this kind will be justifiable even if it were to be held that section 72(1)(a) of the Constitution has been infringed and that the NCOP was obliged to allow an opportunity for a public hearing or public contributions before passing the Health Bills. The public involvement provision is important to our society. Nevertheless the obligation that, at a minimum a reasonable opportunity should be given to the public to make representations in the national legislative process does not emerge readily from the legislative process itself or from section 72(1)(a). In the circumstances it cannot be said that reasonable legislators ought to have been aware that the Constitution required this as a minimum component of section 72(1)(a).

When is intervention by this Court appropriate?

[338] I do not deem it necessary in the circumstances, to deal in detail with the question when it is appropriate for this Court to intervene during the processes of Parliament. I would however advance the approach that this Court ought never to intervene during the proceedings of Parliament unless irreparable and substantial harm

would otherwise result. However the question does not arise in view of the conclusion I have reached.

Conclusion

[339] The Constitution does not require the section 72(1)(a) or section 118(1)(a) public involvement provision to be complied with as a pre-requisite to any legislation being validly passed. To infer a requirement of this kind when it is not expressly provided for is to impermissibly undermine the legislature and the right to vote. In the circumstances the fact that no opportunity was given for public comment in the National Council of Provinces and in most of the provinces in the process of the passing of the Health Bills though regrettable is of no constitutional moment in relation either to whether the National Council of Provinces or the provincial legislatures have complied with their constitutional obligations or to whether the Health Bills have been validly passed. In my view the application accordingly falls to be dismissed.

Skweyiya J concurs in the judgment of Yacoob J.

For the applicant: KJ Kemp SC instructed by Janse Van Rensburg, Strydom & Botha Inc.

For the respondents: N Arendse SC and T Masuku instructed by the State Attorney, Cape Town.