

DEPARTMENT OF PUBLIC, CONSTITUTIONAL AND INTERNATIONAL LAW

CONSTITUTIONAL LAW



Only study guide for CSL2601

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PREFACE

1 WHAT IS CONSTITUTIONAL LAW ALL ABOUT?

Welcome to the module in Constitutional Law. Before you listen to all the negative remarks from your peers about this module, let us reassure you that passing this module is by no means impossible. All it requires is that you approach your studies with a great degree of commitment and hard work.

Constitutional Law is generally regarded with dread. Students regard this module as difficult, boring and impossible to master. The first thing you have to do is eliminate all this negativity and start believing that you can pass this module. We assure you that we will provide you with the necessary support and as much guidance as possible to make your studies meaningful and enjoyable.

The second thing you need to do is to understand what constitutional law is all about. In simple terms, constitutional law is about the “institutional organisation of state power”. In this module, we shall focus on the following components:

- on ways in which state power is **institutionally organised and applied**
- on the **relationship between the different institutions** that exercise state power (ie the rules relating to the distribution and exercise of state authority), on the **interrelationship** between state institutions and other organisations, and on the **limitations** that are imposed on the exercise of this power

In a nutshell, the main focus of this module is to introduce you to the basic principles relating to the form of government that we have in place to look after the day-to-day running of the country. This module is designed to enable you to:

- **DISCUSS** where and in whom the power to govern is vested
- **EXPLAIN** the factors that influenced the system of government that we have adopted
- **CLASSIFY AND COMPARE** the functions, rights and obligations of the bearers of state power and the mechanisms that are in place to ensure that the bearers of state power do not abuse the powers
- **UNDERSTAND** the limitations that exist in the exercise of constitutional powers and the performance of key functions

2 WHO SHOULD REGISTER FOR THIS MODULE?

The most obvious choice would be the law student. But that is not the only group of people who should be familiar with the content of this module. It would be ridiculous to suggest that only certain groups of people should have a knowledge of constitutional law. In a modern state like South Africa, **everyone should have a basic idea of the institutional character of the state** so that they can approach the correct body/functionary with any grievances relating to the way in which they are being governed. Having said that, doing this is a very distant reality for most people; however, it makes sense to say that, at the very least, lawyers, advocates, **political scientists, public officials** and all those who wish to pursue a **career in government office** must have an idea of the contents of this module.

3 WHAT APPROACH HAVE WE ADOPTED AS PART OF THE STUDY OF CONSTITUTIONAL LAW?

We have discarded the old CONTENT-DRIVEN approach to the teaching of constitutional law. The “old” approach involved a textbook, which most students believed contained everything they needed to know about the subject. The old approach encouraged superficial approaches to learning on the part of the learner, since students often memorised large chunks of the textbook and then regurgitated these “chunks” in the examination.

The old, content-driven approach had the effect of producing students who could write pages of memorised content without being able to implement or apply this knowledge in everyday life. Their knowledge was often fragmented, they could not see the bigger picture and they reconciled themselves to learning in a parrot-style fashion: – in no sense were they **active participants in the learning process**.

The new outcome-based approach represents a decisive move away from this “old” approach. It is designed to make students active learners, to develop certain basic skills designed to facilitate their integration into the legal profession, and to equip them with essential tools necessary to help them become **competent members of society**. The new approach has the following distinct features:

- The prescribed tutorial material consists of the 1996 Constitution, a study guide which contains the **theoretical aspects of constitutional law**, and a *Revised Reader* (hereafter “the *Reader*”) which contains **extracts of academic articles and case law** designed to enable you to understand how the principles explained in this module are applied in practical situations.
- The Constitution is the backbone of this module.
- The study guide is a supplement to the Constitution, and not the other way around! **The study guide does not contain constitutional law**

in its entirety. Instead, the study guide is designed to provide you with a basic understanding of the content of the various provisions of the Constitution as set out in this module.

- The extracts of prescribed articles, which have been shortened, are included to facilitate your understanding of this module and to give you a number of different insights into the study of law. By suggesting processes and providing guidance on the activities, we hope to encourage you to develop law-related reading and writing skills and critical legal thinking skills.
- Case law is included as part of your study package. You must know that the study of theoretical knowledge partly contributes to your development as a learner. You must be in a position to **apply the theoretical knowledge to practical problems that you may encounter in your day-to-day life.** Case law is intended to give you an understanding of how legal principles are applied in a given, factual scenario. By providing the necessary support and guidance on how you can analyse the prescribed Court cases, we hope to test your understanding of the subject matter and to help you improve your critical thinking and problem-solving skills.
- Activities, self-assessment questions and guidelines on how to approach the activities, et cetera, are also included as part of your study package. This component of the module is designed to test whether you have understood the study material. This component of the module also tests your understanding of those aspects of constitutional law that you find difficult and that you will need to revise in order to pass this module.
- Although we provide the support and guidance that you need to master this module, you are required to actively work through the prescribed material in order to integrate all the material into a coherent whole.

You should not approach each study unit with no sense of continuity and context.

4 WHAT STRUCTURE HAVE WE ADOPTED FOR EACH STUDY UNIT?

You will find that each study unit follows a certain design, which is set out below:

(a) Cartoon

They say that a picture is worth a thousand words. We have inserted a cartoon in some of the study units to make the study of this module both stimulating and lively. Each illustration depicts a current, topical constitutional issue, for example: corruption at various levels of government, the separation-of-powers dilemma, ministerial accountability, et cetera.

In some study units, we have inserted diagrams to illustrate how state authority is distributed and who the primary roleplayers are. We will refer to the diagrams and cartoon illustrations either as an activity or as part of the content of a particular study unit (with a view to showing you how to interpret and link the illustrations to a particular aspect of constitutional law).

(b) Knowledge that you should have before you attempt some of the study units

Some study units start with a block which sets out the constitutional concepts and principles that you need to know before you continue with the study unit. Each study unit is a follow-up to the next one and you will need to understand the information in the preceding study unit in order to obtain a thorough knowledge and picture of what institutional (constitutional) design is all about.

(c) Outcomes for each study unit

The outcomes, as end products of learning, tell you what you are supposed to know and be able to do after you have worked your way through the prescribed material for a study unit. The outcomes are designed to guide you through the work in a much more focused and methodical way. They also tell you the areas that you need to concentrate on. You can assess how much you have absorbed by testing how well you are able to do the things in the listed outcomes. The outcomes may require you to explain, discuss, list, argue, comment on or analyse a point involving key principles or concepts of constitutional law. However, the acquisition of knowledge is of no real use unless you know what to do with it. By this we mean that you must understand and learn to use the knowledge that you acquire in this module in your everyday life. It is only by doing this that the study of constitutional law becomes meaningful.

(d) Overview

In this part of the study unit, you will find a brief overview of the core principles and concepts which will be covered in that particular unit. We have attempted to cross-reference the study units so that you can integrate your study of the module.

(e) Prescribed study material

Immediately after the overview, we have inserted the prescribed material for this module. You must pay attention to instructions such as “You must read only”, “You must study”, and “You must or may refer to ...”, since each instruction requires a different response or action on your part.

(f) Recommended material

Very few study units contain a list of recommended reading material. The

material in these lists is **not prescribed for examination purposes**. In other words, you may consult these sources if you wish in order to increase your knowledge of a particular aspect of constitutional law, but you are **not expected to study this material for examination purposes**.

(g) Content

In this part of the study unit, reference is made to the relevant provisions of the Constitution, and to any legislation, case law and academic writing that will contribute to your understanding of the module. In essence, this part of the study unit sets out the theoretical knowledge and the practical application of the content of constitutional law. It is then up to you to actively internalise this knowledge to obtain a proper understanding of constitutional law.

You will find margin notes throughout the study guide that highlight some of the important questions that you need to ask yourself when studying this module. We hope that, by posing the questions asked in the margin notes, you will be motivated to find the answer and grasp the principles contained in the text; this will definitely contribute to your understanding of the subject matter. You must be able to define and discuss the concepts used in the module in your own words, because it is essential that you are able to use the technical language specific to constitutional law.

(h) Self-assessment activities and feedback

You will find that we have incorporated a number of activities and self-assessment questions in each of the study units. The activities are based on the subject matter that has been covered. The activities are designed to test your understanding of the principles and concepts relating to constitutional law. As we mentioned before, the activities and self-assessment questions are also intended to **test whether you know how to apply the constitutional principles to concrete situations in everyday life**.

If you need **feedback on the activities**, you have to submit them to us and we will provide feedback on your answers. This feedback will help you to assess whether you understand a particular component of constitutional law. If your answers differ markedly from the feedback, then this means you need to revisit those aspects of constitutional law that you are finding difficult to grasp. **Note: the feedback will contain guidelines on how to formulate a proper answer and will not necessarily contain the answer itself!**

5 HOW DO I USE THE PRESCRIBED STUDY MATERIAL?

The purpose of the study guide is to guide you through the prescribed material. However, a great deal depends on the way in which you approach

your studies. You must remember that you cannot study each unit as a separate unit on its own. To succeed in your studies, you need to integrate all the prescribed material.

We suggest that you approach your studies in the following way:

- To succeed in your studies, you must have a copy of the study guide, the *Reader* and the 1996 Constitution in your possession. You must look at Tutorial Letter 101 for details on how to obtain your copy of the 1996 Constitution and the *Reader*. In any event, extracts of most of the prescribed sections of the Constitution have been included at the beginning of most study units for your convenience.
- Start studying immediately! You have only one semester in which to master the tutorial material and the skills, critical ability and level of understanding that we expect of you. You can draw up a study programme in which you indicate the dates by which you should have completed the different study units. You should make sure that you allow sufficient time for revision before the examination. You may refer to the next study unit of this study guide to get an idea of how to pace yourself or, if you wish, design your own time-management programme.
- Start each study unit by reading the outcomes set out at the beginning of that study unit in order to get an idea of what you should be able to do after you have worked through the unit. If you do not understand some of these outcomes, don't worry. The content (knowledge) and activities that you have to work through should enable you to achieve even the more difficult outcomes.
- Once you have done this, take the first heading and summarise the notes that appear under that heading. Your notes could include an explanation of difficult constitutional concepts, references to specific provisions of the Constitution, commentaries, and references to case law. Integrate the notes in such a way that you understand both the theory and the practical application of the material.
- After you have mastered the prescribed material under each study unit, you should attempt the activities that have been included as part of your tutorial material. Remember that the activities are intended as a means of evaluating your own progress. The activities will also help you achieve the specified outcomes and help you to identify any difficulties that you may be experiencing with a particular aspect of constitutional law.
- Once you have attempted the activities, test your answers against the guidelines that we have provided. If there is a vast difference between your answers and the ones that we give, then contact us so that we can solve your problems at an early stage in your studies. Remember: the activities are similar to the questions that will be asked in the examinations. If you can answer the questions posed in the activities, then you should have no trouble attempting the examination and achieving the outcomes stipulated at the beginning of each study unit.

- You must contact us if you come across tutorial material that is unclear, ambiguous or just student-unfriendly. This will enable us to clarify any difficulties that you are experiencing with this module and will also enable us to improve the quality of the tutorial material.
- Finally, you should have already attempted a few of the first-level law modules before attempting this one!

LEARNING STRATEGIES

OUTCOMES

Once you have studied the material in this study unit, you should be able to do the following:

- pace yourself in your studies
 - find the meanings of difficult words
 - summarise/analyse/evaluate/read the prescribed Court cases
 - answer/solve problem-type questions
 - equip yourself with the basic learning tools/strategies necessary to master the prescribed tutorial material
-

1 INTRODUCTION

Studying at a university, particularly an open distance learning (ODL) university, differs markedly from the studying you did at school. As a law student, you are required to master a large volume of study material in a short period of time. You are also expected to develop certain skills to enable you to take your place in the legal profession. These objectives can only be achieved through self-discipline and dedication.

We are aware that studying via an ODL institution such as Unisa requires a higher degree of commitment and self-management than studying at an on-campus institution such as the University of Pretoria. This may be attributed to the lack of one-on-one contact between you and the lecturer, to the fact that you don't have to attend classes, and to the lack of peer support. In an attempt to overcome these obstacles, we have decided to insert a few study techniques which, we hope, will help you in your studies as a law student.

Always bear in mind that the skills and knowledge that you are expected to acquire in this module are **not** peculiar to constitutional law. The ability to do the following is indispensable to all fields of law:

- to research, analyse and critically evaluate legal materials (the Constitution, legislation, case law, academic opinion, etc)
- to formulate a logical and coherent legal argument
- to apply the theoretical knowledge that you have acquired to a practical or concrete problem

Take note that the guidelines contained in this section are merely

suggestions on how to manage your studies more effectively. You are not compelled to adopt these study techniques — you are perfectly free to adopt the style of studying that suits you best.

2 TIME MANAGEMENT

We are aware that each student has his or her own way of studying. We are also aware that there are many factors which may influence the study method that a student adopts, for example individual personalities, employment circumstances, family responsibilities, the field of study chosen by the student, and the number of modules the student is attempting in a semester.

Given all this, we firmly believe that **TIME MANAGEMENT** is an essential ingredient for success. You must pace yourself properly, otherwise you will find it difficult to cover all the material prescribed for this module. As you work through the study material, you will find that some aspects of constitutional law are easier to understand than others and will generally take less time to grasp than others. The trick is to manage your time in such a way that you **AVOID** spending too much time on the easy stuff and, instead, concentrate on the difficult concepts and principles.

One method of ensuring that you do not end up in the position of trying to get through the bulk of your studies just before the exam is to divide up the study material according to your particular needs.

For this module, we have outlined a schedule that may help you to plan and organise your studies.

STUDY UNIT/S	NUMBER OF DAYS ALLOCATED
1	3
2	3
3	3
123	3 (revision)
4	10
5	8
6	8
7	8
8	12
9	8
10	5

3 IMPROVING YOUR LANGUAGE SKILLS

Some of our students are experienced and academically mature. However, many students do not yet have the necessary linguistic experience, skill and expertise, so what is said here is for their benefit.

Language is very much the lawyer's tool. Therefore, highly developed language skills are indispensable. Because English is the language in which this module is presented, and the language in which most of our sources are written, language skills in this module mean ENGLISH language skills!

TAKE NOTE: Before registering for CSL2601, ideally, students should have done the language modules or, at the very least, the first-level modules.

Students therefore need to practise both their reading and writing skills.

You can improve your reading skills by practising the following:

- **Comprehension skills:** you must understand what you read! This may mean practising any one or all of the following things:
 - Reading a particular text more than once.
 - Completing your glossary of commonly used terms as explained in an activity.
 - Using the template we have given to you to analyse Court cases.
 - Making concept maps or mind maps or summaries of individual study units to reduce the content of a study unit to a page or two. This will make studying and revision for the exams much easier.
 - Personalising the content as often as possible. This means that you must relate the knowledge that you obtain from the prescribed material to your everyday life. Remember: the knowledge you are grappling with is a tool that can make your own life and the lives of the people around you more meaningful.

- **Using a good dictionary, including legal dictionaries.** As we have said, language is an essential tool of the legal profession. It is important in the study of any area of the law. You must bear in mind that a word can have a variety of meanings, depending on the context in which it is used. For example, the word “office” in the phrase “office of the President” does not refer to the President's place of employment. Instead, in the context in which it is used, it refers to the status of the President as a very important person. You will come across this phrase in study unit 9 of this guide.

Throughout the study guide, you will encounter a number of complex and unfamiliar constitutional concepts. Most of these concepts are defined in detail. However, some concepts may not be defined but there is no need to panic! As a law student, you are required to develop certain basic skills which will help you in the real world. Learning how to find the meaning of

difficult words is one of these basic skills. Although we do not prescribe a dictionary, a good dictionary is indispensable to a law student. A good dictionary is also useful for completing your glossary of terms.

You could acquire or simply consult any one of the following sources in order to find the meanings of words:

- *Collins Cobuild English Dictionary (1995)*
- *The Concise Oxford Dictionary*
- Van der Walt & Nienaber (1998), *English for Law Students, published by Juta*
- *HAT (Verklarende Handwoordeboek van die Afrikaanse Taal)*

Some of these sources are extremely useful, because they contain considerably more than simply the meaning of words: they also contain additional information on how a word may be used in different contexts.

- **Identifying keywords in a text and making summaries/concept maps which reflect the keywords and ideas included in the text.**
- **Careful reading to ensure that your identification of keywords and your summaries are accurate.** This may require that you read the prescribed material more than once to make sure you understand the essence of the study material.

You can improve your writing skills by paying attention to the following guidelines:

- **Make sure that your grammatical construction and usage are correct.**
- **Make sure that you spell words correctly.** Once again, a good dictionary is indispensable!
- **Make sure that you use the correct words.**
- **Make sure that your thoughts and ideas are presented in a logical and coherent argument.**

ACTIVITY 1

As a practical exercise, study the prescribed cases that appear in the *Reader* and the study guide and the notes on how to summarise a Court case. After this, make a list of the concepts which you find difficult to understand, consult a dictionary to find the meanings of the words and add the words to your glossary of concepts and phrases.

In order to attempt this activity, you have to:

create your own glossary of frequently used legal concepts and phrases in a separate workbook (You will find that, by the end of this module, you will have a list of concepts which you know and understand.)

4 HOW TO SUMMARISE/ANALYSE/EVALUATE/READ A JUDGMENT IN A COURT CASE

As already mentioned, case law forms an integral part of your development as a law student. Case law is intended to help you understand how the constitutional concepts you encounter are interpreted and applied by the Courts in a concrete, factual situation. Many students struggle with this aspect of their studies. However, it is a skill which you must master if you intend working in the field of law.

When summarising a case, there are essentially four basic components that you must look for. Consider the text box that appears below:

FACTS OF A CASE

What events took place which led to the matter coming before the Court?

ISSUE/S TO BE DETERMINED

Which principles of law and practice, based on the facts before the Court, did the Court have to determine/assess?

FINDING OF THE COURT

What was the Court's ultimate decision/finding/conclusion?

REASONING OF THE COURT

Which principles of law and practice did the Court rely on, or refer to, in order to determine the issue before it?

ACTIVITY 2

Using the questions with their explanations in the template above, consider the application of this structure in the summary of the *Premier of the Province of the Western Cape v the President of the Republic of South Africa* case (cooperative government one), which appears in your *Reader*.

In order to attempt the above activity, you have to:

- study the explanation on case summaries
 - study the *Western Cape* case in detail
-

FACTS OF A CASE

The facts of a case could also be referred to as the “background” or “historical context” of the case. In simple terms, they refer to **THE EVENTS (which could be some form of misconduct, a dispute or an infringement of a right) WHICH TOOK PLACE AND WHICH LED TO THE MATTER COMING BEFORE THE COURT FOR RESOLUTION.**

Do not be alarmed if you find that the Courts have used other concepts which have a similar meaning to the word “facts”. Judges constantly use words with a similar meaning to the word “facts” to describe the events that took place before the matter was brought to Court. Once again, your glossary of concepts will be helpful here. Note that not all Court cases have headings to make it easier to find the facts of the case. Most cases start with a narration of the judgment and it is up to you to sift through the judgment to find out the events that led to the matter coming to Court. The facts of a case are usually found at the beginning of the judgment.

Now look at the *Premier of the Province of the Western Cape* case. You will notice that it does not contain any heading to indicate that this paragraph contains the facts of the case. However, you will find a summary of the facts in the first paragraph of the *Reader*.

In the examination, you are required to be precise in your summary of the facts. You must also remember that the facts of the case may not necessarily appear in one paragraph of the case. The main thing is that you understand the content of the disputed legislation, that is, the issue/conduct that the disputed legislation was designed to regulate.

Try to make your **OWN** summary of the facts of this case and then compare it with the one that appears below. Make sure that you have included the most relevant information.

In this case, Parliament had passed an amendment to the Public Service Act of 1994. This meant that the provincial and the national heads of departments were given the same broad functions and responsibilities. Provincial heads of departments no longer fell under the administrative control and responsibilities of the provincial Director-General (DG). The DG assumed responsibility for the administration of the office of the Premier, intergovernmental relations, and cooperation between the various divisions of the provincial administration.

THE ISSUE/S FOR DETERMINATION BY THE COURT

This **DOES NOT** refer to the facts of the case. The issue refers to the legal issue that the Court will have to determine in order to resolve the dispute before it. It is a principle of law that will have to be assessed in the context

of a particular case. Normally, the issue for determination is easy to find, since it is the party who brings the matter before Court that directs the Court to the legal issue that has to be determined (even if this is not expressed in legal terms).

You will find that some cases deal with just one issue, some have more than one issue, and some go further and state a primary issue and then the subissues.

Study the third paragraph of the judgment in the *Reader* and paragraphs 60 to 62 of the case to grasp the core issue/s facing the Court. Then analyse the paragraph that is set out below in order to assess whether you understand the applicant's contentions in this case. If you find this difficult to do, reread the paragraphs in the judgment.

Issues

The Province of the Western Cape challenged the constitutionality of this amendment on the basis that this new scheme violated section 41(1)(g) of the Constitution in three important respects, namely:

- (1) it assigned functions to the provincial Director-General and heads of departments in an unacceptable manner
- (2) it restricted the Premier's executive powers to establish or abolish departments of government
- (3) it gave the Minister the power to transfer certain functions from the province to national level

In a nutshell, the issue facing the Court was whether the new scheme encroached upon the geographical, functional and institutional integrity of the provincial sphere of government.

THE FINDING OF THE COURT

This relates to the ultimate decision of the Court.

The finding of the Court usually carries the least number of marks, since it is the conclusion that the Court comes to after it has examined the law and applied the law to the set of facts placed before it. Consider the following examples:

- In a criminal matter, the accused could be found guilty or not guilty of committing the crime in question.
- In a civil claim (eg in respect of a motor vehicle collision), the Court could find in favour of the plaintiff whose car was damaged; alternatively, the Court could find in favour of the defendant who (successfully) raised a plea to the alleged cause of action.

- In a constitutionality challenge, the Court could find that the alleged conduct or law violates a Chapter 2 right or any other provision of the Constitution and thus declare such conduct or law invalid; or it could find the conduct or law constitutional.

Now assess whether you agree with the finding of the Court in the *Premier of the Province of the Western Cape* case, which is set out below:

Finding

The Court, in this case, considered the allegations made by the Western Cape Province and concluded that, save in one respect only, the new scheme as a whole did not violate section 41(1)(g) of the Constitution.

THE REASONING OF THE COURT

Many students confuse the finding of the Court with the reasoning of the Court. As already stated, the finding of the Court refers to the ultimate decision of the Court. **The reasoning of the Court refers to THE PRINCIPLES OF LAW AND ANY EXCEPTIONS THAT EXIST WHICH THE COURT MAY REFER TO IN ARRIVING AT ITS CONCLUSION.**

In a legal matter (whether it is brought on application or by way of action procedure), a party may claim that his or her rights have been violated on one or more grounds. The Court will then have to evaluate each and every ground in order to arrive at its finding. This implies that a Court will only consider those arguments that have been placed before it. In analysing each ground of contention, the Court may refer to one or more of the following:

- the provisions of the 1996 Constitution that are in dispute
- any enabling statutes that are relevant to the dispute
- case law that has a bearing on the issue to be determined
- international law on the subject matter under analysis
- academic opinion on the issue to be determined
- laws and practices in foreign jurisdictions
- the definitions of complex legal terms or concepts
- the tools of interpretation
- any other aid that will assist the Court in coming to its conclusion

This list is not exhaustive. There may be other considerations that a Court may take into account. By referring to these sources of law and aids of interpretation, the Court is in a better position to arrive at a finding that is substantiated in law and practice.

Many students try to find the reasoning of the Court in a single sentence or paragraph. This approach is unrealistic and will not contribute to your development as a law student. Consider a simple example: you are a practising attorney. A client approaches you with a problem. In the real world, we assume that the client has no, or very limited, legal knowledge and that is why he/she has come to you for legal assistance. The client is not going to tell you that he/she has a problem which relates to contract or delict or criminal law. The client is simply going to tell you a story, whether this story is about someone hitting him/her with a brick, a friend failing to pay a debt, or an accident he/she was involved in. You will then be required to classify the problem, identify the law applicable to the problem and then advise the client on the best possible step/s to take.

Similarly, in a Court judgment, you will rarely find a heading which reads “**reasoning of the Court**”. You will have to study the **ENTIRE JUDGMENT** in order to arrive at the reasoning of the Court. Although some cases (eg the *Premier of the Province of the Western Cape* case) do have headings, you will have to read **ALL** the paragraphs that fall under a particular heading in order to understand the analysis that takes place.

In this case, you must summarise the reasoning of the Court in respect of each issue/subissue. Once you have done this, compare your answer with the summary that appears below.

The Court gave the following reasons for its findings:

- (1) Section 41(2) provides that Parliament can enact laws to facilitate the process of cooperative government. The creation of the post of Director-General to attend to the efficient management and administration of the Premier’s office was consistent with this section. In addition, the National Executive did not usurp the power of the Premier, who still exercised control over the functions and the appointment of the Director-General.
- (2) The new scheme did not restrict the power of the Premier to establish or abolish departments of government. All that the new scheme required was that the Premier confirm with the President the constitutionality/legality of any proposed restructuring within the public service of the province. This encouraged a system of cooperation between the various spheres without any violation of section 41(1)(g).
- (3) The Western Cape Province was consulted throughout the adoption process and was given sufficient opportunity to raise any objections to the new scheme (which it did).
- (4) The new scheme did not in any way limit the powers and functions of the Premier.
- (5) The new scheme was not enacted in an arbitrary manner nor in a manner inconsistent with the provisions of the Constitution.

STUDENTS WHO DO NOT ATTEMPT THE SUMMARY WILL FIND THAT THEY SIMPLY REGURGITATE WHAT HAS BEEN INSERTED HERE: – IN OTHER WORDS, THEY WILL BECOME PASSIVE LEARNERS.

5 HOW TO ANSWER PROBLEM-/APPLICATION-TYPE QUESTIONS

Problem-type questions are designed to test whether you can apply your theoretical knowledge (ie the legal principles that you have studied) to a practical set of facts. Problem-type questions usually contain a long list of facts which may contain relevant and irrelevant details. In order to answer this kind of question, you should note the following:

- Step 1: Read through the set of facts carefully and extract the most relevant ones. You will find keywords and phrases helpful here!
- Step 2: Once you have summarised the most important facts, identify the core issue/s that has/have to be analysed.
- Step 3: After you have identified the key issue/s for discussion, identify the area/s of the law that is/are applicable and that is/are most specific to the case.
- Step 4: State what the law says. This could involve setting out the **general principles of law** applicable to the area of law under discussion. It could also involve stating any exceptions to the **general principles of law, and referring to Court cases, academic opinions or any other relevant material.**
- Step 5: Finally, you should apply the law to the hypothetical set of facts and draw your own conclusions. In this part of the analysis process, you could, in your evaluation of the legal position, make comparisons, identify similarities and make distinctions.

6 REVISION TECHNIQUES

There are many methods which you could use to make your notes and revise. You could, for example, summarise the most important points under each heading of the study guide by using different colour pens for different issues or use abbreviations for words that appear often in the tutorial matter. Alternatively, you could select keywords and other words linked to the keywords by drawing a diagram, using arrows or lines. You can be as **creative** as you want to be!

Another technique which you may find useful is **MIND MAPPING** or **CONCEPT MAPS**. In this method, you do not summarise or revise your notes in text form, that is, you do not write short sentences of the main ideas in paragraph form. Instead, you use circles in which you “capture”

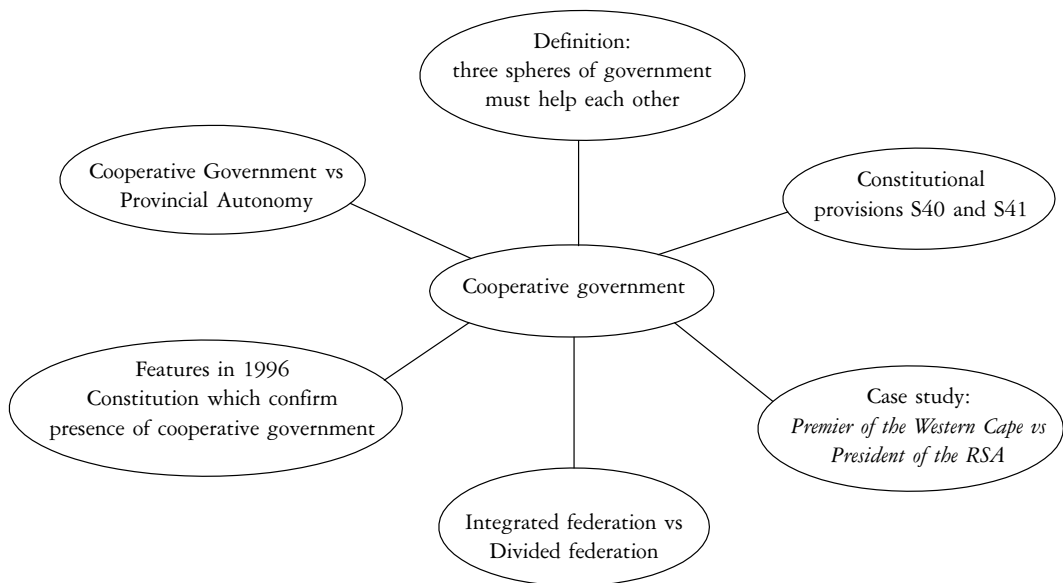
the salient points of the area of law you are studying. You can draw a large circle which has the main idea or legal principle, with smaller circles that contain the subsidiary principles or concepts.

ACTIVITY 3

Study the study unit on cooperative government in the study guide. Now draw a mind map or concept map which condenses the material in a form that makes it easier to learn and to understand the principles of cooperative government.

Compare your mind map or concept map with the one that we have drawn to show you how you can use this technique to make notes and revise.

MIND MAP FOR STUDYING THE PRINCIPLES OF COOPERATIVE GOVERNMENT



Note: You can create links to each of the subthemes and then summarise your notes further.

7 SELF-ASSESSMENT QUESTIONS

- (1) Define the key concepts that you have identified in this study unit.
- (2) Briefly list the skills that you are required to develop as a law student.
- (3) Do you agree that time management is vitally important for success in one's studies?
- (4) Briefly discuss the key components that would improve your reading and writing skills and thus help to make you a good student.
- (5) After studying the notes on how to summarise a prescribed case, prepare a summary of the *Liquor Bill* case, dealing with the relationship between Parliament and the provincial legislatures relating to Schedule 4 and 5 matters.

- (6) Briefly list the key components that make up a case summary.
- (7) List the five steps involved in the answering of problem-type questions.
- (8) Consider the extract below and draw a mind map which highlights the most salient points for revision purposes.

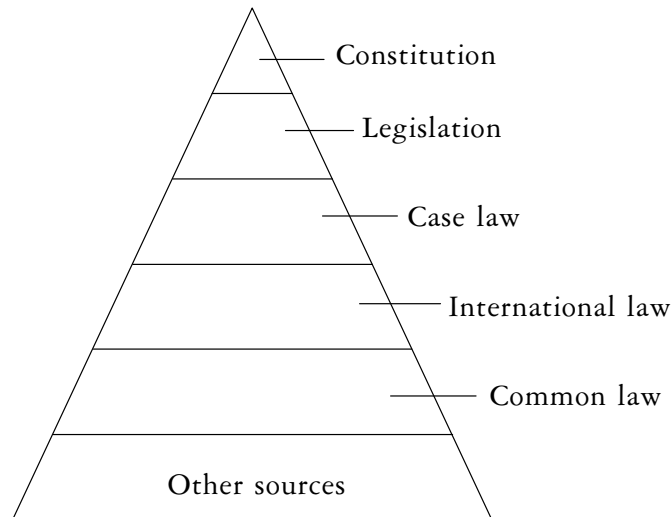
The Constitution of the Republic of South Africa was the product of a long process of struggle, multiparty political negotiations and democratic deliberations in which politicians, lawyers, representatives of civil society and the people all played a major role. Prior to 1994, South African constitutional law was characterised, in the words of Etienne Mureinik, by a “culture of authority”. What Parliament commanded was law, and there was little scope for individuals or groups to challenge government action. The people themselves could not participate in any critical enquiry about the society they wanted to live in, and Parliament adopted any law, no matter how discriminatory the effect. By the mid-1980s it had become clear that the South African legal system and constitutional order was suffering a severe legitimacy crisis. Anarchy reigned in the townships and threatened to spill over into white areas. Against this background, and on 2 February 1990, FW de Klerk announced the unbanning of the liberation movements and the release of Nelson Mandela. During the next few years, the various political parties and movements started the negotiation process and produced the 1993 Constitution. The negotiations centred on what had to be included in a new constitution and on the way in which the new Constitution would have to be adopted in order to calm the fears expressed by minority parties that their interests would not be taken into account. (There was also the fact that the delegates to the multiparty negotiations did not enjoy a mandate from the electorate.) A compromise was subsequently reached which contained built-in safeguards. This compromise entailed a two-stage transition: the first stage involved the adoption of an interim Constitution which provided for the election of a Constitutional Assembly which would adopt the final Constitution. It also contained a set of guidelines (the Constitutional Principles [CPs]) which the parties at Kempton Park had agreed upon as the principles that would form the solid basis for a future Constitution. These principles were referred to as a solemn pact. This reference to a solemn pact meant that the parties regarded themselves as morally and legally bound to adhere to these principles when the final Constitution was drawn up. The Constitutional Assembly would have to certify that the text complied with the Constitutional Principles. The second stage involved the holding of elections in 1994 for South Africa’s first fully representative Parliament (which doubled up as a Constitutional Assembly). The

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Constitutional Assembly only just managed to adopt a new constitutional text within the two years as prescribed by the interim Constitution. The Constitutional Assembly submitted the first draft to the Constitutional Court, which found that the text did not comply fully with the Constitutional Principles. Even though the basic structure and assumptions of the constitutional text were found to be watertight, certain individual provisions did not comply with the standards set by the CPs. The Constitutional Assembly subsequently amended the text, and the Constitutional Court certified the amended text, which came into operation on 4 February 1997.

STUDY UNIT 1

Sources of constitutional law



OVERVIEW

In study unit 2, we will give you a brief description of how the 1996 Constitution came into operation. You need to study that study unit carefully in order to understand how the change in South Africa's dispensation had certain consequences in terms of where one finds the legal principles and norms that constitute the law. You will find that the traditional sources and the hierarchy in which they were referred to have both undergone certain changes.

In this study unit, you will learn more about the new sources of law and the effect that the new Constitution has had on the old sources of law. You will also learn a little about how to find these sources.

UNIT OUTCOMES

After you have studied the material in this study unit, you should be able to do the following:

- explain what you understand by the phrase “sources of law”
- classify and examine the sources of constitutional law
- apply these sources to a concrete situation
- know where to begin searching for the various sources of constitutional law

PRESCRIBED STUDY MATERIAL

None

1.1 MEANING OF THE PHRASE “SOURCES OF LAW”

A general or basic definition of this phrase is as follows: “sources of law” refers to the places where you can find the legal rules, principles and values that govern a particular branch of the law. For this module, we are concerned with identifying the places where you would find the rules, principles and values that govern constitutional law.

ACTIVITY 4

In the introductory study unit, we gave you some idea of what constitutional law is all about. Can you make a list of the places where you would find the sources of constitutional law? Once you have done this, compare your list with the list included in the discussion that follows.

1.2 THE SOURCES OF CONSTITUTIONAL LAW

1.2.1 The Constitution

The term “constitution” has many meanings. On the one hand, it may refer to the entire body of rules (both written and unwritten) which govern the exercise of state authority in a particular state, as well as the relationship between the citizens of the state and the organs of state. You will learn more about this relationship in study unit 3 when we look more closely at the constitutional law relationship. On the other hand, “constitution” may refer to a written document which contains some, or most, of the constitutional rules. The 1996 Constitution is an example of a written document which contains most of the constitutional rules regulating the relationship between state organs *inter se* and state organs and individuals. The 1996 Constitution is the supreme law of the land, as evidenced by section 2 of the Constitution. The implications of this section for constitutional law are as follows:

- First, the Constitution sets the standard in terms of which the bearers of state authority are required to exercise state authority.
- Secondly, the Constitution prescribes the limits that are imposed on the exercise of state authority. If you study section 2 of the Constitution, you will find that any law or conduct which is inconsistent with the Constitution will be declared invalid.
- Thirdly, in some instances, the Constitution also prescribes the consequences/penalties that may arise in the event of state authority being improperly exercised.

1.2.2 Legislation or statute

From the preceding discussion you will have deduced that the Constitution is the most important source of constitutional law. However, it is not the only source of constitutional law. Legislation constitutes the second source in the hierarchy of binding sources of law. By “binding source” we mean an authoritative source of law. You need to understand that a constitutional document can never contain all the rules, principles and values that are needed to deal with the interaction of state authorities and individuals. A constitution is normally couched in general language and sets out a broad framework for the governance of the country. It then expressly leaves it to the legislature (Parliament at the highest level) to add the flesh to the basic framework. The legislature may comply with its duty by passing either original or subordinate legislation (which you will encounter in the study unit dealing with legislative power). The rationale for this practice is explained by Du Plessis and Corder (1994) as follows:

Because its provisions cannot be repealed or amended it [a constitution] must be capable of growth and development over a period of time in order to meet new technological, social, political, and economic realities often unimagined by its framers.

Some of the most important national laws include the South African Citizenship Act 88 of 1995, the Electoral Act 73 of 1998 and the Local Government: Municipal Structures Act 117 of 1998.

ACTIVITY 5

Read the following passage:

You are a constitutional law “fundi” at Skelms & Associates. You have been approached by Depp who tells you that he has been reading the 1996 Constitution and has come across section 33(2) which says that national legislation must be enacted to give effect to this provision. He says that he does not know what this means.

Now answer the following question:

Depp would like to know the effect of this provision and whether there are similar provisions in other parts of the Constitution.

To answer this question, you have to do the following:

Skim through the Constitution and see whether you can find ten places in which Parliament is expressly authorised to adopt legislation to give effect to a constitutional provision.

Do some research to find out whether Parliament has, in fact, complied with its constitutional duty to pass legislation in order to give effect to a constitutional provision.

FEEDBACK

An example of the task would be section 3(3) of the Constitution which provides that national legislation (Parliament) must provide for the acquisition, loss and restoration of citizenship. In order to give effect to this constitutional provision, Parliament enacted the South African Citizenship Act 88 of 1995. Another example would be section 184(4) of the Constitution and the Human Rights Commission Act 54 of 1994, which gives effect to this constitutional provision. Now see whether you can find the rest.

1.2.3 Common law

The common law is the unwritten law of South Africa, in the sense that the common law is not contained in written legislation. Since the operation of the 1996 Constitution, the common law has ceased to be an important source of South African constitutional law. However, we should not forget that the English common law did play an important role in the development of South African constitutional law, even if it was under the Westminster system of government. The 1993 Constitution, and then the 1996 Constitution, made a decisive break with the Westminster system of government, particularly in that they substituted constitutional supremacy for parliamentary sovereignty. This does not mean that the common law ceased to exist. Instead, in terms of section 39(2) of the Constitution, the Courts are required to develop the common law to bring it in line with constitutional precepts.

1.2.4 Customary law

Customary law is that system of law which is generally derived from custom. It therefore refers to long-established practices that have acquired the force of law by common adoption acquiescence.

The 1996 Constitution recognises customary law as part of our legal system, and thus as a source of our law. This recognition is clear from a number of sections in the Constitution. These include section 39(2) which provides that our Courts must develop customary law in accordance with the spirit, purport and objects of the Constitution. In terms of section 211(2) of the Constitution, traditional authorities that observe customary law may function subject to customs which include amendments to, or the repeal of, those customs. This recognition of customary law has been

supported by various legislative developments. These include the Recognition of Customary Marriages Act 120 of 1998, as amended by the Judicial Matters Second Amendment Act 42 of 2001, which recognises customary marriages; the Traditional Leadership and Governance Framework Act 41 of 2003, which recognises the role and institution of traditional leadership in the administration of justice; and the pending Traditional Courts Bill [B 15-2008] published in GG 30902 of 2008-03-27, which provides for the structure and functioning of traditional Courts.

Furthermore, our Courts have, on numerous occasions, confirmed the importance of customary law in our legal system. Examples of case law in this regard include *Bhe v the Magistrate, Khayelitsha*; *Shibi v Sithole Case CCT69/03*; *South African Human Rights Commission v President of the Republic of South Africa* [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) para 43; *Alexkor Ltd v Richtersveld Community* 2003 (12) BCLR 1301 (CC) para 51; *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) para 44; *Mabuza v Mbatsha* 2003 (4) SA 218 (C); 2003 (7) BCLR 743 (C) para 32; *Mthembu v Letsela* 2000 (3) SA 867 (SCA); [2000] 3 All SA 219.

By recognising customary law, the Constitution has put customary law on a par with the common law. For instance, in *Richtersveld* it was indicated that:

While in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common law, but to the Constitution. The Courts are obliged by section 211(3) of the Constitution to apply customary law when it is applicable, subject to the Constitution and any legislation that deals with customary law. In doing so the Courts must have regard to the spirit, purport and objects of the Bill of Rights [footnotes omitted].

It is however important to note that “due to South Africa’s history of colonialism and apartheid, its multi-cultural nature, and the dynamic nature of customary law, it is difficult to establish pure customary or indigenous law”. In his dissenting judgment in *Bhe*, Ngcobo J (as he then was) pointed that:

It is now generally accepted that there are three forms of indigenous law: (a) that practised in the community; (b) that found in statutes, case law or textbooks on indigenous law (official); and (c) academic law that is used for teaching purposes. All of them differ. This makes it difficult to identify the true indigenous law. The evolving nature of indigenous law only compounds the difficulty of identifying indigenous law.

Like any other law in modern South Africa, customary law is subject to the Constitution. Courts are mandated to apply customary law subject to the Constitution or any legislation that deals specifically with customary law. Furthermore, the development of customary law is a constitutional mandate of any Court, tribunal or forum. This means customary law may be developed not only by formal Courts of law but also by other adjudicative forums or tribunals such as traditional Courts, which are the custodians of this system of law. The development of customary law should be in accordance with the spirit, purport and objects of the Constitution. The Constitution has as one of its objects, the achievement of equality [footnotes omitted].

1.2.5 Case law (*stare decisis*)

In the preface to this study guide, we told you that case law forms an integral part of your studies. Case law is important because it illustrates the practical application of the constitutional principles, rules and values that you may encounter in your studies and tells you how a particular case alters or contributes to the development of the law. In study unit 10, you will learn more about the structure/ hierarchy, the jurisdiction, et cetera, of the Courts that have been created by the 1996 Constitution.

In the past, case law was an extremely limited source of South African constitutional law. This position has changed drastically. The entrenched Constitution, which sets out the institutions that bear state authority at the highest levels and which contains a justiciable Bill of Rights, constantly leads to numerous constitutional judgments and has already caused a dramatic increase in case law (as a source of constitutional law).

1.2.6 International law

Section 39(1) of the Constitution makes it compulsory for a Court to consider international law in the determination of constitutional issues. Recourse to international law, which has a wealth of conventions and practices which are designed to protect and promote human rights, is indispensable to the development of South African constitutional jurisprudence, particularly in the analysis of the Bill of Rights.

1.2.7 Other sources of constitutional law

Whilst the Constitution, legislation, the common law and case law constitute your primary sources of law, there are a variety of other sources that help us to interpret constitutional norms and to give us guidance on how to apply them in concrete settings. These additional sources are merely persuasive in nature, which means that anyone referring to them is

not necessarily obliged to follow their interpretation. However, they often influence legislative and judicial decisionmaking and are, therefore, important. We shall mention just a few examples here:

- *Academic writings*, that is, writings in books and journals. The Courts, in particular the Constitutional Court, often refer to academic opinions expressed in books and in articles in journals.
- *Policy documents*. Current government policies expressed in green papers, white papers and other documents issued by the organs of state help to shape the legislative agenda; these are often translated into legal norms. The green paper is a consultative document, since all key players are invited to comment on a proposed form of action. A white paper is the final document and is, in effect, a blueprint of the government's policy. An example was the Growth, Equity and Redistribution (GEAR) policy, which embodies the government's current macroeconomic policy.
- *Reports by "state institutions supporting constitutional democracy"*. These include reports by the Public Protector, the Auditor-General, the Human Rights Commission, parliamentary committees, and so on. These institutions report on the conduct of ministers and other public officials and make recommendations to the relevant legislature on how to rectify any abuse of power.
- *Foreign law*. Section 39(1)(c) of the Constitution provides that the Courts may consider foreign law, that is, especially case law from other countries such as Canada, Germany, the United States of America (USA), India, et cetera. This is a discretionary power, which means that the Courts may choose to consider the laws of other countries where there is insufficient guidance available from South African sources.

1.3 WHERE TO FIND THESE SOURCES

If you are looking for **legislation**, you can consult any of the following:

- *Government Gazettes* published and printed by the Government Printer
- a loose-leaf legislation book, as well as an annual collection of statutes, published by Butterworths
- the websites at <http://www.polity.org.za/legislation> and <http://www.acts.co.za> if you have access to the internet

If you are looking for **case law**, there are a number of places where you can find cases relating to constitutional matters:

- The most comprehensive compilation of South African case law is to be found in the *South African Law Reports*, which are published monthly by Juta. The *South African Law Reports* contain cases dealing with both constitutional and nonconstitutional matters.
- Constitutional cases are also published separately in the *Butterworths Constitutional Law Reports (BCLR)*.
- If you have access to the internet, you can also access decisions of the

Constitutional Court and the Supreme Court of Appeal on the web page of the Law School of the University of the Witwatersrand at <http://www.law.wits.ac.za>

There are numerous textbooks on South African constitutional law. We mention only a few:

- Chaskalson *et al Constitutional Law of South Africa* Juta (1996)
- Devenish *A Commentary on the South African Constitution* Butterworths (1998)
- Rautenbach & Malherbe *Constitutional Law* Butterworths (2009)

Articles dealing with constitutional law topics are published in a number of journals. There are two South African journals which specialise in constitutional and human rights issues:

- *South African Public Law (SA PR/PL)*, which is published by the VerLoren van Themaat Centre, Unisa
- *South African Journal on Human Rights (SAJHR)*, which is published by Juta

You can find policy documents and reports of government institutions on the following website <http://www.polity.org.za>

Note:

You do not have to consult any of the above sources for this course everything you need to know is contained in the Constitution, the study guide and the *Revised Reader* (hereafter “the *Reader*”).

ACTIVITY 6

Study the *South African Rugby Football Union* case, which appears in your *Reader*. Skim through the judgment and find the sources of law that the Court referred to in determining the number of issues placed before it.

1.4 CONCLUSION

From the above discussion you will have realised that the hierarchy in which the sources of law were referred to, changed. This flows from the fact that constitutional supremacy has replaced parliamentary sovereignty. You will learn more about these concepts in study units 3 and 4 of this study guide.

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STUDY UNIT 2

Birth of the Constitution of the Republic of South Africa, 1996

OVERVIEW

The Constitution of the Republic of South Africa 1996 was the product of a long process of popular struggle, multiparty political negotiations and democratic deliberation in which politicians, lawyers, representatives of civil society and ordinary people all played a major role.

In the next few pages, we shall give you a brief overview of the constitutional process which culminated in the adoption of the 1996 Constitution. (We will not attempt to give you a general historical overview of South African constitutional history: – if you are interested in South Africa’s constitutional history since the time of Jan van Riebeeck, you may consult Rautenbach & Malherbe, ch 2.)

UNIT OUTCOMES

After you have studied the material in this study unit, you should be able to do the following:

- discuss the history of the adoption of the Constitution of the Republic of South Africa of 1996
 - discuss the first *Certification* judgment
 - explain in which respects the 1993 and 1996 Constitutions represent a radical break with the previous constitutional dispensation
-

PRESCRIBED STUDY MATERIAL

The material in this study unit will not form part of the examination paper. However, to better understand and appreciate the South African Constitution, it is imperative that you know something of the history of the Constitution.

2.1 THE POSITION PRIOR TO 1994

2.1.1 Parliamentary sovereignty

- Prior to 1994, South African constitutional law was characterised, in the words of Etienne Mureinik, by a “**culture of authority**” (see Mureinik at 31).

- What Parliament commanded was law, and there was little scope for individuals or groups to challenge government action.
- The people of South Africa were expected merely to obey government dictates and not to participate in a critical enquiry about the society they would have liked to be part of, and about the best way of creating such a society.

Parliament was sovereign, which meant that it could adopt any law, no matter how unfair or discriminatory, and the validity of such law could not be challenged in Court. This position was aggravated by the entrenchment of white privilege and the exclusion of black people from any meaningful participation in the running of the country.

- The human rights of the majority of the population were systematically trampled upon by draconian laws which denied people their freedom, equality and human dignity.

2.1.2 The events that led to the negotiations

- By the mid-1980s, it had become abundantly clear that the South African legal and constitutional order was suffering a severe crisis of legitimacy.
- The apartheid legal order rested almost exclusively upon coercion and was not perceived by the majority of people as right and just.
- Anarchy reigned in the townships and threatened to spill over into “white” areas.
- Internationally, South Africa was becoming increasingly isolated.
- It was against this background that FW de Klerk announced the unbanning of the “liberation movements” and the release of Nelson Mandela in a historic speech made on 2 February 1990.
- During the next few years, the various political parties and movements scrambled for strategic advantage as they started the process of multiparty political negotiations, negotiations which eventually produced the 1993 Constitution.

2.1.3 The two-stage process

- The negotiations centred not only on what had to be included in a new Constitution, but also on the way in which a new Constitution was to be adopted.
- A process had to be devised which would reconcile two contradictory positions.
- On the one hand, the former liberation movements insisted that a new Constitution would enjoy legitimacy only if it were to be adopted by a democratically elected body.
- The delegates at the multiparty negotiations did not have a mandate from the people and could therefore not adopt a Constitution.

- Other groups (including the National Party government) were afraid that a Constitution adopted by democratically elected representatives would not adequately address the fears and anxieties of minority groups and might result in a tyranny of the majority.
- A compromise was subsequently reached which satisfied both the wish for democratic legitimacy and the need for an orderly transition which would contain built-in safeguards to appease the fears of minorities.
- This compromise entailed a two-stage transition.
- During the **first stage**, an interim Constitution was adopted at the multiparty negotiating process.
- The interim Constitution provided, *inter alia*, for the election of a Constitutional Assembly, which would adopt a final Constitution.
- It also contained a set of guidelines (the **Constitutional Principles**) which the final Constitution had to comply with.
- The **second stage** of the transition commenced on 27 April 1994 with elections for South Africa's first fully representative Parliament, which doubled up as a Constitutional Assembly.
- The constitutional text was adopted by the Constitutional Assembly on 8 May 1996, but had to be amended when the Constitutional Court found that some of its provisions did not comply with the Constitutional Principles.
- The amended text was certified by the Constitutional Court on 4 December 1996 and came into operation on 4 February 1997.

2.2 THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA 200 OF 1993 (THE "INTERIM" CONSTITUTION)

- The 1993 Constitution initiated a constitutional revolution in South Africa.
- It was the first Constitution in the history of South Africa which was supreme and which contained a written Bill of Rights. (Supremacy is discussed in study unit 3.)
- It also established a democratic dispensation which is totally representative of the country's population.
- The Constitution, in the words of Mureinik (at 32), replaced the old culture of authority with a new culture of justification: – "a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command".
- The 1993 Constitution was, however, intended from the outset to be no more than an interim measure.
- In the words of the postscript to the Constitution (titled "National unity and reconciliation"):

This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and

injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex

- As an interim measure, the Constitution provided, *inter alia*, for a government of national unity, which entitled minority parties to representation at Cabinet level. Similar arrangements existed at provincial level.
- The postscript also articulated the pursuit of national unity and reconciliation and instructed Parliament to adopt Acts in terms of which “amnesty shall be granted in respect of acts, omissions and offences associated with political objectives committed in the course of the conflicts of the past”.
- Parliament obliged by adopting the Promotion of National Unity and Reconciliation Act 34 of 1995, which instituted and spelt out the powers of the Truth and Reconciliation Commission.
- The purpose of the interim Constitution is worded as follows in the **preamble**:

In humble submission to Almighty God,
We, the people of South Africa declare that

WHEREAS there is a need to create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms;

AND WHEREAS in order to secure the achievement of this goal, elected representatives of all the people of South Africa should be mandated to adopt a new Constitution in accordance with a solemn pact recorded as Constitutional Principles;

AND WHEREAS it is necessary for such purposes that provision should be made for the promotion of national unity and the restructuring and continued governance of South Africa while an elected Constitutional Assembly draws up a final Constitution; ...

2.3 THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA OF 1996

The interim Constitution also spelt out the procedure to be followed in the adoption of a new Constitution.

The new Constitution had to be adopted by the Constitutional Assembly (consisting of the National Assembly and the Senate sitting jointly) with a two-thirds majority of its members.

Before the new constitutional text could come into operation, the Constitutional Court also had to certify that it complied with the Constitutional Principles contained in Schedule 4 of the interim Constitution.

2.3.1 The Constitutional Principles

- The **Constitutional Principles** are the principles to which the parties in Kempton Park (ie those who negotiated the transition to a new constitutional dispensation) agreed on in order to form a solid basis for a future Constitution.
- These principles are contained and agreed to in what is referred to as a “solemn pact”.
- This reference to a “solemn pact” indicates that the parties regarded themselves (morally and legally) bound to adhere to these principles when the final Constitution was drawn up.
- The 1993 Constitution vested the “solemn pact” with **legal status**.
- In terms of section 71(1)(a), the new constitutional text had to comply with the Constitutional Principles.
- Before the new constitutional text enjoyed legal force, the Constitutional Court also had to certify that the text complied with these principles [s 71(2)].
- The Constitutional Assembly only just managed to adopt a new constitutional text within two years, as prescribed by the interim Constitution.
- The constitutional process almost foundered on a few issues (eg the property clause, the right of employers to lock out workers, and the right to an education in one’s mother tongue), but, fortunately, compromises were eventually reached.
- The constitutional text was adopted on **8 May 1996**, after which it was submitted to the Constitutional Court for **certification**.
- The Court found that the text did not comply with the Constitutional Principles.
- Even though the basic structure and assumptions of the constitutional text were found to be watertight, certain individual provisions did not comply with the standards set in the Constitutional Principles [*Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (10) BCLR 1253 (CC); 1996 (4) SA 744 (CC)].
- The Constitutional Assembly subsequently **amended** the text, and the Constitutional Court certified the amended text as being in compliance with the Constitutional Principles [*Certification of the Amended Text of the Constitution of the Republic of South Africa*, 1996 1997 (1) BCLR 1 (CC)].
- The new Constitution came into operation on 4 February 1997.

2.3.2 Was the role of the Constitutional Principles over after the amended Constitution was certified?

- The question now is whether the Constitutional Principles still had a role to play once the amended constitutional text was certified.
- On the surface, the answer to this question appears to be “No”, since the Constitutional Principles do not form part of the text of the new Constitution.

- It is important to remember, however, that the Constitutional Principles, in addition to the practical framework they supplied to the Constitutional Assembly, also have another function.
- They are more than mere principles with which the Constitution had to comply.
- They reflect the ideals that must guide a new constitutional dispensation.
- The new Constitution will still have to be interpreted in such a way as to give expression to these ideals.
- The Constitutional Court interpreted the provisions of the new constitutional text so as to comply with the Constitutional Principles as far as possible.
- This means that the Courts will, in future, be bound by this interpretation and will always have to keep the Constitutional Principles and certification decisions in mind (*Certification of the Constitution of the Republic of South Africa*, 1996, para 43).

Please note

The Constitution is not an Act of Parliament. The Constitution was made by the Constitutional Assembly (CA), a body separate from Parliament. The CA had its own procedure, chairperson and administration and, unlike Parliament, was not divided into a National Assembly and Senate. That the Constitution is not an Act of Parliament is further attested to by the fact that it had to be certified by the Constitutional Court. It is therefore wrong to refer to the Constitution as Act 108 of 1996 (Van Wyk at 377). The Constitution is the supreme law of the land; it has a far higher status than Acts of Parliament. You will never see us refer to the Constitution as anything else but “the Constitution of 1996”, “the 1996 Constitution” or simply “the Constitution”.

The Citation of Constitutional Laws Act 5 of 2005 (s 1) reads as follows:

No Act number to be associated with Constitution of the Republic of South Africa, 1996

- (1) From the date of commencement of this Act, no Act number is to be associated with the “Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996)”.
- (2) Any reference to the “Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996)”, contained in any law in force immediately prior to the commencement of this Act, must be construed as a reference to “the Constitution of the Republic of South Africa 1996”.

2.4 THE IMPORTANCE OF THE 1993 CONSTITUTION

The 1996 Constitution repealed the 1993 Constitution in its entirety (s 242, read with Schedule 7).

The focus of this course is therefore on the new, not the interim, Constitution.

You need not obtain a copy of the interim Constitution, and you are not required to know any of its provisions. At the same time, however, you will often be referred to the interim Constitution in the tutorial material.

The reason for this is quite obvious: the new Constitution was, in many respects, influenced by provisions in the interim Constitution, and by the way in which the interim Constitution was interpreted by the Courts.

It is, therefore, often impossible to come to an adequate understanding of the one without consulting the other. We mention only a few examples of the way in which the 1993 Constitution may still be used as an **interpretative tool**:

- We have already referred to the continued relevance of the Constitutional Principles.
- Certain provisions of the 1993 Constitution have been included in the new Constitution's transitional arrangements, and continue to exist despite the repeal of the interim Constitution.
- Certain provisions in the new Constitution were directly influenced by shortcomings in, or problems with, the interpretation of provisions of the 1993 Constitution.

In this course, you will often be referred to Court cases which were decided in terms of the 1993 Constitution. In order to establish to what extent these cases are still applicable, it is necessary to compare the relevant provisions of the 1993 Constitution with the corresponding provisions in the 1996 Constitution.

2.5 THE FIRST CERTIFICATION JUDGMENT

We have already referred you to the first *Certification* judgment. In this section, we would like to give you some idea of what you need to look out for when reading the judgment.

There are a number of reasons why we believe that is important for students of constitutional law to read the *Certification* judgment (or at least parts of it):

- Reading it should give you a better idea of the social, historical and legal context from which the 1996 Constitution originated.

- In this regard, study paragraphs 5-21 of the judgment.
- As the Court explains in paragraph 1, the certification of a Constitution is an unprecedented undertaking.
- It is therefore important to understand
 - (a) how the Court went about discharging its function, and
 - (b) how it viewed its own role in the Constitution-making process. In this regard, study paragraphs 22-31 and 32-47.
- Paragraph 45 contains a very useful summary of the Constitutional Principles. Read it through a few times: – it will give you a sense of some of the Constitution’s most salient features.
- We have given you only a very small part of the Court’s decision on the question whether individual provisions of the text complied with the Constitutional Principles.
- Paragraphs 149 to 150 deal with the question whether, if the Constitution contains provisions designed to exempt certain statutes from constitutional scrutiny, this is inconsistent with the Constitutional Principles.
- Paragraphs 151 to 159 deal with the question whether the provisions relating to constitutional amendment complied with the Constitutional Principles. You have to study these paragraphs.

The Constitutional Court found that the provisions of the constitutional text regarding constitutional amendment did not comply with the Constitutional Principles. The Court found that section 74 of the new text provided for “special majorities”, but not for “special procedures”. It therefore did not comply with Constitutional Principle XV.

It also found that, since the Bill of Rights was not given more stringent protection than the rest of the Constitution, Constitutional Principle II was not complied with. The amended section 74 in the final text provides for a range of additional safeguards.

The following “special procedures” were added:

- (1) a Bill amending the Constitution may not include any provisions other than constitutional amendments [s 74(4)]
- (2) periods of notice are provided for in section 74(5)
- (3) provision is made for the consideration of written comments received from the public and provincial legislatures [s 74(6)], et cetera

An amendment to the Bill of Rights now also requires a vote of at least six provinces in the National Council of Provinces, in addition to the vote of two-thirds of the members of the National Assembly [s 74(2)].

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(Please note: the following sources were consulted, but do **NOT** constitute compulsory tutorial matter.)

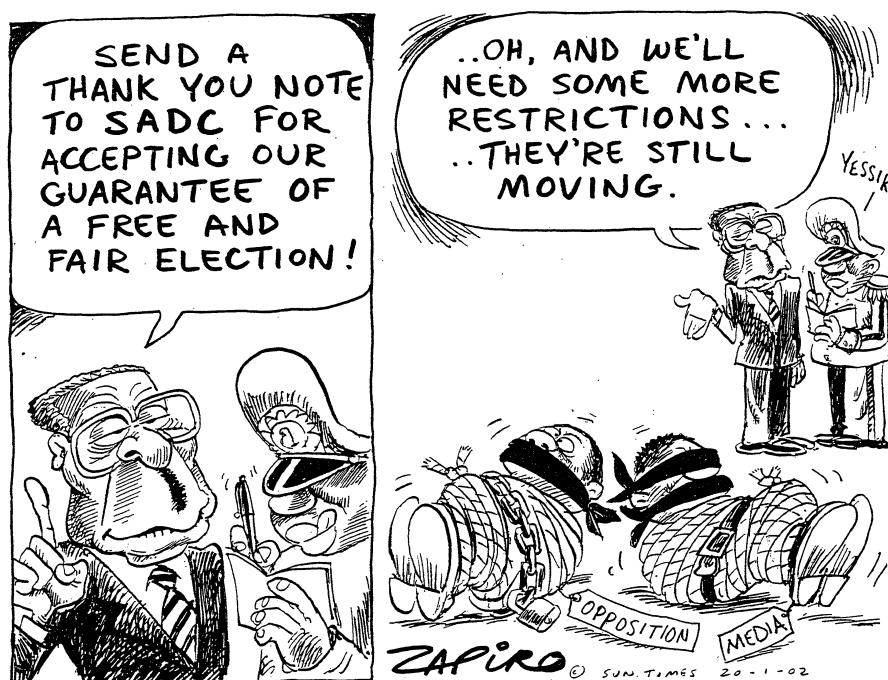
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STUDY UNIT 3

Concepts of constitutional law



OVERVIEW

In the previous study unit, we dealt with the history of the new South African constitutional order. In the early 1990s, South Africa radically broke with the past, a break which led to the adoption of the 1996 Constitution.

ACTIVITY 7

Read the following passage:

Vusi is a Grade 4 pupil who was born in 1995. He has, therefore, no first-hand knowledge of the history of South African constitutional law.

Now answer the following question:

Explain our constitutional history to Vusi by referring briefly to the main points of the historical and political context set out by the Constitutional Court in *Ex Parte Chairperson of the Constitutional Assembly: In re the Certification of the Constitution of the Republic of South Africa 1996* (the first *Certification* judgment).

To answer this question (1), you have to do the following:

Study the previous study unit. Read paragraphs 5 to 31 of the first *Certification* judgment.

In this study unit, and in the following study units, we will be looking at a few extremely important characteristics of the current constitutional order (the 1996 Constitution).

It is of the utmost importance that you make sure that you thoroughly understand the definitions and concepts discussed in this study unit before you continue with the next study units! You will regularly come across these definitions and concepts later on in this study guide. You will find it extremely difficult to master the content of this course unless you know and understand these basic definitions and concepts.

UNIT OUTCOMES

After you have studied the material in this study unit, you should be able to do the following:

- explain what is meant by “constitutional law”
 - explain why constitutional law (and administrative law, to which it is related) is said to be part of public law
 - explain why the distinction between public and private law has become blurred in the modern state
 - explain the difference between flexible and inflexible constitutions
 - explain the difference between supreme constitutions and constitutions which are not supreme
 - explain the difference between written and unwritten constitutions
 - discuss whether South Africa has an autochthonous (indigenous) constitution
 - explain what is meant by “government”, “state” and “sovereignty”
 - define the following concepts:
 - constitutional law
 - flexible constitution
 - inflexible constitution
 - supreme constitution
 - constitution which is not supreme
 - written constitution
 - unwritten constitution
 - autochthonous constitution
 - government
 - state
 - sovereignty
-

PRESCRIBED STUDY MATERIAL

Sections 1, 2, 8(1), 74 and 172(1)(a) of the Constitution

Ex Parte Chairperson of the Constitutional Assembly: In re the Certification of the Constitution of the Republic of South Africa 1996 (first Certification judgment)

Relevant sections of the Constitution

	Section number	Title of section	Content
You must know this section	Section 1	Republic of South Africa	<p>The Republic of South Africa is one, sovereign, democratic state founded on the following values:</p> <ul style="list-style-type: none"> (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.
You must know this section	Section 2	Supremacy of Constitution	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.
You must know this section	Section 7	Rights	<ul style="list-style-type: none"> (1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom. (2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights. (3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.
You must know this section	Section 8(1)	Application	<ul style="list-style-type: none"> (1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.

Note that you only need to know this section in the context of the amendment of the Constitution and for purposes of flexibility/inflexibility. The whole section will be dealt with in study unit 8

Section number	Title of the section	Content
Section 74	Bills amending the Constitution	<p>(1) Section 1 and this sub-section may be amended by a Bill passed by: –</p> <ul style="list-style-type: none"> (a) the National Assembly, with a supporting vote of at least 75 per cent of its members; and (b) the National Council of Provinces, with a supporting vote of at least six provinces. <p>(2) Chapter 2 may be amended by a Bill passed by: –</p> <ul style="list-style-type: none"> (a) the National Assembly, with a supporting vote of at least two-thirds of its members; and (b) the National Council of Provinces, with a supporting vote of at least six provinces. <p>(3) Any other provision of the Constitution may be amended by a Bill passed: –</p> <ul style="list-style-type: none"> (a) by the National Assembly, with a supporting vote of at least two-thirds of its members; and (b) also by the National Council of Provinces, with a supporting vote of at least six provinces, if the amendment <ul style="list-style-type: none"> (i) relates to a matter that affects the Council; (ii) alters provincial boundaries, powers, functions or institutions; or (iii) amends a provision that deals specifically with a provincial matter. <p>(4) A bill amending the Constitution may not include provisions other than constitutional amendments and matters connected with the amendments.</p> <p>(5) At least 30 days before a bill amending the Constitution is introduced in terms of section 73(2), the person or committee intending to introduce the Bill must: –</p> <ul style="list-style-type: none"> (a) publish in the national Government Gazette and, in accordance with the rules and orders of the National Assembly, particulars of the proposed amendment for public comment;

Section number	Title of the section	Content
		<p>(b) submit, in accordance with the rules and orders of the Assembly, those particulars to the provincial legislatures for their views; and</p> <p>(c) submit, in accordance with the rules and orders of the National Council of Provinces, those particulars to the Council for a public debate, if the proposed amendment is not an amendment that is required to be passed by the Council.</p> <p>(6) When a Bill amending the Constitution is introduced, the person or committee introducing the Bill must submit any written comments received from the public and the provincial legislatures</p> <p>(a) to the Speaker for tabling in the National Assembly; and</p> <p>(b) in respect of amendments referred to in subsection (1), (2) or (3)(b), to the Chairperson of the National Council of Provinces for tabling in the Council.</p> <p>(7) A Bill amending the Constitution may not be put to the vote in the National Assembly within 30 days of: –</p> <p>(a) its introduction, if the Assembly is sitting when the Bill is introduced; or</p> <p>(b) its tabling in the Assembly, if the Assembly is in recess when the Bill is introduced.</p> <p>(8) If a Bill referred to in subsection (3)(b), or any part of the Bill, concerns only a specific province or provinces, the National Council of Provinces may not pass the Bill or the relevant part unless it has been approved by the legislature or legislatures of the province or provinces concerned.</p>

You must know
this section

Section number	Title of the section	Content
		(9) A Bill amending the Constitution that has been passed by the National Assembly and, where applicable, by the National Council of Provinces, must be referred to the President for assent.
Section 172(1)(a)	Powers of Courts in constitutional matters	When deciding a constitutional matter within its power, a Court: – (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency.

3.1 CONSTITUTIONAL LAW

3.1.1 Definition

Constitutional law is usually defined as the legal rules and principles relating to the distribution and exercise of state authority. The rules of constitutional law define both the relationships between the organs of state *inter se* (between themselves) and the relationships between the organs of state and individuals.

Let us look more closely at this definition. The first sentence tells us that constitutional law regulates the exercise of state authority. The second sentence reinforces this: we are told that constitutional law regulates the exercise of state authority between organs of state. This means, for example, that constitutional law regulates the relationship between the national legislature and the provincial legislatures. Can both the national legislature and a provincial legislature make laws about public transport? If so, must the provincial legislature adopt the same policy with regard to public transport as the national legislature? Constitutional law similarly regulates the relationship between the Constitutional Court and the national legislature; between Premiers of provinces and the Cabinet; between the National Director of Public Prosecutions and the President of the country; and so forth. Constitutional law also regulates issues such as the appointment and dismissal of the President, the delivery of basic services by municipalities, and the responsibilities of the Electoral Commission.

Suppose, for instance, that the Premier of Gauteng decides to appoint a commission of inquiry into alleged corruption within the province. The rules of constitutional law are supposed to tell us the following:

- Can he/she do it? Or does some other body or official, such as the President of the country, have the sole power to appoint commissions of inquiry?
- How should he/she go about appointing the commission? For example, should he/she first consult with the members of his/her executive council, or anybody else? And may he/she appoint his/her brother, who is also working for the provincial government, to chair the commission?

The second sentence also tells us that constitutional law regulates relationships between organs of the state and private individuals. It therefore seems as if the state is always involved in a constitutional law relationship. Constitutional law, it seems, has nothing to do with the relationship between spouses, or between parties to a contract, since the state is not directly involved in those relationships.

3.1.2 Where does constitutional law fit into the legal system?

Because constitutional law deals with the distribution and exercise of state authority, it is said to be part of public law. Public law is usually distinguished from private law.

Public law is said to regulate relationships between organs of state and between organs of state and individuals. For this reason, public law relationships are often described as relationships of authority and inequality (the individual is always subordinate to the government organ, which is vested with state authority).

An example of a public law relationship is the relationship between the South African Revenue Service (SARS) as a tax collector on the one hand, and individuals or companies on the other. Another typical example is that where an individual is arrested by the state and accused of committing a criminal offence.

Private law, by contrast, is said to govern relationships between people who are on an equal footing. Examples of private law relationships are those where two individuals enter into a contract or a marriage relationship. Admittedly, there are unequal relationships in private law as well (eg between parent and child or guardian and ward), but the authority here is exercised by the parent or guardian and not a state authority.

It is also true that the state sometimes acts in a non-authoritative capacity, that is, in the same way as a private person or company. This occurs when, for instance, the state purchases supplies or hires a lawyer. In such cases, it is said that the relationship between the state and the other contracting party is governed by private law, and not public law. In short, then, public

law regulates relationships where one of the parties is always the state as bearer of state authority. However, the dividing line between public and private law has become largely blurred in recent times. There are a number of reasons for this:

- (1) The modern state has become extremely involved in “private law” relationships

The state is closely involved in the relationship between employer and employee (through extensive labour laws). The state is also closely involved in relationships between landlord and tenant, and husband and wife (through laws arranging the division of property between spouses and laws prohibiting domestic violence). This involvement is sometimes called “the rise of the regulatory state”.

- (2) The Constitution itself states that “private” relationships are often unequal

The Constitution now states that the rights in the Bill of Rights are also applicable to relationships between private parties [s 8(2)]. It also gives Parliament the power to pass Acts that prohibit unfair discrimination by private persons and companies [s 9(4)]. Finally, the Constitution states that our common law (which includes private law relationships) must be interpreted so as to promote the spirit and objects of the Bill of Rights [s 39(2)]. These provisions recognise that the relationships between South Africans are often unequal and in need of transformation. This is sometimes called “transformative constitutionalism” or “the rise of the transformative state” (ie the task of the state is not only to maintain law and order, but also to change or transform the current order).

- (3) Over the past few years, public functions have increasingly been privatised

Public functions that were traditionally performed by state authorities, such as public transport, telecommunication, water purification, road maintenance and crime policing, are increasingly being outsourced and performed by semipublic corporations such as Transnet and Telkom, or are exercised by private companies like ADT Security. This is sometimes described as “the rise of the neoliberal state paradigm”, “the privatisation of the state”, “the corporate capture of the state” or even as “globalisation” (in as far as multinational mining companies, for example, take over the traditional functions of state authorities as they establish self-sufficient villages with their own roads and water infrastructure, hospitals, schools, and security all being provided by the company).

The end result of these developments is that public and private law are so closely connected with each other that both often apply to the same case. It is true that the law courses at university are divided into either private law or public law. This, however, is purely for practical reasons, and not because there exists a clear and absolute division between public and private law.

When studying constitutional law, you should therefore not think of it as an isolated part of the law curriculum. Constitutional law, in fact, applies in the adoption of all legislation — even legislation dealing with “private law” (eg matters such as contracts, wills and the relationship between spouses). (The Constitution prescribes certain procedures for the adoption and amendment of Acts of Parliament and the laws of a provincial legislature.) Moreover, constitutional law can crop up at any time during any legal dispute. This is because all law must conform to the rules, principles and values of the Constitution.

When you study courses in, for example, criminal law and the law of criminal procedure, you will see that considerable changes have been brought about by the Constitution. Accused persons, for example, now have rights such as a right to a fair and speedy trial, the right to remain silent, et cetera.

ACTIVITY 8

Read the following passage:

Sipho, a first-year LLB student, is having a dinner conversation with one of his friends, Mary, a final-year LLB student. Sipho, who has a special interest in public law modules, wants to know from Mary what law modules he should register for and how he should go about making the distinction between private and public law modules.

Now answer the following questions (Think about the other law modules you are currently studying, or which you studied in previous years.)

- (1) Using the traditional distinction, would you describe these modules as dealing predominantly with public law or private law matters?
- (2) Is it entirely satisfactory to classify these modules as belonging to either the one or the other realm of law?
- (3) If not, why not? (Of course, some of the modules, such as Introduction to the Theory of Law, would probably not fit the public law/private law distinction at all.)

To answer this question, you have to do the following:

Look at the relationships that are governed by the relevant module. If these relationships are based on an equal footing, and there is no exercise of state authority, the module can probably be categorised under private law. On the other hand, if the relationships are based on an unequal footing, and there is the exercise of state authority, the module can probably be categorised under public law.

Constitutional law is closely related to administrative law. Administrative

law may be defined as the body of legal rules governing the administration, organisation, powers and functions of administrative authorities such as government departments.

Administrative law is also said to form part of public law, since it regulates the public interest which comes into play in legal relationships of subordination, either between administrative authorities themselves or between an administrative authority and private individuals. [You will learn more about administrative law in the module on Administrative Law (ADL2601).]

Both constitutional and administrative law are thus concerned with the way in which a state is governed and with the distribution and exercise of government power. Administrative law and constitutional law are, therefore, closely related: the two fields cannot really be distinguished from each other on the basis of character and content. However, the distinction is maintained largely for reasons of convenience.

Nevertheless, it may be said that, while constitutional law (in the narrow sense) deals with the interaction of organs of state at the highest level (ie with the powers and procedures of Parliament, the supreme executive and the judiciary), administrative law is concerned with only one branch of the body politic (state system), namely the administration (executive). Administrative law, in fact, regulates the organisation, powers and actions of the state administration.

In other words, the two disciplines have different areas of focus — constitutional law relates mainly to structures and the formulation of initial policy, and administrative law to the day-to-day business of government.

Now that we know what the study of constitutional law entails, and where constitutional law fits into the legal curriculum, it is necessary to take a closer look at the most important source of South African constitutional law, namely the Constitution of the Republic of South Africa, 1996.

3.2 CLASSIFICATION OF CONSTITUTIONS

In this section, we shall look at different types of constitutions. Constitutions are often classified as flexible or inflexible, supreme or not supreme, written or unwritten, and indigenous (autochthonous) or borrowed.

3.2.1 Flexible and inflexible constitutions

The distinction between flexible and inflexible constitutions relates to the difficulty of amending them.

Flexible constitutions require no special procedures or majorities for amendment and can be amended in the same manner as any other legislation.

Inflexible constitutions require special amendment procedures (eg a two-week notice period) and special amendment majorities (eg a two-thirds majority) before they can be amended. An inflexible constitution can therefore not be amended in the same manner as ordinary legislation and seek to entrench the constitution as a whole or some of its provisions against the shifts in ordinary politics. This does not necessarily mean that an inflexible constitution is seldom amended. To amend it, however, the stipulated requirements must be met.

Why, then, do many constitutions require a special amendment procedure? The reason is quite simple: it is felt that a constitution is unlike ordinary legislation and therefore needs to be protected against overhasty amendment. A constitution is often the result of lengthy negotiations between different political parties and other roleplayers, and/or the result of careful deliberation between the people's democratically elected representatives. A constitution is supposed to be the embodiment of the values and principles to which a nation has committed itself, and contains rights and procedures which must protect individuals and minorities against unfair treatment by the government. If a constitution can be amended too easily, the majority party in Parliament will be tempted to abolish (or at least water down) some of these protections if it is politically expedient to do so.

Of course, the fact that a constitution is inflexible normally does not prevent constitutional amendments from being passed. However, it is hoped that, by making it more difficult to amend the constitution, constitutional amendments will at least be preceded by protracted debate.

The South African Constitution 32 of 1961 (the Republican Constitution) was an example of a flexible constitution. Although it contained a few entrenched provisions which required a certain procedure for amendment, it could be amended quite easily. The Constitution 110 of 1983 (the "tricameral" Constitution) was less flexible in that it contained more entrenched clauses, but could still be classified as a flexible constitution.

ACTIVITY 9

In *Ex Parte Chairperson of the Constitutional Assembly: In re the Certification of the Constitution of the Republic of South Africa 1996*, the Constitutional Court had to rule on the flexibility of the Constitution. Identify the basic criteria for an inflexible constitution which the Court applied, and explain the meaning of constitutional entrenchment as understood by the Court.

In order to complete the activity, you have to do the following.

Read paragraphs 151 to 159 of the judgment.

The Constitution of the Republic of South Africa of 1996 is thus an example of an inflexible constitution. Its amendment requires special procedures and special majorities. Most of its provisions can be amended only by a two-thirds majority of the National Assembly. Other provisions are even more firmly entrenched.

In this regard, section 74 of the Constitution provides specifically that:

- (1) Section 1 and this subsection may be amended by a Bill passed by
 - (a) the National Assembly, with a supporting vote of at least 75 per cent of its members; and
 - (b) the National Council of Provinces, with a supporting vote of at least six provinces.

- (2) Chapter 2 may be amended by a Bill passed by
 - (a) the National Assembly, with a supporting vote of at least two-thirds of its members; and
 - (b) the National Council of Provinces, with a supporting vote of at least six provinces.

- (3) Any other provision of the Constitution may be amended by a Bill passed
 - (a) by the National Assembly, with a supporting vote of at least two-thirds of its members; and
 - (b) also by the National Council of Provinces, with a supporting vote of at least six provinces, if the amendment
 - (i) relates to a matter that affects the Council;
 - (ii) alters provincial boundaries, powers, functions or institutions; or
 - (iii) amends a provision that deals specifically with a provincial matter.

Other examples of inflexible constitutions are those of Germany, Namibia and the United States of America (USA).

ACTIVITY 10

Read the following passage:

Johan is a gay, third-year art student. He is very anxious about the fact that the Constitution, which provides for substantial rights with regard to gay persons, may be amended to abolish the rights of gay persons. He asks you for advice.

Study sections 1 and 74 of the Constitution, and then answer the following questions:

- (1) Does South Africa have a flexible or inflexible constitution? Why? (3)
- (2) What majorities are required to amend different provisions of the Constitution?
- (3) Why is a greater majority required to amend certain provisions of the Constitution (such as s 1)? (2)
- (4) What special procedures are in place to prevent Parliament from amending the Constitution without giving the matter due consideration? (5)

To answer question (1), you have to do the following:

- Examine the characteristics of flexible and inflexible constitutions as set out in 3.2.1 above.
- Examine sections 1 and 74 of the Constitution.

To answer question (2), you have to do the following:

- Read section 74 of the Constitution.

To answer question (3), you have to do the following:

- Examine the nature and extent of the relevant provisions as contained in the Constitution.

To answer question (4), you have to do the following:

- Examine the provisions of sections 74(4)–(8) of the Constitution.

You will again encounter the concept of an inflexible constitution in study unit 7 (when dealing with the process for the adoption of a Bill amending the Constitution).

3.2.2 Supreme constitutions and constitutions which are not supreme

A distinction is often drawn between constitutional supremacy and parliamentary supremacy. When a constitution is not supreme, Parliament is supreme. This means that the legislature can pass any law, provided that it has complied with the correct procedure for passing the law. When a constitution is supreme, on the other hand, the Courts have a testing power over legislation to establish whether the law complies with substantive requirements set out in the constitution, usually in a bill of rights. The Supreme Court (in the USA and Canada) or the Constitutional Court (in Germany) has the power to inquire into the validity of any law and can declare legislation unconstitutional because the law violates the Bill of Rights.

This does not mean, however, that no law which limits constitutional

rights can ever be passed. What it does mean is that the limitation must comply with the standards contained in the constitution itself, and will be measured against those standards (see s 36 of the Constitution).

Examples of countries with supreme constitutions include the USA, Canada, Germany and South Africa (under the interim Constitution of 1993).

Examples of countries with constitutions which are not supreme include Britain (Britain does not have a written constitution in the sense of a single document called “the constitution” and is therefore regarded as a country with a constitution which is not supreme) and South Africa under the “Republican Constitution” of 1961 and the tricameral Constitution of 1983.

Is the South African Constitution of 1996 a supreme constitution? Yes. The Constitution makes it clear that it is the supreme law of the country and that the Constitutional Court (and the high Courts) has the power to declare legislation unconstitutional when the legislature acts in violation of the Bill of Rights. Section 1(c) states that the Republic is founded on the value of constitutional supremacy, section 2 states that the Constitution is the supreme law of the Republic and that laws that are inconsistent with the Constitution are invalid, section 8(1) states that the Bill of Rights binds the legislature, and section 172(1) provides that Courts must declare laws that are inconsistent with the Constitution, invalid.

ACTIVITY 11

In *Ex Parte Chairperson of the Constitutional Assembly: In re the Certification of the Constitution of the Republic of South Africa 1996*, the Constitutional Court had to rule on whether the attempt to shield the provisions of certain legislation from constitutional review violated the supremacy of the Constitution. How did the Court understand “constitutional supremacy” and what was its ruling in this regard?

In order to complete the activity, you have to do the following:

Read paragraphs 149 to 150 of the judgment.

The following comparison sets out the differences between supreme constitutions and constitutions which are not supreme:

SUPREME CONSTITUTIONS	CONSTITUTIONS WHICH ARE NOT SUPREME
(1) Ranks above all other laws in a state. (2) Any law which is inconsistent with it will be declared invalid (referred to as the <i>Grundnorm</i> , against which all other legislation is tested for validity). (3) Is usually (but not always!) inflexible.	(1) Does not enjoy any special status when compared with other laws. (2) The legislature can pass laws which are inconsistent with the constitution. The Courts cannot question the legality (or validity) of such laws, provided that the required procedure has been complied with. (3) Is usually (but not always!) flexible.

ACTIVITY 12

Read the following passage:

The government wants to pass a law which will prohibit all men from being appointed as airline stewards (because it is believed that women make better airline stewardesses). The government asks you for your expert opinion on this matter.

Study sections 1, 2, 7, 8(1) and 172(1)(a) of the Constitution and then answer the following questions:

- (1) Explain, in your own words, whether South Africa has a supreme Constitution. (3)
- (2) Explain the relationship between constitutional supremacy and the Courts' power to test the constitutionality of legislation. (2)
- (3) Explain the relationship between constitutional supremacy and an inflexible constitution. (3)

To answer question (1), you have to do the following:

- Examine sections 1(c), 2 and 172(1)(a) of the Constitution.

To answer question (2), you have to do the following:

- Examine section 172(1)(a) of the Constitution.

To answer question (3), you have to do the following:

- Study the characteristics of flexible and inflexible constitutions as set out in subsection 3.2.1.

Consider the following:

- (1) What would be the value of a supreme constitution that is flexible (ie which can easily be amended)?
- (2) What would be the value of an inflexible constitution that is not supreme (ie which ranks the same as the other laws of the state)?

To answer questions (1) and (2), you have to do the following:

- Study the discussion of supreme/nonsupreme constitutions in 3.2.2 above.

You will encounter numerous references to the supremacy of the South African Constitution in this course. See, in particular, study unit 2 (the part dealing with the finding of the Constitutional Court in the first *Certification* decision) and study unit 10, which deals with the judiciary.

ACTIVITY 13

Look at the cartoon at the beginning of this study unit.

Now answer the following questions:

- (1) Do you think that the particular state to which this cartoon refers is governed by a supreme constitution? Explain your answer in detail.
- (2) Suppose this state is governed by a supreme constitution which contains a bill of rights that guarantees free and fair elections and freedom of speech. Will the president of this state be entitled to ignore the provisions of the constitution and pass an Act that provides for the abolition of freedom of speech and free and fair elections? Discuss in detail.

To answer questions (1) and (2), you have to do the following:

- Examine the features of a supreme constitution as set out in 3.2.2 of this study unit.
-

3.2.3 Written and unwritten constitutions

A distinction is sometimes drawn between written and unwritten constitutions. This is not an absolute distinction. Very few countries do not have written constitutions. For example, Great Britain, which is often used as an example of a country without a written constitution, has a number of important, statutory constitutional sources. On the other hand, even in countries where there is a single document called “the Constitution” there are always other constitutional enactments which supplement it. No single document can ever contain all the rules governing constitutional issues. (See the discussion of the different sources of constitutional law in study unit 1.)

3.2.4 AUTOCHTHONOUS (INDIGENOUS) AND ALLOCHTHONOUS (FOREIGN) CONSTITUTIONS

Autochthonous constitutions are said to be indigenous (“home-grown”) rather than “borrowed” constitutions. The distinction is important in order to understand the legitimacy of a constitution in the eyes of the people who are governed by it.

It is very difficult to find a constitution which can be said to be totally indigenous. Most of the “modern” constitutions in the world today are based on the government systems of the former colonial powers. It is debatable whether the term “autochthony” relates to the origin, content or manner in which a constitution was adopted.

It might be useful to distinguish between three kinds of constitutions: the first is the reactive constitution, which originated as a result of specific problems in the past and which seeks to resolve those problems. This type of constitution may therefore be regarded as indigenous. The German and South African Constitutions could be given as examples here. The South African Constitution originated as a reaction against the history of colonialism and apartheid.

Secondly, there are constitutions which are intended to maintain continuity with established norms in the legal tradition of the society concerned, and these may also be said to be indigenous — for example, the Constitution of the Netherlands.

Thirdly, there are the “superimposed” constitutions. Their most distinguishing characteristic is that the contents of these constitutions are largely unrelated to the history of the country concerned. The independent constitutions of former British colonies are obvious examples: these constitutions were imposed upon the colonies by Britain and contain very little local content or flavour.

South Africa’s 1993 Constitution may be described as autochthonous or indigenous, in the sense that it was the product of negotiations between representatives of political parties and interest groups in the country and was not drawn up by, or “inherited from”, another state. There was therefore no direct “outside influence” as in the case of the Zimbabwean Constitution, which originated from the Lancaster House negotiations. The same applies as regards the new Constitution, which was adopted by the democratically elected Constitutional Assembly. At the same time, however, one should be careful not to overemphasise the indigenous qualities of the Constitution. The drafters of the Constitution drew upon the constitutional experience of a number of countries, and were also influenced by international law.

This influence is evident from a number of provisions in the Constitution.

For instance, it is stated in the preamble that the Constitution was adopted to “build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations”. And section 39(1) states that a Court, when interpreting the Bill of Rights, must consider international law, and may consider foreign law. With the adoption of the Constitution, South Africa became part of a constitutional tradition which goes beyond the borders of any particular state and is able to draw upon a vast store of universally accepted constitutional principles.

The Constitutional Court also indicated, on a number of occasions, that the Constitution should be interpreted in the light of South Africa’s history (eg the desire to break with the apartheid past) and the background against which the Constitution was adopted. Also, in the death-penalty case [*S v Makwanyane* 1995 (6) BCLR 665 (CC)], many judges emphasised the importance of taking into account indigenous values when interpreting the Constitution. These judges relied especially on the reference to ubuntu in the English text of the postscript to the (interim) Constitution.

3.3 STATE AND GOVERNMENT

Earlier on, we said that constitutional law is concerned with the distribution and exercise of state authority, and that the state is always a party to public law and constitutional law relationships. In this section, we shall inquire into the meaning of the concepts “state”, “government” and “sovereignty”.

3.3.1 State

There are many definitions of “state”, each emphasising different aspects of the concept. For the purpose of this course, all you need to know is that the following are normally regarded as requirements of “statehood”:

- a specific, geographically defined territory
- a community of people who live within that territory
- a legal order to which the community is subject
- an organised system of government which is able to uphold the legal order
- a certain measure, at least, of separate political identity, if not sovereign political status (the individual states which form the USA, for example, would not qualify as “states” in this sense)

[The community of people consists of citizens and aliens who find themselves within the national territory of the state. The term “citizenship” refers to persons who belong to the permanent population of the country. In this regard, see ss 3 and 20 of the Constitution (which deal with citizenship).]

Students who have completed courses in criminal law and/or the law of criminal procedure or who are public prosecutors will know that the word “state” may also be used to signify the organised authority of the state — in other words, the persons or bodies that are vested with authority. In a criminal prosecution, for instance, a case will be reported as *S v Marx* 1962 (1) SA 848 (N).

3.3.2 The government of a state

The concept “government” can be better understood if it is distinguished from the concept “state”.

The state is the permanent legal entity (consisting of a territory, a community, a legal order, an organised government and a measure of political identity), while the government is the temporary bearer of state authority. The government represents the state at a particular time.

Like the term “state”, the term “government” has not always had the same meaning it has today. Initially, “government” did not have a political connotation. Instead, it was closely linked with the judicial function of government (eg the application and interpretation of the law).

Gradually, the political connotation found its way into the idea of government until it came to be adopted as a general term covering all the functions and organs of the state. Today, we understand “government” as relating primarily to the executive function and having a particular bearing on the formation and implementation of policy. According to Baxter (at 227) government is “the tangible machinery of the state”.

ACTIVITY 14

Read the following passage:

One of your best friends, Florence, is completely confused about the difference in meaning between “state” and “government”; she feels that both words refer to exactly the same thing. She wants to know why it is important to distinguish between the two concepts.

Now answer the following question:

- (1) Who (the state or government) concludes a treaty or interstate agreement with another state for instance, to share the airspace of that particular state?

To answer this question (1), you have to think about the following subquestions:

- (a) Who represents the state at any given time?

- (b) Which one of the two concepts refers to a certain defined territory?
 - (c) Will the subsequent governments of the particular state be bound by the terms of the treaty?
-

3.3.3 Sovereignty

Section 1 of the Constitution provides that the Republic of South Africa is a sovereign state. What does the term “sovereign state” mean?

Today, the term “sovereign state” is mainly used in international law to refer to states which are autonomous and independent. This means that the state is not subject to the authority of any other state — it has the sole right to own and control its own territory. For instance, South Africa may not use the airspace of another country without the prior consent of that country. Such agreements between sovereign states are usually embodied in written documents, which are referred to as “treaties”.

The term “sovereignty” is also used in constitutional law and has a long and complicated history. It was first used to refer to a particular person such as a monarch (the king or queen). However, advocates of a democratic form of government soon started talking of the “sovereignty of the people”, which means that the government’s entire authority is derived from the consent of the people, and not from the will of God as manifested in the figure of the monarch.

This usage gave rise to the idea that Parliament is sovereign. In Britain, Parliament is still regarded as the sovereign or supreme power. Following the British model of parliamentary sovereignty, the 1983 Constitution also declared that Parliament was sovereign (ie South Africa had a system of legislative supremacy/sovereignty). This simply meant that the highest legislative authority was vested in Parliament. Parliament could enact any legislation, no matter how unreasonable or unjust, and, as long as the prescribed procedures were adhered to, the Courts did not possess the power to question the merit of the legislation.

Under the Constitution of 1996, the Constitution is now the supreme law. Parliament has to exercise its legislative authority subject to the Constitution, and Parliament is, officially, no longer “sovereign”.

3.4 COMMON MISTAKES AND PROBLEM AREAS

Many students have problems distinguishing between constitutions that are flexible/inflexible and constitutions which are supreme/not supreme.

A constitution which is inflexible is usually a supreme constitution, and a

flexible constitution is usually not supreme. The flexibility/inflexibility of a constitution, as we have said already, relates to the ease or difficulty of amending such constitution.

The supremacy/nonsupremacy of a constitution, on the other hand, concerns the status of a constitution in relation to the other laws of a particular state. A supreme constitution has a higher status than the other laws of the state, while a constitution which is not supreme ranks equally with other laws of the state.

It is therefore quite possible for a particular country to have a flexible, supreme constitution, or an inflexible constitution which is not supreme.

Make sure that you understand this distinction clearly before you continue with the next study units. Do not hesitate to contact us if you feel you do not really understand the meanings of any of the definitions and concepts discussed in this study unit.

3.5 SELF-ASSESSMENT QUESTIONS

- (1) Are a supreme constitution and an inflexible constitution the same thing? Give reasons for your answer. (5)
- (2) Discuss the 1996 Constitution in the light of the following:
 - (a) flexibility/inflexibility
 - (b) whether it is autochthonous or allochthonous

In each case, your answer needs to include the definitions of these concepts. (10)

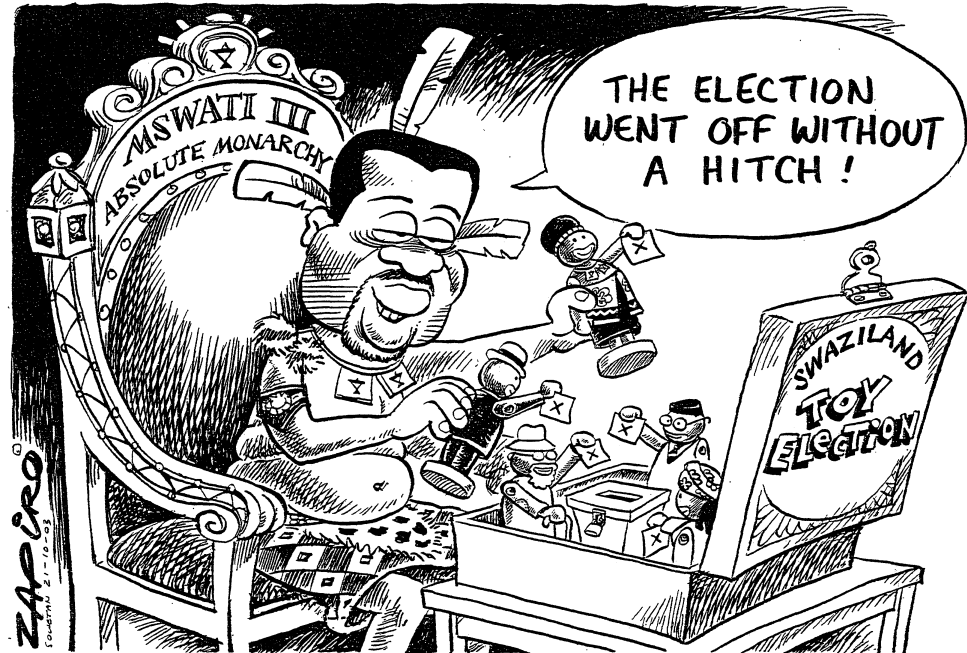
- (3) "The dividing line between public and private law has become blurred." Why do we say this? (5)
- (4) Distinguish between an autochthonous and an allochthonous constitution. Give an example of each. (5)

3.6 CONCLUSION

You will again encounter the basic concepts of this chapter in later sections of the prescribed work. The inflexibility of the 1996 Constitution, for example, becomes important when we study the procedure for the adoption of Bills (Acts) amending the Constitution. The supremacy of the 1996 Constitution becomes important when we study judicial review and the ability of the Constitutional Court to test Acts which conflict with the Constitution.

STUDY UNIT 4

Concepts of constitutional law (continued)



OVERVIEW

In the previous study unit, we dealt with some very important basic definitions and concepts relating to constitutional law.

In this study unit, we shall deal with the concepts of constitutionalism, democracy, the rule of law, the *Rechtsstaat* principle, and parliamentary and presidential systems of government. It is important that you understand these concepts and the way in which they apply to the South African constitutional system.

This study unit is important because these concepts will be referred to repeatedly throughout this course. It is therefore extremely important that you make sure that you know and thoroughly understand these concepts before you continue with the next study unit.

UNIT OUTCOMES

After you have studied the material in this study unit, you should be able to do the following:

- explain what is meant by “constitutionalism”
- explain what is meant by the “rule of law”
- explain what is meant by the “*Rechtsstaat* principle”

- explain what is meant by “democracy”
- explain what is meant by “representative democracy”
- explain what is meant by “constitutional democracy”
- distinguish between parliamentary and presidential systems of government
- explain whether South Africa (1) is a constitutional state, and (2) is a democracy
- define the following concepts:
 - constitutionalism
 - the rule of law
 - the *Rechtsstaat* principle
 - democracy
 - representative democracy
 - constitutional democracy
 - presidential system of government
 - parliamentary system of government

PRESCRIBED STUDY MATERIAL

None

RELEVANT SECTIONS OF THE CONSTITUTION

None

4.1 CONSTITUTIONALISM, THE RULE OF LAW AND THE *RECHTSSTAAT* PRINCIPLE

The preamble to the 1993 Constitution recognised the need for a “sovereign and democratic state”. Section 1 of the 1996 Constitution states that the Republic of South Africa is a democratic state founded, *inter alia*, on the supremacy of the Constitution and the rule of law. In this section, we shall inquire into the meaning of the terms “constitutionalism” (or “constitutional state”) and the “rule of law”, and the relationship between these concepts.

4.1.1 Constitutionalism

What is constitutionalism?

Constitutionalism, in a nutshell, refers to government in accordance with the Constitution. This implies that the government derives its powers from, and is bound by, the Constitution. The government’s powers are thus limited by the Constitution.

In a constitutional state, there are several mechanisms to keep tabs on government power and to prevent power becoming concentrated in a single office or institution. In practice, one speaks about “constitutionalism” if the state includes certain features. These features include the

protection of fundamental rights, an independent judiciary, the separation of powers, and certain democratic principles (eg general adult suffrage and regular multiparty elections).

Constitutionalism is normally also associated with a supreme constitution, which binds all branches of government, including the legislature. (See study unit 3 on the meaning of constitutional supremacy.)

However, not everyone agrees that a supreme constitution is a prerequisite for constitutionalism: British constitutional lawyers argue that constitutionalism reigns in Great Britain because the state considers itself bound by the Constitution and the laws of the land, even though the Constitution is not above ordinary Acts of Parliament.

4.1.2 The rule of law

What is the rule of law?

Constitutionalism, then, describes a state in which the law reigns supreme. The state authorities are therefore bound by the law, and are not above it. Constitutionalism is related to the Anglo-American concept of the rule of law, and to the continental *Rechtsstaat* concept. The doctrine of the rule of law developed in England and received its classical exposition in 1885 in AV Dicey's *Introduction to the Study of the Law of the Constitution*.

According to Dicey, the rule of law rests on the following three premises:

- (1) the absence of arbitrary power — no person is above the law, and no person is punishable except for a distinct breach of the law established in the ordinary manner before the ordinary Courts
- (2) equality before the law — every individual is subject to the ordinary law and the jurisdiction of the ordinary Courts
- (3) a judge-made constitution — the general principles of British constitutional law are the result of judicial decisions confirming the common law

Even though the rule of law represents much that is “good” in statecraft, the doctrine (or at least Dicey’s exposition of it, which exerted considerable influence in South Africa) should be seen against the background of (19th-century) English constitutional law. The view that the law by which the government is bound is the common law is peculiarly English. As Davis *et al* (at 1) point out:

The equation of the common law, which protects the private sphere of individual autonomy, with the ordinary law of the land, prevented the development of adequate legal principles to which the bureaucracy was subject.

Or, to put it differently, the belief that the common law provided the individual with adequate protection effectively prevented the development of adequate principles of constitutional and administrative law that could

hold the state accountable to the people. In South Africa, historically, the common law clearly did not provide the individual with adequate protection in the face of legislative encroachments on fundamental rights and liberties.

4.1.3 THE *RECHTSSTAAT* PRINCIPLE

What is the *Rechtsstaat* principle?

The German *Rechtsstaat* (*regstaat*) concept refers to the principle of government by law, and not by force. A distinction is often drawn between the formal and the material *Rechtsstaat*. The formal *Rechtsstaat* requires compliance with formal criteria, such as due process, the separation of powers, and legal certainty. The material *Rechtsstaat* goes further: the state authority is bound to higher legal values, which are embodied in the Constitution, and the exercise of state authority must result in a materially just legal condition (Van Wyk at 152).

With the adoption of the 1993 and 1996 Constitutions, South Africa, in addition to being a formal *Rechtsstaat*, also became a material *Rechtsstaat*. The new Constitution not only contains a whole number of formal requirements for the validity of government action, but is also a supreme constitution which contains a Bill of Rights and which gives expression to the values to which the South African political community has committed itself. These values must guide the legislature, the executive and the judiciary in applying the provisions of the Constitution.

In the light of the above discussion, it is perhaps a bit curious that the 1996 Constitution refers only to the concept “rule of law”, and not, like the 1993 Constitution, to the ideal of a “constitutional state” (or *regstaat*, in the Afrikaans version). However, it is clear that the framers of the Constitution had in mind a much broader concept of the rule of law than that allowed for in Dicey’s restrictive understanding of the term.

The fact that the Constitution is supreme, contains a justiciable Bill of Rights, spells out the requirements for valid administrative action (see eg s 33), and requires judges to have regard to constitutional values (see eg ss 1, 36 and 39) indicates that the reference to the rule of law is meant to be understood in the broadest sense, that is, as a system of government in which the law reigns supreme. In fact, it would appear that the Constitution aims to establish a constitutional state.

ACTIVITY 15

Read the following passage:

Matome, a Grade 10 learner, must make an oral presentation at his school on the 1996 Constitution, and specifically the values on which the Constitution is based. He asks you for advice.

Now answer the following question:

- (1) Section 1 contains a list of values upon which the Constitution is based.

Write these values below one another. Then skim through the Constitution and see whether you can find other references in the Constitution to these values. Indicate, in brackets, in which sections these values can be found.

To answer this question (1), you need to look at the following example:

- equality (preamble, and ss 1, 9, 36, 39 and 187)
-

The Constitution also contains a variety of mechanisms to curb the powers of government and to realise the values in the Constitution. Among these are the following:

- the Bill of Rights
- the fact that the whole Constitution, including the Bill of Rights, is subject to judicial control
- the democratic election of representatives to Parliament
- the collective and individual responsibility of Cabinet ministers to Parliament
- the separation of powers between the legislature, executive and judiciary
- an independent judiciary
- independent institutions such as the Public Protector, the Human Rights Commission, the Commission on Gender Equality and the Auditor-General, all of which must serve as watchdogs over the government (the Constitution refers to “state institutions supporting constitutional democracy”)
- the demarcation of powers between the national and provincial levels of government (federalists, however, claim that the scale is too heavily balanced in favour of the national government)
- civilian control of the military

4.2 DEMOCRACY

4.2.1 Definition

What is
democracy?

Democracy is one of the core values on which the new constitutional order is based. The words “democracy” and “democratic” feature prominently in the preamble to the Constitution, where it is said that the Constitution aims to:

establish a society based on democratic values ...

lay the foundations for a democratic and open society in which government is based on the will of the people ...

build a united and democratic South Africa.

Section 1 proclaims that South Africa is a democratic state; section 36 states that the limitation of rights in the Bill of Rights must be “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”; and section 39(1) instructs Courts and tribunals to “promote the values that underlie an open and democratic society based on human dignity, equality and freedom”. And, in terms of section 195(1), the public administration “must be governed by the democratic values and principles in the Constitution”.

Democracy is one of the most valued, and often the vaguest of, political concepts. It is used mostly in a political or an ideological context. It is not an easy concept to define, because it has many faces. People are inclined to define democracy in accordance with their own views and ideologies rather than measuring these ideologies against some fixed criterion.

The word “democracy” is derived from two ancient Greek words: *demos* (the people) and *kratos* (strength). This implies that democracy refers to government by the people. In a democracy, the right to govern does not vest in a single person (a king or queen or other monarch) or class of persons (eg an aristocracy), but in the people as a whole. Democracy presupposes free political discussion, the toleration of differences between people, and the right of all citizens to participate in political decisionmaking.

4.2.2 Forms of democracy

Democracy may take the form of direct or representative democracy.

What types of democracy do we get?

Direct democracy means that all major political decisions are taken by the people themselves. This form of democracy may work in a very small political community where people can get together on a regular basis (eg in the town hall) to discuss and decide matters of common interest.

However, direct democracy is hardly an option in the modern state, which is usually too populous to allow for the direct participation, on a regular basis, of all citizens in the affairs of the nation. Modern democracies therefore follow a system of representative democracy.

Representative democracy is characterised by the fact that the citizens of a state elect the representatives of their choice, and these representatives then express the will of the people. Or, simply stated, representative democracy demands that all the inhabitants of the state [ie all those above a certain age (eg 18 years), and those who are not disqualified for another reason] should, via direct representation, have

a say in the way in which the state is governed, usually by being represented in the legislature. Note that a representative democracy is created via the process of elections. These elections should be held at regular intervals, and reasonably frequently.

Representation is meant to ensure that the interests of society in general are protected and cared for by elected representatives of that society. Consent is central to the concept of representation. It entails government power being exercised by representatives of the people on their behalf, and with their consent. In parliamentary terms, representation refers to the constitutional system for electing members of the legislative body; these representatives then work in the interest of those who elected them.

The objection may be raised that representative democracy, as we have come to know it, is a far cry from the ideal of government by the people. The people can hardly be said to govern in any real sense if they go to the polls only once in every four or five years to elect representatives who are then free to govern as they see fit, and who are in no way obliged to consult the people on important issues.

Critics of modern representative democracies argue that the opportunity for meaningful political participation by the people is further weakened by the power of certain groups and individuals to define the political agenda. For instance, political parties depend on big business to finance their election campaigns and are extremely reluctant to do anything that may alienate their sponsors. Trade unions are also powerful, because they have the capacity to paralyse the economy. This may mean that governments often do everything within their ability to appease business and labour, but are much less eager to listen to the concerns of less powerful groups, such as the elderly and the unemployed.

As opposed to these arguments, proponents of representative democracy point out that it is the only workable form of democracy in modern, complex societies. It is argued that elections are still a powerful mechanism to keep a government accountable to the people: a government that loses sight of the concerns and aspirations of the broad population is unlikely to be re-elected at the end of its term in office.

Moreover, constitutional checks and guarantees, such as the separation of powers, freedom of the press, freedom of information and freedom of association, may prevent any single group or institution from becoming too strong and may promote democratic debate and competition. Some commentators also argue that it is possible to combine representative democracy at the national and provincial levels with a more direct, participatory form of democracy at the level of local government, as well as in the workplace.

Even though the political institutions of modern democracies differ in

important respects, there are a number of features which are common to most democratic societies. The following features are widely regarded as indispensable to democratic government:

- free and regular elections (usually once every four or five years)
- a multiparty system
- universal suffrage, which means that all citizens above a certain age have the right to vote
- the protection of minorities
- mechanisms to ensure the accountability of government to the electorate

The exact opposite of a democracy is a dictatorship or despotic regime. The state, in this form of government, is governed by a dictator or despotic ruler who runs the state or country as he or she sees fit and makes laws as he or she pleases. The people of such a state have absolutely no say in how the state is governed or in any political decisions.

ACTIVITY 16

Read the following passage:

A state representative of the newly formed state, Atlantis, comes to see you for legal advice. The people of Atlantis want to be a democratic society, but are not quite sure what a democracy consists of.

Now answer the following questions:

- (1) Would you describe the following societies as democracies? Give reasons for your answers.
 - (a) the Republic of MCP, where only adult males are entitled to vote
 - (b) General's Valley, which is ruled by a military government
 - (c) The Kingdom of Utopia, which is ruled by a king, in consultation with the royal family
 - (d) Consensus Corner, where elections are held every five years, but where only one political party is allowed to stand in the election
 - (e) Bapetikosweti, where elections are held every five years, and where a number of political parties stand in the election, but where Party A has won all seats in Parliament for the past three elections

To answer this question (1)(a) to (e), you have to do the following:

Look closely at the requirements of a democracy as set out in 4.2.2 above and judge the societies described immediately above against these requirements.

The 1993 Constitution established a fully representative democracy for the first time in South Africa's history. The 1996 Constitution also guarantees

the right of all South Africans above the age of 18 to vote in democratic elections, and provides for the direct election of representatives in the national, provincial and local spheres of government.

In addition to being a representative democracy, South Africa is also a constitutional democracy. This means that the people's representatives in Parliament, in the provincial legislatures and in Municipal Councils are not free to make whatever laws they wish, but are bound to observe the norms and values embodied in the Constitution. Laws that are inconsistent with the Constitution will be declared invalid.

ACTIVITY 17

Look at the cartoon at the beginning of this study unit.

Now answer the following question:

- (1) Do you think that the state to which this cartoon refers is a democracy?

Explain your answer in detail, with specific reference to the essential features that must be present for a state to qualify as a democracy.

To answer this question (1), you have to do the following:

Study the features of a democracy as set out in this study unit and use these features as criteria to judge the state depicted in the cartoon.

4.3 PARLIAMENTARY AND PRESIDENTIAL SYSTEMS OF GOVERNMENT

The relationship between the legislature and executive determines whether a country has a parliamentary or presidential system of government. At the risk of oversimplification, the following differences between parliamentary and presidential systems of government can be identified:

What is the difference between presidential and parliamentary systems of government?

PRESIDENTIAL SYSTEM	PARLIAMENTARY SYSTEM
(1) The head of government is also the head of state. This is the case in the United States of America (USA), for instance.	(1) The head of state and the head of government are two different persons. For instance, in the Westminster system, which is the archetypal model of a parliamentary system, there is a symbolic head of state (monarch), with the real power of government vesting in the prime minister.

PRESIDENTIAL SYSTEM	PARLIAMENTARY SYSTEM
<p>(2) The head of government is not a member of the legislature, and is not responsible to it. For instance, the American president is not a member of Congress, and neither are the members of his or her Cabinet.</p> <p>(3) The head of government (president) is often elected directly by the people. In the USA, for instance, the president is popularly elected and his or her election is independent from the election of the legislature.</p>	<p>(2) The head of government and his or her Cabinet are members of the legislature, and are responsible to it. One can therefore conclude that there is often a more complete separation of powers (in the sense of a separation of personnel) in a presidential system than in a parliamentary system.</p> <p>(3) The head of government is the leader of the party with a clear majority in Parliament.</p>

Both the 1993 Constitution and the new Constitution are prime examples of constitutions with both presidential and parliamentary features. Presidential features are to be found in the fact that the President is both head of state and head of government. Parliamentary features are that the President is elected by Parliament, and not directly by the voters, and that he or she must also resign if Parliament adopts a motion of no confidence in him or her. Another feature of a parliamentary system of government is that members of the supreme executive (the Cabinet) must be members of Parliament. In this regard, see the study unit dealing with the executive authority (study unit 9).

4.4 COMMON MISTAKES AND PROBLEM AREAS

Many students make the mistake of thinking that, in a state where Parliament is sovereign (as in Britain), there can be no democracy. This is, however, not the case, since such a state may have other features which make it a democracy in the eyes of the people of that state.

Another common mistake made by students is that they confuse the terms “direct” and “representative democracy” with the terms “territorial” and “proportional systems of representation”. Democracy, as a concept, refers to the form of government that is in existence in a particular state/country.

Territorial and proportional representation refer to the electoral system that is intended to facilitate elections/voting. An electoral system is one of the mechanisms designed to promote democracy. Others include a bill of rights, separation of powers, et cetera.

4.5 SELF-ASSESSMENT QUESTIONS

Possible examination questions.

- (1) Briefly explain the term “democracy”. (5)
- (2) Is the following statement true or false? Give reasons for your answer.
 - (a) Constitutionalism refers to a system of government in which the will of a single person prevails. (5)
- (3) Democracy is a core value in the South African constitutional order. The term features prominently in the preamble, section 1 and section 36 of the Constitution. Answer the following questions in the light of the above statements:
 - (a) What do you understand by the term “democracy”? (2)
 - (b) Briefly discuss the difference between direct and representative democracy. (4)

4.6 CONCLUSION

Democracy is one of the core values on which the 1996 Constitution is based. The practical implementation of the principles of democracy, as set out in the 1996 Constitution, will be discussed in more detail in the next few study units.

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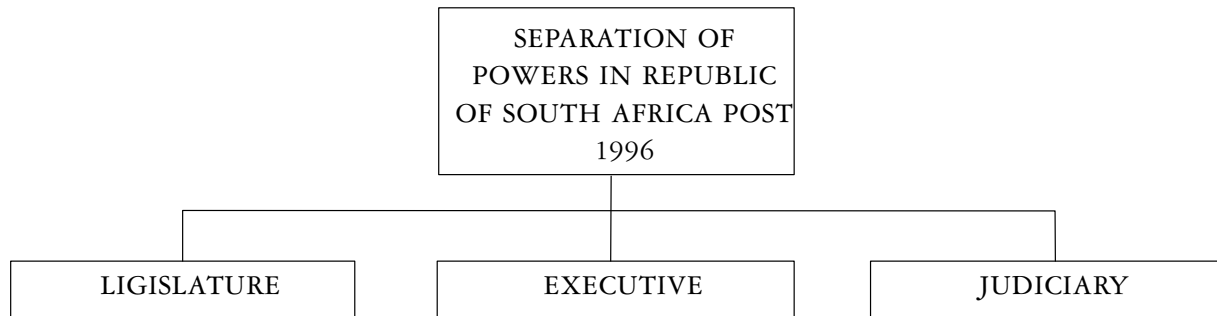
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STUDY UNIT 5

The separation of powers and checks and balances



In the previous study unit, you were introduced to a number of constitutional principles, such as constitutionalism, democracy and the rule of law. At the beginning of this course, you also learnt that the study of constitutional law deals with institutional design, and more especially with how government authority is distributed within a state. There are essentially three core values which inform modern-day governments premised on notions of constitutionalism, namely:

- federalism, which is the spatial division of power (discussed in greater detail in study unit 6)
- the separation of powers between the different organs of state
- the notion of constitutional rights (which you will learn more about in the module on Fundamental Rights).

In this study unit, we are going to focus on the second value, which is the separation-of-powers principle.

The separation-of-powers principle is one of the oldest constitutional principles in politics and constitutional law, and its global prominence is proved by the fact that it is a guiding constitutional principle in almost all democracies. Rautenbach and Malherbe (2009) state that any discussion of the term “government authority” would be incomplete without reference to the contribution of the separation-of-powers doctrine in modern governance, for not only does it prevent a concentration of power in the hands of one body, but it also goes further and introduces a system of checks and balances in government to ensure that state authority is constitutionally controlled and not exercised in an arbitrary fashion. This is clearly in line with the ideals of a constitutional state or the *Rechtsstaat* principle which you came across in study unit 4.

The 1996 Constitution does not contain a single provision which confirms that the South African government endorses the separation-of-powers doctrine within its new constitutional dispensation. However, there are a

number of provisions which together confirm that this doctrine is an integral part of our constitutional framework. These include, but are not limited to, sections 43, 44, 85, 125 and 165.

In this study unit, we are going to take you on a journey where you will discover some of the following facts about the separation-of-powers doctrine:

- the meaning of “separation of powers” in the constitutional sense
- the origin and importance of this doctrine in the modern state
- a comparison of its application in indigenous communities *vis-à-vis* its application in a modern state
- the issue of checks and balances, and the most important check that exists within the framework of the 1996 Constitution

UNIT OUTCOMES

After you have studied the material in this study unit, you should be able to do the following:

- define and explain in greater detail what you understand by the term “separation of powers”
- identify and explain the functions of the legislature, judiciary and executive
- explain the interrelationship, if any, between the legislature, executive and judiciary
- compare the application of the separation-of-powers doctrine in indigenous communities *vis-à-vis* modern democracies
- identify and explain the most important check and balance that is in place
- discuss whether the principle of judicial review is undemocratic
- explain why the separation-of-powers doctrine is important
- evaluate whether South Africa adheres to the principle of separation of powers in its system of government

PRESCRIBED STUDY MATERIAL

Sections 42, 43, 44, 85, 125 and 165

The following Court case which is in your *Revised Reader* (hereafter “the *Reader*”):

Glenister v President of the Republic of South Africa and Others 2009 (1) SA 287 (CC); 2009 (2) BCLR 136 (CC)

RELEVANT SECTIONS OF THE CONSTITUTION

The Legislature

Section number	Title of the section	Content
Section 42(3)	Composition of Parliament	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 scrutinising and overseeing executive action.
Section 43	Legislative authority of the Republic	In the Republic, the legislative authority: – (a) of the national sphere of government is vested in Parliament, as set out in section 44; (b) of the provincial sphere of government is vested in the provincial legislatures, as set out in section 104; and (c) of the local sphere of government is vested in the Municipal Councils, as set out in section 156.
Section 44(1)	National legislative authority	The national legislative authority as vested in Parliament: – (a) confers on the National Assembly the power: – (i) to amend the Constitution; (ii) to pass legislation with regard to any matter, including a matter within a functional area listed in Schedule 4, but excluding, subject to subsection (2), a matter within a functional area listed in Schedule 5; and (iii) to assign any of its legislative powers, except the power to amend the Constitution, to any legislative body in another sphere of government; and

Section number	Title of the section	Content
		<p>(b) confers on the National Council of Provinces the power: –</p> <ul style="list-style-type: none"> (i) to participate in amending the Constitution in accordance with section 74; (ii) to pass, in accordance with section 76, legislation with regard to any matter within a functional area listed in Schedule 4 and any other matter required by the Constitution to be passed in accordance with section 76; and (iii) to consider, in accordance with section 75, any other legislation passed by the National Assembly.
Section 44(4)	National legislative authority	When exercising its legislative authority; Parliament is bound only by the Constitution, and must act in accordance with, and within the limits of, the Constitution.
Section 54	Rights of certain members of Cabinet members and Deputy Ministers in the National Assembly	The President and any member of the Cabinet or any Deputy Minister who is not a member of the National Assembly may, subject to the rules and orders of the Assembly, attend and speak in the Assembly, but may not vote.

Section number	Title of the section	Content
Section 55(1)	Powers of National Assembly	In exercising its legislative power, the National Assembly may: –
Section 55(2)		<p>(a) consider, pass, amend or reject any legislation before the Assembly; and</p> <p>(b) initiate or prepare legislation, except money Bills.</p> <p>The National Assembly must provide for mechanisms: –</p> <p>(a) to ensure that all executive organs of state in the national sphere of government are accountable to it; and</p> <p>(b) to maintain oversight of: –</p> <p>(i) the exercise of national executive authority, including the implementation of legislation; and</p> <p>(ii) any organ of State.</p>

Executive Authority

Section number	Title of the section	Content
Section 85	Executive authority of the Republic	<p>(1) The executive authority of the Republic is vested in the President.</p> <p>(2) The President exercises the executive authority, together with the other members of the Cabinet, by: –</p> <p>(a) implementing national legislation except where the Constitution or an Act of Parliament provides otherwise;</p> <p>(b) developing and implementing national policy;</p> <p>(c) co-ordinating the functions of state departments and administrations;</p> <p>(d) preparing and initiating legislation; and</p> <p>(e) performing any other executive function provided for in the Constitution or in national legislation.</p>

Section number	Title of the section	Content
Section 91	Cabinet	<p>(1) The Cabinet consists of the President, as head of the Cabinet, a Deputy President and Ministers.</p> <p>(2) The President appoints the Deputy President and Ministers, assigns their powers and functions, and may dismiss them.</p> <p>(3) The President: –</p> <p>(a) must select the Deputy President from among the members of the National Assembly;</p> <p>(b) may select any number of Ministers from among the members of the National Assembly; and</p> <p>(c) may select no more than two Ministers from outside the Assembly.</p> <p>(4) The President must appoint a member of the Cabinet to be the leader of government business in the National Assembly.</p> <p>(5) The Deputy President must assist the President in the execution of the functions of government.</p>

The Judiciary

Section number	Title of the section	Content
Section 165	Judicial authority	<p>(1) The judicial authority of the Republic is vested in the Courts.</p> <p>(2) The Courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.</p> <p>(3) No person or organ of state may interfere with the functioning of the Courts.</p> <p>(4) Organs of State, through legislative and other measures, must assist and protect the Courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the Courts.</p> <p>(5) An order or decision issued by a Court binds all persons to whom and organs of state to which it applies.</p>

5.1 DEFINITION, ORIGIN AND JUSTIFICATION OF THE PRINCIPLE OF SEPARATION OF POWERS

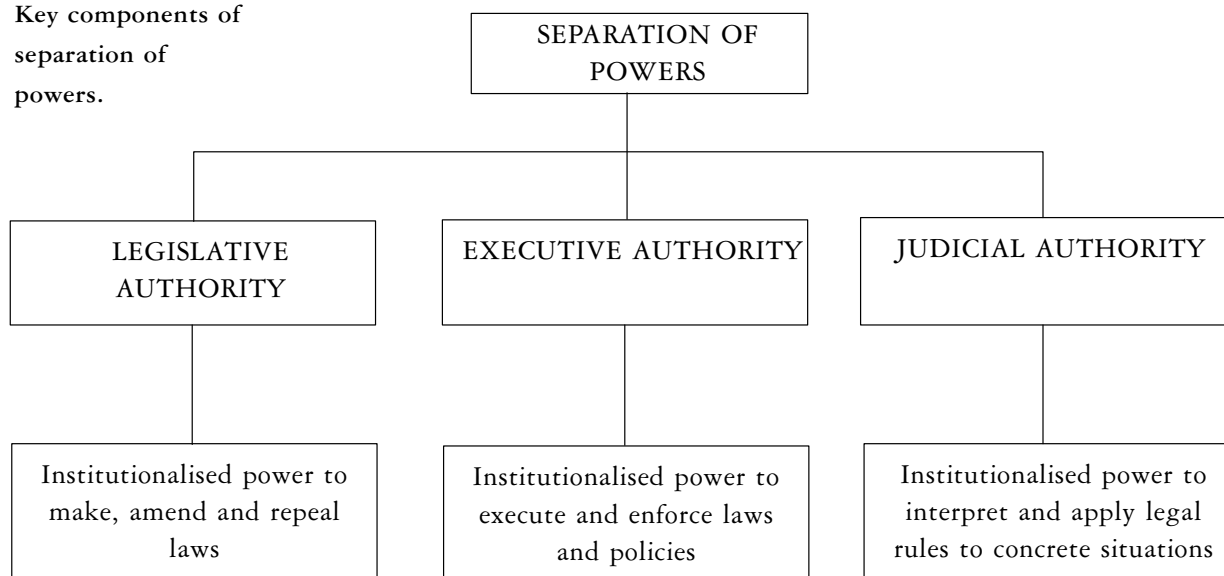
What is separation of powers?

Separation of powers is one of the “essential principles” of constitutionalism and democracy. In a nutshell, it refers to the division of state authority among the legislative, executive and judicial branches of government.

In study unit 6, you will learn that state power is also divided among the three spheres of government in terms of the principle of cooperative government, namely among the national, provincial and local spheres. Separation of powers among the two branches of government (except for the judiciary) takes place within the framework of the three spheres of government as reflected in, for example, section 44 of the 1996 Constitution and elsewhere. Later in this study unit, we provide a diagrammatic illustration which will give you a better understanding of the division of state power across the Republic.

Rautenbach and Malherbe (2009) describe the components of the separation-of-powers doctrine as follows:

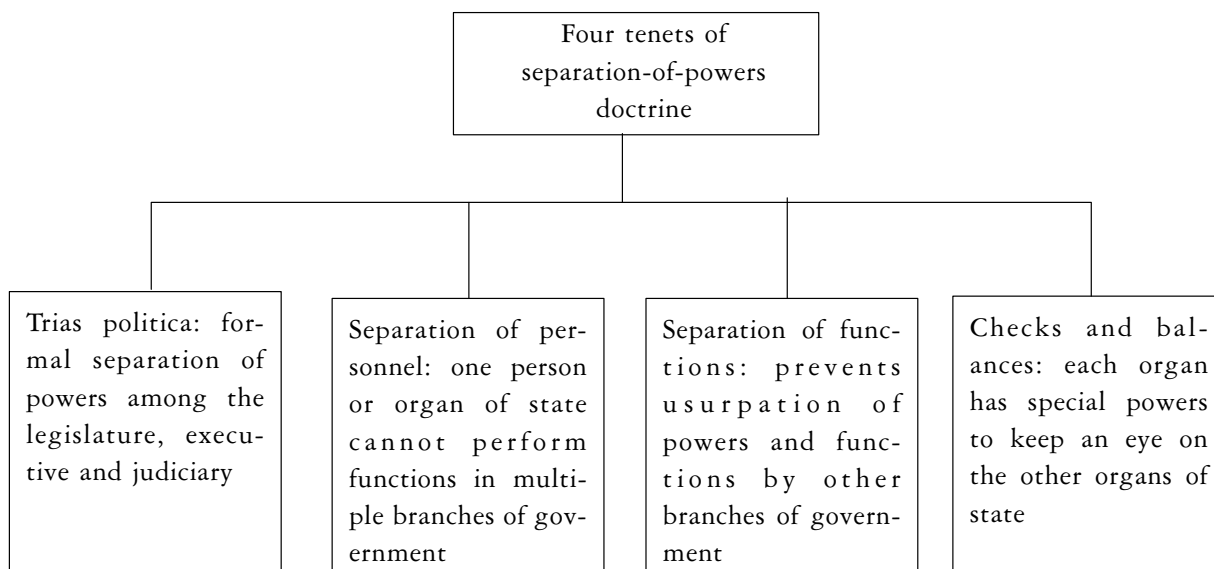
Key components of separation of powers.



These components represent the most simplified breakdown of the separation-of-powers (SOP) doctrine.

Montesquieu equals “father of SOP doctrine”

The separation-of-powers principle originated from philosophical and political thinking at the end of the Middle Ages and came to be adopted by political actors in Western Europe and in the United States of America (USA). This principle was first mentioned in the writings of John Locke, but it is Montesquieu who is regarded as the father of the principle of separation of powers in the state or “the oracle who is always consulted and cited on this subject”. Van der Vyver states that the idea of separation of powers in its modern form developed into a norm comprising four basic tenets, namely:



Montesquieu believed that separating legislative, executive and judicial powers was indispensable to democracy, as this would enhance the liberty of the subject and prevent tyranny, violence and oppression. Writing in the mid-18th century, he famously asserted:

When the legislative and the executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because many apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

Again there is no liberty, if the judicial power is not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be a legislator. Were it joined to the executive power, the judge may behave with violence and oppression. [Montesquieu *The Spirit of the Laws* 163]

Why is separation of powers fundamental?

Other constitutional law commentators confirm that separation of powers is important to achieve the following objectives:

- to secure liberty and democracy
- to prevent corruption, tyranny, despotic government or the suppression of all forms of liberty

- to energise government and to make it more effective by creating a healthy division of labour
- to encourage functional specialisation of the arms of government
- to enhance a particular vision of democracy based on founding values such as accountability, responsiveness and openness

The vast majority of modern African democracies have recognised the importance of this principle. Liberia, The Gambia, Ethiopia, Malawi and Botswana are just a few examples of African states that have entrenched various models of the classic exposition of Montesquieu’s separation-of-powers principle.

ACTIVITY 18

- (1) Briefly explain what you understand by the separation-of-powers principle.
 - (2) Give examples from current media publications that illustrate that this principle is important in modern African democracies.
 - (3) List the reasons why this principle is fundamental to modern democracies.
-

5.2 SEPARATION OF POWERS IN INDIGENOUS COMMUNITIES

Can indigenous constitutional norms guide modern democracies?

Before we start exploring whether the South African constitutional design gives effect to the separation-of-powers principle within its new dispensation, let us deviate a bit to a brief discussion of this principle in the context of African communities in order to see whether there is a better way in which the state can govern itself. Is there an alternative way to share power in modern democracies?

traditional community

TW Bennett states that, in colonial times, the two concepts that were critical in the determination of African forms of government were “tribe” and “chief”. “Tribe” denoted a partially stratified political structure within which the lives of no more than a few thousand individuals were regulated. Members were assumed to be related by a tie of kinship. Leadership within the tribe fell on the most senior member: the chief (*inkosi, morena, kgosi*). The chief, together with the ward heads, who were normally senior members of leading families within the nation or a particular community, and the kraal heads or family heads exercised all three forms of governmental power at different levels in the hierarchy of authority.

The chief was the most important and powerful member of his nation, occupying such position by ancestry alone. In the module on Indigenous Law you will learn more about the following saying: *kgosi ke kgosi ka a tswetswe* (“A king is a king because he is born to it”). You will also learn that the chief, ward headman and family heads exercised legislative,

executive and judicial powers simultaneously, that is, they could be judge, jury and executioner in one sitting. This concentration of power was only circumscribed normatively by a duty to consult councillors, who checked self-interest or capricious action, and who acted for the benefit of the people. The exercise of powers by the rulers was not subject to the scrutiny of an independent judiciary, but was controlled by rituals, by the military power and by the patron-client relationship created by the loan of cattle.

You can see that this form of government differs markedly from a modern democracy, since the all-inclusive powers of government are not differentiated in the Western manner into judicial, administrative and legislative categories. However, we know that, in a constitutional state, effective and legitimate government depends on different institutions performing different functions as highlighted earlier in this study unit. Although this system of government works within indigenous communities, it is unlikely to be replicated within a modern state where political, economic and social factors demand a more institutionalised form of government with the minimum or no overlap between the legislative, executive and judicial branches of government.

Now let us examine whether South Africa has adopted the separation-of-powers principle within its new constitutional dispensation.

ACTIVITY 19

- (1) Briefly discuss the difference between the indigenous concept of separation of powers *vis-à-vis* its application in modern democracies.
 - (2) Critically discuss whether the indigenous form of separation of powers can be implemented within a modern constitutional state.
 - (3) Draw a diagram which illustrates your understanding of the separation of powers within indigenous communities.
-

5.3 SEPARATION OF POWERS IN SOUTH AFRICA

5.3.1 Is separation of powers present in the South African constitutional state?

What was the pre-1994 position?

The pre-1994 constitutional system was not founded on the separation-of-powers principle, that is, the constitutional structure did not adequately separate power, personnel and roles. The only component of the doctrine which was upheld in South Africa, then, was the formal classification of political power into the legislative, executive and judicial function. This formal classification permitted, instead of prevented, the endemic invasion of fundamental rights and the political exclusion and economic impoverishment of the poor and the working class in South Africa.

During the period from 1910 to 1993, the impact and development of the separation-of-powers principle were suppressed by the all-powerful legislative and executive institution and an absence of a system of checks and balances against legislative and executive activities. Van der Vyver states that it is clear that we cannot look to our pre-1994 past for our present understanding of the separation-of-powers principle and how it would intersect with the democratic aspirations of our new constitutional state.

The separation-of-powers principle was introduced into our constitutional architecture by Constitutional Principle VI, which was part of our interim Constitution and was one of the principles which was to serve as a template for the drafting of the final Constitution. This principle provided that:

[t]here shall be a separation of powers between the Legislature, Executive and Judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.

The 1996 Constitution does not expressly state in unequivocal terms or in a single provision that this principle is part of our constitutional state. However, in the first *Certification* judgment, namely *In re Certification of the Constitution of the Republic of South Africa, 1996*, the Constitutional Court was satisfied that this doctrine was firmly established in the South African Constitution. In arriving at this conclusion, the Court reasoned that:

[t]here is, however, no universal model of separation of powers and in a democratic system of government in which checks and balances result in the imposition of restraints by one branch of government upon another, there is no separation that is absolute. The principle of separation of powers, on the one hand, recognises the functional independence of branches of government. On the other hand, the principle of checks and balances focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another. In this sense it anticipates the unnecessary or unavoidable intrusion of one branch on the terrain of another. No constitutional scheme can reflect a complete separation of powers: the scheme is always one of partial separation.

The question that now arises is: how has this principle been adopted in South Africa? Is there an absolute separation of powers among the three organs of state or does our model leave room for partial separation? The answer to this question will provide you with examples of the sections in the 1996 Constitution which confirm that this principle is established in our constitutional architecture.

5.3.2 Absolute or relative separation of powers

Has South Africa opted for the American or British “SOP doctrine”?

The most complete separation of powers (personnel) appears in the American Constitution or presidential system, as is evidenced by the following institutional order of government:

- Federal legislative authority is vested in Congress, which is neither formally nor informally linked to the executive. Congress does not directly or indirectly designate the President.
- Federal executive authority is vested in the President who is elected independent of Congress for a fixed term. The President and Cabinet are not members of Congress nor are they dependent on majority support from Congress and the President may veto Bills approved by Congress.
- Judicial authority is vested in the Courts.

However, this does not mean that the American Constitution embodies a “pure” theory of separation of powers. For example, although legislative authority is vested in Congress, the President may veto (political power used to prevent the authorisation of a decision or action) legislation, and Congress exerts control over the President in that it may impeach the President if he or she transgresses the Constitution and the law.

Conversely, in the British parliamentary system, a relative separation of powers exists. This is illustrated by the following:

- Legislative authority is vested in Parliament, which consists of the monarch, the House of Commons and the House of Lords.
- Executive authority is vested in the monarch and Cabinet.
- The monarch is the head of the legislative as well as the executive authority.
- Members of the Cabinet are members of the legislature and they are appointed by the leader of the majority party in the House of Commons.
- Judicial authority is vested in the Courts.

South Africa has carved its own distinct design of separation of powers. It has adopted a hybrid between a parliamentary and presidential system of separation of powers. Our Constitution has opted for a model which encourages a relationship between the legislative and the executive branches of government, which is clear from an analysis of the following sections in the 1996 Constitution:

- section 86(1), which provides that the President is elected by the National Assembly (which is one of the two houses of Parliament) from among its members at its first sitting after elections
- section 89, which provides that the National Assembly may remove the President from office, on a vote of at least two-thirds of its members

and only on the grounds of: (a) a serious violation of the Constitution or the law; (b) serious misconduct; and (c) inability to perform the functions of office

- section 85(2)(d), which provides that the Cabinet may prepare and initiate legislation which is then introduced either in the National Assembly or the National Council of Provinces for debate and passing

There are many more sections in the Constitution which illustrate the unique South African conception of the separation-of-powers principle. These sections are discussed in greater detail in other study units in this study guide.

The Courts have, on numerous occasions, recognised that the separation-of-powers principle cannot be adopted in its “pure” form, as an absolute distinction between the three organs of state would lead to inefficiency and inflexibility. In the case of *De Lange v Smuts NO* 1998 (3) SA 785 (CC), the Constitutional Court stated as follows:

[o]ver time our Courts will develop a distinctively South African model of separation of powers, one that fits the particular system of government provided for in the Constitution and that reflects a delicate balancing, informed both by South Africa’s history and its new dispensation, between the need, on the one hand, to control government by separating powers and enforcing checks and balances and, on the other hand, to avoid diffusing power so completely that the government is unable to take timely measures in the public interest.

ACTIVITY 20

- (1) Read the following statement and then answer the question that follows:

“South Africa has one of the few parliamentary systems of government in Africa.”

Critically evaluate this statement in the light of the operation of the separation-of-powers principle in South Africa.

- (2) Differentiate between the American and English adoption of the separation-of-powers principle. You may tabulate your answer.
- (3) True or false: South Africa leans more towards the American concept of separation of powers. Justify your answer.
- (4) Briefly discuss the model of separation of powers that the Constitutional Court advanced in the *De Lange* case.

5.4 CONSTITUTIONAL JURISPRUDENCE ON THE SEPARATION OF POWERS

Thus far, we have taken you on a theoretical exploration of the separation-

of-powers principle. Now let us see how this principle works in reality by looking at the relationship between the legislative, executive and judicial branches of government through a brief analysis of some of the cases that have dealt with this principle.

5.4.1 Relationship between the legislature and the executive

Separation of powers in operation!
Can Parliament delegate its law-making function?

O'Regan states that one of the earliest cases considered by the Court dealt with the relationship between the legislature and the executive, and, in particular, with whether the legislature could delegate its law-making functions to the executive, and, if so, to what extent. The case that dealt with this issue was *Executive Council of the Western Cape Legislature v President of the RSA* 1995 (4) SA 877 (CC), where the Court had to analyse section 16A of the Local Government Transitional Government Act 209 of 1993. Section 16A(1) of the said Act provided that "the President may amend this Act and any Schedule thereto by proclamation in the Gazette". This case was decided under the interim Constitution.

The majority of the Constitutional Court held that the "manner and form" provisions of the interim Constitution prevented Parliament from delegating to the executive the power to amend the provisions of an enabling Act of Parliament. The Court went further by stating that sections 59, 60 and 61 of the interim Constitution were not merely directory but prescriptive, in terms of prescribing how laws were to be made and changed, and were part of the scheme that guaranteed the participation of both Houses in the exercise of legislative authority vested in Parliament under the Constitution. This judgment is important because it protects the proper sphere of the legislature to make, amend and pass laws. O'Regan states that this is an important aspect of the South African principle of separation of powers, and that the separation between the judiciary, legislature and executive, while not monolithic, underlies a structural and functional distinction between the arms of government which, in order to preserve their institutional integrity and their democratic function, needs to be preserved from intrusion.

ACTIVITY 21

Read the following passage and then answer the question that follows:

Parliament passes a law in terms of which President Zuma is authorised to amend and repeal the provisions of certain parliamentary legislation as well as presidential proclamations pursuant to such legislation.

(1) Critically evaluate whether this law is constitutionally valid in the context of the separation-of-powers principle.

5.5 RELATIONSHIP BETWEEN THE LEGISLATURE AND THE JUDICIARY

Is the power to bring a law into effect an administrative or a political power?

O'Regan further states that one of the earliest cases that dealt with the relationship between the legislature and the judiciary in the early days of our democracy was the Supreme Court of Appeal decision concerning Parliament's powers to discipline its members in *Speaker of the National Assembly v De Lille*. We will not discuss this case in detail here, as it appears in study unit 7, where it is in fact discussed in detail. However, what was important about this judgment is the Court's recognition that the separation-of-powers principle cannot be used by the other organs of state as a shield against judicial intervention or what is termed the "principle of non-intrusion". The role of the Courts has changed under the new dispensation. This means that the principle of non-intrusion, which is a fundamental aspect of the separation-of-powers principle, must give way to the need to provide protection for individual rights which lie at the heart of our democratic order. This deduction will become very clear when you study this case later on in the study guide.

In *Pharmaceutical Manufacturers Association of SA and Others: In re Ex Parte Application of the President of the RSA and Others*, the Court was concerned with the power of the President to bring legislation into force. Section 55 of the South African Medicines and Medical Devices Regulatory Authority Act 132 of 1998 provided that the Act would come into operation on a date to be determined by the President in the *Government Gazette*. On 30 April 1999, the President issued a proclamation purporting to bring the legislation into force. However, it subsequently became clear that the purported legislation was premature, as the regulations designed to make the Act function properly had not been prepared or issued by the Minister of Health. The President and the Minister applied to have the proclamation bringing the Act into force set aside. The issue that arose was whether the Court could review the exercise of an executive decision to bring legislation into force, especially since this function was so closely intertwined with the legislative process. The Court held that, in the circumstances of the case, the proclamation issued by the President had not been rationally related to a purpose for which the power to issue the proclamation had been given to the President and ordered that the proclamation be set aside. In arriving at this conclusion, the Court reasoned as follows:

The power [to bring an Act into force] is derived from legislation and is close to the administrative process. In my view, however, the decisions to bring the law into operation did not constitute administrative action. When he purported to exercise the power, the President was neither making law, nor administering it. Parliament had made the law, and the executive would administer it once it had been brought into force. The power vested in the President thus lies between the law-making process and the administrative process. The exercise of that power requires a political

judgement as to when the legislation should be brought into force, a decision that is necessarily antecedent to the implementation of legislation which comes into force only when the power is exercised. In substance, the exercise of the power is closer to the legislative process than the administrative process.

A number of other cases such as *S v Dodo* 2001 (5) BCLR 423 (CC) and *S v Malgas* 2001 (2) SA 1222 (SCA) also considered the relationship between Parliament and the Courts.

ACTIVITY 22

- (1) Critically evaluate the interrelationship between the legislature, executive and judiciary under the 1996 Constitution. Refer to relevant case law in your answer
-

Now let us move to a discussion of the relationship between the executive and the Courts.

5.6 RELATIONSHIP BETWEEN THE EXECUTIVE AND THE JUDICIARY

Can the judiciary intervene within the executive domain?

O'Regan states that one of the most difficult areas of constitutional jurisprudence involves the relationship between the executive and the judiciary. Remember that the executive is involved in the day-to-day administration of the state. One of its key functions is to conduct foreign affairs. In the case of *Kaunda v President of the RSA* 2004 (10) BCLR 1009 (CC), the Court had to consider the executive's power to make diplomatic representations under international law to other states on behalf of its citizens. The case concerned 69 South African citizens who had been arrested and held in custody when their plane landed in Zimbabwe. It was alleged that the 69 were mercenaries who were en route to overthrow the government of Equatorial Guinea.

The applicants sought a range of relief, including an order declaring that the government of South Africa was under an obligation, first, to extradite them to South Africa for them to be criminally prosecuted there, secondly, to take steps to protect them in relation to their conditions of imprisonment in Zimbabwe, and, thirdly, to make diplomatic representations on their behalf to prevent them from being extradited to Equatorial Guinea where, they alleged, they would not receive a fair trial.

On the issue of diplomatic representation, the Constitutional Court held that section 3 of the Constitution entitles citizens to request diplomatic protection, thus placing a corresponding obligation on the government to consider the request and deal with it consistently within the framework of the Constitution. The Court further recognised that this is a terrain where

the Courts must exercise discretion and recognise that government is better placed than they are to deal with such matters, as it has a particular and special competence which the Courts should be slow to interfere with. This does not mean that the exercise of such power is beyond the scrutiny of the Courts. But what is difficult is to balance the very powerful principles in our constitutional order, both of which are relevant to the separation-of-powers principle: first, the need to protect the executive domain from impermissible intrusion by the judiciary, and, secondly, the need to ensure that citizens' rights are protected where possible.

Other cases that illustrate the difficulty of maintaining a rigid separation of powers between the executive and the judiciary have arisen in the analysis of socioeconomic rights, particularly given the more creative role that the Courts are now required to play within our new democratic dispensation. You will study these cases in greater detail when you do the module on Fundamental Rights.

ACTIVITY 23

Read the following set of facts and then answer the question that follows:

Section 7(1) of the National Prosecuting Act of 32 of 1998 created a special task team called "STING" to deal with high-profile organised crime. STING has special powers to investigate serious crimes and to institute criminal proceedings. In June 2009, the Cabinet initiated draft legislation in terms of which it sought to disband STING as a special investigatory unit and to merge it with the South African Police Service. Mr Greedy, who is a businessman, believes that the existence of STING is indispensable given the high levels of crime that are prevalent in South Africa. Mr Greedy challenges the disestablishment of STING in terms of draft legislation proposed by the Cabinet and submits that the Court should set such proposed legislation aside.

- (1) Critically evaluate whether the Court has the power to set aside the decision of the Cabinet to initiate such legislation. Refer to the *Glenister* case in your discussion.

5.7 JUDICIAL REVIEW AND DEMOCRACY

Why should unelected judges have the power to test laws and the conduct of elected representatives?

From the above discussion it is clear that the separation-of-powers principle is definitely an essential ingredient in preventing an excessive concentration of power and an abuse of power by the legislative and executive branches of government within a constitutional democracy. It is also trite that the Courts have an invaluable role to play within this context. They are required to protect the Constitution and individual

rights, whilst at the same time remaining sensitive to the legitimate constitutional interests of the other arms of government. However, their role is also not without some degree of controversy: are the Courts truly legitimate given that judges are not elected but nominated to a position?

5.7.1 Representative democracy and the separation of power

Representative democracy is characterised by the fact that the citizens of a state elect the representatives of their choice, and these representatives express the will of the people. Or, simply stated, representative democracy demands that all the inhabitants of the state (ie all those above a certain age, eg 18 years, and those who are not disqualified for another reason) should, via direct representation, have a say in the way in which the state is governed, usually by being represented in the legislature. Note that a representative democracy is created via the process of elections. These elections should be held at regular intervals and reasonably frequently.

Representation is meant to ensure that the interests of society in general are protected and cared for by the elected representatives of that society. Consent is central to the concept of representation. Representation entails, as the word implies, government power being exercised by representatives of the people on their behalf, and with their consent. In parliamentary terms, representation refers to the constitutional system for electing members of the legislative body who will work in the interests of those who elected them.

Constitutional checks and guarantees, such as the separation of powers, freedom of the press, freedom of information and freedom of association, may prevent any single group or institution from becoming too strong, as well as promote democratic debate and competition. Some commentators also argue that it is possible to combine representative democracy at the national and provincial levels with a more direct, participatory form of democracy at local government level (and in the workplace).

5.7.2 Constitutional democracy and the separation of powers

In addition to being a representative democracy, South Africa is also a constitutional democracy. This means that the people's representatives in Parliament, in the provincial legislatures and in Municipal Councils are not free to make whatever laws they wish, but are bound to observe the norms and values embodied in the Constitution. Laws that are inconsistent with the Constitution will be declared invalid.

Is judicial review undemocratic?

Why should unelected judges have the power to invalidate laws made by the people's chosen representatives?

The objection may be raised that it is undemocratic for the judiciary (which is not an elected body) to have the power to declare legislation enacted by Parliament (which is an elected body) invalid.

American scholars speak of the “counter majoritarian problem”, since, so the argument goes, judicial review is in conflict with the wishes of the legislative majority. We do not wish to enter that debate here. However, we would like to suggest that constitutionalism and democracy may complement each other, and that the existence of a supreme, justiciable Constitution is not necessarily incompatible with democracy. The following arguments can be made to defend judicial review against the charge that it is undemocratic:

The South African Constitution was itself made by the representatives of the people, assembled in the Constitutional Assembly. In fact, the Constitution had to be adopted by a two-thirds majority of the members of the Constitutional Assembly and was the product of a lengthy process of negotiations and democratic deliberation. This explains, to some extent, why the Constitution enjoys precedence over ordinary legislation.

Democracy presupposes a vigorous political debate in which citizens feel free to state their views and to challenge widely accepted beliefs. Judicial review may contribute to this result: by protecting people’s political rights, or freedom of expression, judges may help to ensure a free and uninhibited public debate.

ACTIVITY 24

Read the following paragraph and then answer the questions that follow:

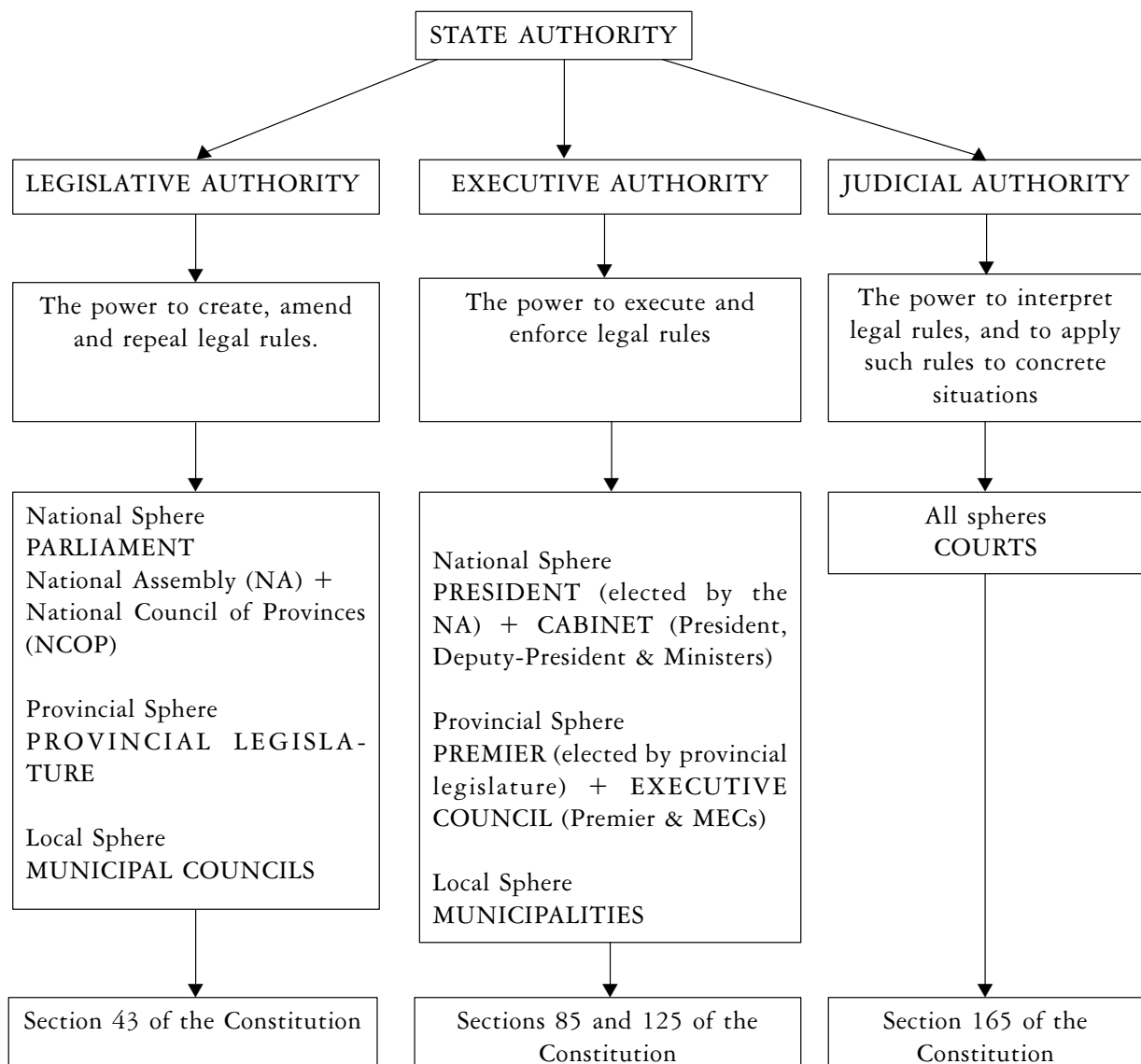
Montesquieu wrote that “all would be in vain if the same person or the same body of officials, be it the nobility or the people, were to exercise these three powers: that of making laws, that of executing public resolutions, and that of judging crimes and disputes of individuals”.

- (1) Do you agree with Montesquieu’s submission? If so, briefly describe what would happen if the opposite norm were to be accepted within the South African constitutional framework.
- (2) Briefly discuss the importance of the judiciary within a constitutional state premised on the rule of law.
- (3) Critically discuss whether the legitimacy of judicial review is jeopardised by its counter-majoritarian features.

Judges may inquire into the constitutionality of legislation, but this does not mean that they can simply substitute their own views for those of the legislature. When a judge strikes down a law as unconstitutional, he or she does not make a new law or tell the legislature what a new law should look

like. The discretion to amend a law that has been struck down belongs to the legislature — the only condition is that the amended law must be constitutional!

5.8 DIAGRAMMATIC SUMMARY



5.9 COMMON MISTAKES AND PROBLEM AREAS

Many students confuse the branches of government with the spheres of government.

Study the table below, which sets out the differences between these two concepts.

Separation of powers	Cooperative government
Branches of government	Spheres of government
Legislative, executive and judicial branches of government	National, provincial and local spheres of government

5.10 CONCLUSION

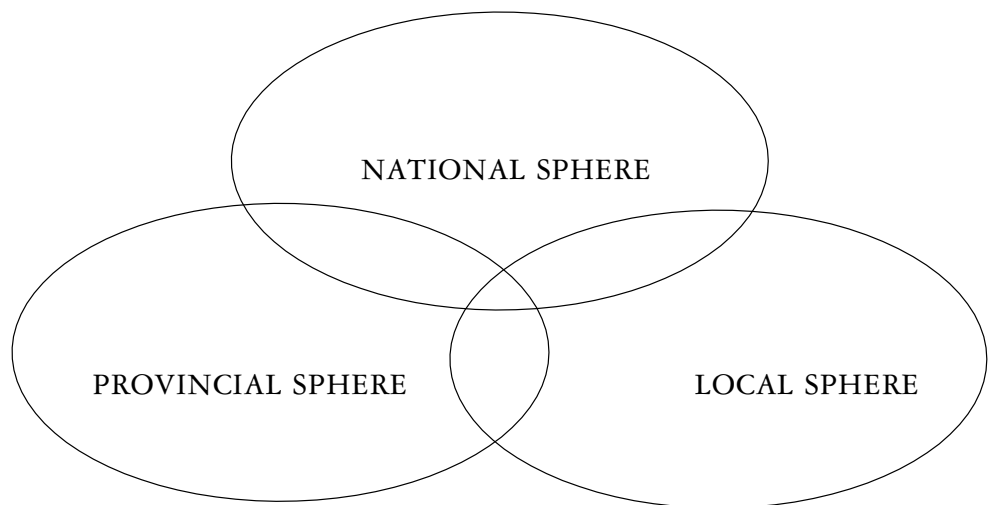
The separation-of-powers principle is a part of South Africa's broad commitment to accountable and limited government. The Courts have confirmed this by developing jurisprudence in an attempt to set certain ground rules to ensure the efficacy and institutional integrity of each arm of the government. However, O'Regan states that a fully articulated separation-of-powers doctrine may still have to be designed in the future.

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- Davis D, Chaskalson M & De Waal J "Democracy and constitutionalism: the role of constitutional interpretation" in Van Wyk D, Dugard J, De Villiers B & Davis D (eds) *Rights and Constitutionalism: the New South African Legal Order* (1994) 1.
- O'Regan K "Checks and balances: reflections on the development of the doctrine of separation of powers under the South African Constitution" *PELJ* (2005, (8) 1, 120–150.
- Rautenbach I & Malherbe EFJ *Constitutional Law* (2009) chapters 8, 9 and 10.

STUDY UNIT 6

Cooperative government



OVERVIEW

As we saw in the previous study unit, the Constitution has provided an opportunity for the collaboration of the spheres of government in ensuring the promotion of good governance in public administration in line with the prescripts of the Constitution. Such collaboration requires:

- a fair distribution of state authority among the three spheres of government, which are divided into:
 - national,
 - provincial and
 - local governments

The distribution of state authority is informed by the principle of cooperative government which seeks to determine the relationship between the aforementioned spheres of government. In terms of this principle, the relationship is one of close cooperation within the larger framework that recognises the distinctiveness, interrelatedness and interdependence of the entire state component. The relationship is further characterised by consultation, coordination and mutual support (Malherbe at 239).

The principle of cooperative governance is further distinguished by the different forms of government systems (unitary and federal) and the key features characterising each form. Furthermore, it enables the determination of the form of government that South Africa has adopted and whether such form of government is consistent with the idea of provincial autonomy.

Chapter 3 of the Constitution forms the basis for the development of the principle of cooperative governance, as it entrenches that,:

{i}n the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated [see s 40(1)].

In addition, it further requires that:

{a}ll spheres of government must observe and adhere to the principles in this Chapter and must conduct their activities within the parameters that the Chapter provides [see s 40(2)].

The development of cooperative governance is reinforced by section 195(1) in Chapter 10 of the Constitution, which seeks to regulate the governing of the public service within these spheres of government. This section entrenches the basic values and principles which require public administration to be informed by the democratic values and principles enshrined in the Constitution, which principles should apply to:

- (a) administration in every sphere of government;
- (b) organs of state; and
- (c) public enterprises.

{See s 195(2).}

The regulation of cooperative government in the three spheres of government is further supplemented by the establishment of a monitoring body to ensure adherence to the precepts of democratic values as entrenched in section 195. Section 196, which establishes the Public Service Commission (PSC), guarantees the independence of the Commission and the execution of its mandate without fear or favour in order to ensure the maintenance of effective and efficient public administration and a high standard of professional ethics in the public service.

Therefore, the essence of this constitutional framework is to foster close cooperation among the spheres of government in the implementation of their policies and programmes in order to provide citizens with a coordinated or comprehensive approach to the delivery of services.

UNIT OUTCOMES

After you have studied the material in this study unit, you should be able to do the following:

- define the term “cooperative government” and explain it in greater detail
- distinguish and characterise the forms of government
- discuss the principles of cooperative government

- analyse the basic obligations in the functioning of the spheres of government as entrenched in Chapter 10 of the Constitution
- evaluate the interdependence of cooperative governance and the basic principles of public administration
- describe the functioning of the Public Service Commission in strengthening cooperation between the spheres of government
- indicate how the relationship between the spheres of government enhances the promotion of the principles of public administration

PRESCRIBED STUDY MATERIAL

Certification of the Constitution of the Republic of South Africa 1996 (10) BCLR 1253 (CC)

Independent Electoral Commission v Langeberg Municipality 2001 (1) BCLR 883

Premier, Western Cape v President of the Republic of South Africa and Another 1999 (4) BCLR 383

Matatiele Municipality and Others v President of the Republic of South Africa 2006 (5) BCLR 622

Merafong Demarcation Forum and Others v President of the Republic of South Africa 2008 (10) BCLR 968 (CC)

Sankie Mthembu-Mahanyele v Mail & Guardian Ltd and Another (054/2003) [2004] ZASCA 67

Recommended material

Please note that you need not study the following material for examination purposes:

Asmal K “Constitutional issues for a free South Africa: decentralisation of a unitary state” (1990) Volume 13, *Transformation*, 81

Devenish GE *The South African Constitution* (2005) Butterworths Publishers, Durban, chapter 3, 215–218

Malherbe R “The role of the Constitutional Court in the development of the provincial autonomy” (2001) Volume 16, *SAPR/PL*, 233

Rautenbach I & Malherbe EFJ *Constitutional Law* (2004) 5th ed, Butterworths Publishers, Durban, chapter 6, 69–93

Simeon R & Murray C, “Multi-sphere governance in South Africa: an interim assessment” (2001) Volume 31, No 4, *The Journal of Federalism*, 65

Swart MR & Malan LP “Public management principles: the relevance of the 16th century reformation for public managers in the 21st century” (2007) Volume 26 No 3, *Politica*, Unisa Press, 67

Relevant sections of the Constitution

You must study and summarise sections 40, 41, 151, 195, 196 and 197 of the 1996 Constitution for examination purposes. These sections focus on the following:

- the form of government that South Africa adopted after the dawn of democracy
- the principles of cooperative government
- the manner in which the spheres of government are supposed to interact with one another
- the basic principles and values governing public administration
- the role of the Public Service Commission in monitoring the effective and proper governance and administration of the public service
- the manner in which employees must be recruited to the public service

Section number	Title of section	Content
Section 40	Government of the Republic	(1) In the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and inter-related.
		(2) All spheres of government must observe and adhere to the principles in this Chapter and must conduct their activities within the parameters that the Chapter provides.
Section 41(1)	Principles of co-operative government and intergovernmental relations	All spheres of government and all organs of state within each sphere must <ol style="list-style-type: none"> (a) preserve the peace, the national unity and the indivisibility of the Republic; (b) secure the wellbeing of the people of the Republic; (c) provide effective, transparent, accountable and coherent government for the Republic as a whole; (d) be loyal to the Constitution, the Republic and its people; (e) respect the constitutional status, institutions, powers and functions of government in the other spheres; (f) not assume any power or function except those conferred on them in terms of the Constitution;

Section number	Title of section	Content
		<p>(g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and</p> <p>(h) co-operate with one another in mutual trust and good faith by</p> <ul style="list-style-type: none"> (i) fostering friendly relations; (ii) assisting and supporting one another; (iii) informing one another of, and consulting one another on, matters of common interest; (iv) co-ordinating their actions and legislation with one another; (v) adhering to agreed procedures; and (vi) avoiding legal proceedings against one another.
Section 41(2)		<p>An Act of Parliament must: –</p> <ul style="list-style-type: none"> (a) establish and provide for structures and institutions to promote and facilitate intergovernmental relations; and (b) provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes.
Section 41(3)		<p>An organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a Court to resolve the dispute.</p>
Section 41(4)		<p>If a Court is not satisfied that the requirements of subsection (3) have been met, it may refer a dispute back to the organs of state involved.</p>

Section number	Title of section	Content
Section 195	Basic values and principles governing public administration	<p>(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:</p> <ul style="list-style-type: none"> (a) A high standard of professional ethics must be promoted and maintained. (b) Efficient, economic and effective use of resources must be promoted. (c) Public administration must be development-oriented. (d) Services must be provided impartially, fairly, equitably and without bias. (e) People's needs must be responded to, and the public must be encouraged to participate in policy-making. (f) Public administration must be accountable. (g) Transparency must be fostered by providing the public with timely, accessible and accurate information. (h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated. (i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.

Section number	Title of section	Content
		<p>(2) The above principles apply to: –</p> <p>(a) administration in every sphere of government;</p> <p>(b) organs of state; and</p> <p>(c) public enterprises.</p> <p>(3) National legislation must ensure the promotion of the values and principles listed in subsection (1).</p> <p>(4) The appointment in public administration of a number of persons on policy considerations is not precluded, but national legislation must regulate these appointments in the public service.</p> <p>(5) Legislation regulating public administration may differentiate between different sectors, administrations or institutions.</p> <p>(6) The nature and functions of different sectors, administrations or institutions of public administration are relevant factors to be taken into account in legislation regulating public administration.</p>
Section 196	Public Service	Commission
		<p>(1) There is a single Public Service Commission for the Republic.</p> <p>(2) The Commission is independent and must be impartial, and must exercise its powers and perform its functions without fear, favour or prejudice in the interest of the maintenance of effective and efficient public administration and a high standard of professional ethics in the public service. The Commission must be regulated by national legislation.</p>

Section number	Title of section	Content
		<p>(3) Other organs of state, through legislative and other measures, must assist and protect the Commission to ensure the independence, impartiality, dignity and effectiveness of the Commission. No person or organ of state may interfere with the functioning of the Commission.</p> <p>(4) The powers and functions of the Commission are: –</p> <ul style="list-style-type: none"> (a) to promote the values and principles set out in section 195, throughout the public service; (b) to investigate, monitor and evaluate the organisation and administration, and the personnel practices, of the public service; (c) to propose measures to ensure effective and efficient performance within the public service; (d) to give directions aimed at ensuring that personnel procedures relating to recruitment, transfers, promotions and dismissals comply with the values and principles set out in section 195; (e) to report in respect of its activities and the performance of its functions, including any finding it may make and directions and advice it may give, and to provide an evaluation of the extent to which the values and principles set out in section 195 are complied with; and

Section number	Title of section	Content
		<p>(f) either of its own accord or on receipt of any complaint: –</p> <p>(i) to investigate and evaluate the application of personnel and public administration practices, and to report to the relevant executive authority and legislature;</p> <p>(ii) to investigate grievances of employees in the public service concerning official acts or omissions, and recommend appropriate remedies;</p> <p>(iii) to monitor and investigate adherence to applicable procedures in the public service; and</p> <p>(iv) to advise national and provincial organs of state regarding personnel practices in the public service, including those relating to the recruitment, appointment, transfer, discharge and other aspects of the careers of employees in the public service; and</p> <p>(g) to exercise or perform the additional powers or functions prescribed by an Act of Parliament.</p> <p>(5) The Commission is accountable to the National Assembly.</p> <p>(6) The Commission must report at least once a year in terms of subsection (4)(e): –</p> <p>(a) to the National Assembly; and</p> <p>(b) in respect of its activities in a province, to the legislature of that province.</p>

Section number	Title of section	Content
		<p>(7) The Commission has the following 14 commissioners appointed by the President:</p> <ul style="list-style-type: none"> (a) Five commissioners approved by the National Assembly in accordance with subsection (8)(a); and (b) one commissioner for each province nominated by the Premier of the province in accordance with subsection (8)(b). <p>(8) (a) A commissioner appointed in terms of subsection (7)(a) must be: –</p> <ul style="list-style-type: none"> (i) recommended by a committee of the National Assembly that is proportionally composed of members of all parties represented in the Assembly; and (ii) approved by the Assembly by a resolution adopted with a supporting vote of a majority of its members. <p>(b) A commissioner nominated by the Premier of a province must be: –</p> <ul style="list-style-type: none"> (i) recommended by a committee of the provincial legislature that is proportionally composed of members of all parties represented in the legislature; and (ii) approved by the legislature by a resolution adopted with a supporting vote of a majority of its members. <p>(9) An Act of Parliament must regulate the procedure for the appointment of commissioners.</p>

Section number	Title of section	Content
		<p>(10) A commissioner is appointed for a term of five years, which is renewable for one additional term only, and must be a woman or a man who is: –</p> <ul style="list-style-type: none"> (a) a South African citizen; and (b) a fit and proper person with knowledge of, or experience in, administration, management or the provision of public services. <p>(11) A commissioner may be removed from office only on: –</p> <ul style="list-style-type: none"> (a) the ground of misconduct, incapacity or incompetence; (b) a finding to that effect by a committee of the National Assembly or, in the case of a commissioner nominated by the Premier of a province, by a committee of the legislature of that province; and (c) the adoption by the Assembly or the provincial legislature concerned, of a resolution with a supporting vote of a majority of its members calling for the commissioner's removal from office. <p>(12) The President must remove the relevant commissioner from office upon: –</p> <ul style="list-style-type: none"> (a) the adoption by the Assembly of a resolution calling for that commissioner's removal; or (b) written notification by the Premier that the provincial legislature has adopted a resolution calling for that commissioner's removal. <p>(13) Commissioners referred to in subsection (7)(b) may exercise the powers and perform the functions of the Commission in their provinces as prescribed by national legislation.</p>

Section number	Title of section	Content
Section 197	Public Service	<p>(1) Within public administration there is a public service for the Republic, which must function, and be structured, in terms of national legislation, and which must loyally execute the lawful policies of the government of the day.</p> <p>(2) The terms and conditions of employment in the public service must be regulated by national legislation. Employees are entitled to a fair pension as regulated by national legislation.</p> <p>(3) No employee of the public service may be favoured or prejudiced only because that person supports a particular political party or cause.</p> <p>(4) Provincial governments are responsible for the recruitment, appointment, promotion, transfer and dismissal of members of the public service in their administrations within a framework of uniform norms and standards applying to the public service.</p>

6.1 DEFINITION AND PRINCIPLES OF "COOPERATIVE GOVERNMENT"

What is cooperative government?

Cooperative government refers to the system of government that defines the framework within which the relations between the three spheres of government must be conducted. Chapter 3 of the Constitution makes provision for the regulation of guiding principles of cooperative government as entrenched in section 41(1)(h), which requires the different spheres to cooperate with one another in mutual trust and good faith.

These principles set the framework for the regulation and distribution of government power, which can never be entrusted to a single body. The distribution of state authority is further divided into the national, provincial and local spheres, which are interdependent as entrenched in section 40 of the Constitution. The national sphere is required to play an overarching role in the maintenance of friendly relations between itself and the other two spheres of government. Chapter 6 of the Constitution establishes the different provinces (9) and entrenches their mandatory obligations in the fulfilment of the principles envisaged in section 40. The provincial governments are further required, in terms of the system of cooperative governance, to monitor and supervise the local sphere as entrenched in section 139 of the Constitution. Both the national and

provincial spheres have the legislative and executive authority to ensure effective performance by the local sphere. It is the local sphere that carries a broader mandate in the area of service delivery, which directly contributes to an effective system of public administration for the advancement of the principles of cooperative governance.

In this regard, section 151 describes the status of the local sphere of government as follows:

- It consists of municipalities which must be established for the whole of the territory of the Republic.
- The executive and legislative authority of a municipality is vested in its municipal council.
- A municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution.
- The national or a provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions.

The efficacy of the breakdown of the system of governance indicates a shift away from provincial control over local government which characterised South Africa before the dawn of democracy. The breakdown has further ushered in a new process for the distribution of government authority among these three spheres of government, which Rautenbach and Malherbe (at 76–77) have broken down into the following:

- First, the higher government body takes all the decisions by itself and mandates the subordinate government bodies to execute those decisions.
- Secondly, the powers of a government body (which we may refer to as “A”) are exercised on its behalf by another body (“B”).
- Thirdly, the authority of one sphere is transferred to another, where such other sphere exercises authority and accepts full responsibility for it.
- Fourthly, authority is, from the outset, allocated by an Act or even a constitution to different government spheres and they exercise it independently without interference with one another.

The categorisation of government into different spheres indicates the hierarchical relationship that exists between the levels of government. Section 41 details the principles of cooperative government and intergovernmental relations which each sphere must adhere to. These principles are based on mutual respect for one another's constitutional status, powers and functioning and on consultation of one another on matters of common interest. This relationship requires the spheres of

government to observe and give effect to these principles encapsulated in the Constitution. Devenish (at 215–218) holds that the cooperative principles:

- enable the lower sphere of government to influence the policy that it will have to execute
- imply, at interprovincial level, cooperation to ensure that legislative processes are harmonised in order to guarantee the significance of the operation of the National Council of Provinces
- provide mechanisms to reduce political tensions between, on the one hand, the central government and the provinces, and, on the other, among the provinces themselves.

The basis for the distinction between the different spheres of government is that the national government functions on a nationwide basis, the provincial governments function within the demarcated regions, and local governments function within the smaller areas (Rautenbach & Malherbe at 86). Therefore, in ensuring the development of substantive principles of cooperative government, the Constitutional Court in the *Certification* judgment held that:

[t]he constitutional system chosen by the Constitutional Assembly (CA) is one of co-operative government in which powers in a number of important functional areas are allocated concurrently to the national and the provincial levels of government. This choice, instead of one of “competitive federalism” which some political parties may have favoured, was a choice which the CA was entitled to make in terms of the Constitutional Principles [*Certification of the Constitution of the Republic of South Africa 1996*, 1996 (10) BCLR 1253 (CC) at para 287].

The significance of the principles of cooperative governance lies in the fact that all spheres of government are interrelated and interdependent, in the sense that the functional areas of each sphere (national, provincial and local) are not distinct from one another [see *Independent Electoral Commission v Langeberg Municipality* 2001 (1) BCLR 883 at para 26].

In essence, it can be deduced from the above that cooperative government can be regarded as one of the cornerstones of the new constitutional dispensation. Moreover, the intersection of government relations can be regarded as an essential instrument for the delivery of services by the three spheres of government as is required by section 7(2), which not only entrenches respect for rights, but also requires the state to go beyond this and ensure their fulfilment.

- (1) What do you understand by the term “cooperative government” in the constitutional sense?
 - (2) Why is the government categorised into different spheres?
 - (3) What is the basis for such distinction?
 - (4) What are the methods that assist in identifying the system of distribution of government power?
 - (5) Explain in detail the benefits associated with the principles of cooperative governance.
-

6.2 THE DIFFERENT FORMS OF GOVERNMENT

The distribution of government authority may determine the form of the state. The Constitution provides a framework to determine whether the system of governance is informed by unitary or federal features. The distinction between these two forms of government rests ultimately on the degree of interaction and the division of power between the national, provincial and local spheres of government. Therefore, it is important to define what each system entails in order to determine the differences between them in establishing the South African system of government.

6.2.1 The unitary form of government

In a unitary system of government, state authority is centralised in one sphere (national government). This implies that all other government bodies are subject to the authority exercised by the national government. The essential features of the unitary system of government are, *inter alia*, the following:

- Power is concentrated in central government/the national sphere of government.
- Greater emphasis is placed on the centralisation of state activities than on the decentralisation of state activities. Where decentralisation does occur, the provinces or regions concerned enjoy only a limited degree of autonomy.
- The provinces or regions are subordinate to the central/national sphere of government.
- Even if state authority is distributed among other spheres of government, this by no means divests the national government of its authority. In effect, no real distribution of state authority takes place in this form of government.

The advantages of the unitary system of government are:

- unity, and uniformity of law, policy and administration
- minimal conflict of authority, interest and responsibility
- speedy action and prompt responses to decisionmaking

- a less expensive process with no duplication of government authority

These advantages are outweighed by the disadvantages, which have the potential to limit government authority. Such disadvantages are the following:

- concentration of state authority may pave the way for the central government to rule with absolute political power
- a lack of urgency in dealing with complex problems, particularly with domestic affairs
- central government may be detached from local problems, interests and initiatives (Abueva at 4)

Before the dawn of democracy in 1994, Parliament was supreme and the political dispensation was centralised in both law and practice. The supremacy of Parliament was simply used to promote segregation laws and racist policies. These laws and policies were more prejudicial to blacks and especially to women, who were also discriminated against for no other reason than that they were women [*Brink v Kitsboff* 1996 (6) BCLR 752].

6.2.2 The federal form of government

The federal system of government is characterised by the distribution of government authority among the different spheres of government. The authority of the state is constitutionally entrenched and divided among the various spheres of government. There are various methods for distributing government authority within the federal system of government, namely:

- defining the power of the federal government in the constitution
- defining the powers of the provinces in the constitution, with the remaining powers being vested in the federal government
- defining the powers of both the central and provincial governments, but indicating in whom the highest authority is vested
- providing concurrent jurisdiction between the central and provincial governments (Rautenbach & Malherbe at 89)

These methods give rise to the basic features of the federal form of government, which features involve:

- the distribution of state authority and resources among the various levels of government
- the provinces being given broader powers in executing their mandates
- the limited jurisdiction of provinces on important issues such as the regulation of defence, taxation and customs matters, which matters are normally dealt with by the national government
- disputes between the spheres of government being resolved by an independent arbiter, such as the Constitutional Court in South Africa [*Premier, Western Cape v President of the Republic of South Africa and Another* 1999 (4) BCLR 383]

These features affirm:

- the supremacy of the constitution
- the division of power among the spheres of government
- the rigidity of the constitution
- the independency of the judiciary

In essence, the federal system of government entails the sharing of legal sovereignty among the different spheres, with each sphere having constitutional and legislative authority to make decisions independently, but which do not conflict with one another. This is the situation that prevails in South Africa.

6.2.2.1 Advantages of the federal system of governance

Definition of intergovernmental relations.

One of the basic principles that underlies the system of cooperative governance in a federal government is the development of intergovernmental relations. The term “intergovernmental relations” may be defined as the interaction between the various spheres of government, each of which has an independent role to play, as well as between tiers within a sphere of government (such as a local government), with a view to achieving a common goal for the benefit of all and the wellbeing of the country. In this regard, the interaction of the various spheres of government limits any fragmentation with regard to the distribution of state authority, as it seeks to:

- promote and facilitate cooperation in decisionmaking
- advance the coordination and alignment of priorities, budgets, policies and activities across interrelated functions and sectors
- ensure the smooth flow of information within the government, and between government and communities, with a view to enhancing the implementation of policy and programmes
- prevent and resolve conflicts and disputes

The Inter-governmental Relations Framework Act 13 of 2005 seeks to give effect to the principles set out in Chapter 3 of the Constitution and to ensure that such principles are implemented. Basically, the Act seeks to promote and facilitate government relations. In addition, it seeks to provide mechanisms and procedures designed to facilitate the settlement of intergovernmental disputes, and to provide for matters connected therewith (see the preamble to the Act).

Distinction between an integrated and a divided system of governance.

The federal system of government provides not only for the principles of cooperative government, for procedures for settling intergovernmental disputes and for provincial participation in the national Parliament, but also for the devolution of powers or functions among the various spheres of government (see Schedule 4 and 5 of the Constitution). It ensures an integrated rather than a divided system of governance. In the former

system of governance, intergovernmental cooperation and coordination are entrenched with a view to satisfying the interests and needs of the citizens. In the latter, final authority rests with the national government, which subjects the other lower spheres of government (provincial and local) to a subordinate status, as they derive their power from the national government, which may overrule them at any time by way of the ordinary legislative process.

In other words, the federal system of governance is a move away from the unitary system of governance which characterised South Africa before the new constitutional dispensation. Simeon and Murray (at 65) note that the federal system of government is required to:

- deepen the democracy embraced in 1994
- contribute to socioeconomic transformation and effective service delivery
- contribute to the management of diversity in a divided society

They further hold that the benefits depend crucially on the ability of the component parts to carry out their assigned roles and responsibilities.

6.2.2.2 The relationship between the various spheres of government

As discussed above, the federal system of governance entails the decentralisation of state authority, which may be determined by the **geographical** and **functional** areas of each sphere of government. The historical, political, geographical, economic and administrative factors can determine objectively at which level each matter can be dealt with most effectively. The distribution of state authority among the spheres ensures the fair allocation of functional areas so as to minimise the over-concentration of state authority in one sphere, for example the national government (see Rautenbach & Malherbe at 84).

The governance of the relationship between the various spheres of government is dealt with in section 41 of the Constitution. The intergovernmental relations are inevitable in the light of the fact that the Constitution provides for concurrent legislative powers, which, in some instances, may give rise to disputes. As Chaskalson P stated in the *Western Cape* case:

The provisions of chapter 3 of the Constitution are designed to ensure that in fields of common endeavour the different spheres of government cooperate with each other to secure the implementation of legislation in which they all have a common interest. The cooperation called for goes so far as to require that every reasonable effort be made to settle disputes before a Court is approached to do so (at para 54).

The intergovernmental relationship also entails the independent exercise of

governmental authority, which is not subject to interference by an outside territory of each sphere, except through the normal checks and balances that regulate government conduct in public administration. The Constitution has, in Schedule 4, further given the national and provincial governments overlapping powers in a wide range of functional areas, but subject to the regulation of conflicts among these spheres as entrenched in sections 146 to 150.

Generally, the relationship between the various spheres of government requires careful coordination among the provincial legislatures and the National Council of Provinces (NCOP). Through the NCOP, a mechanism is provided for facilitating development and economic growth in less developed provinces, but without inhibiting economic development in provinces that have greater natural resources at their disposal. Devenish (at 216) submits that the procedures required for the operation of the NCOP require careful and thorough preparation and that their success will depend on the ability and the will of provincial legislatures to exploit, in an optimal manner, the opportunities and challenges provided by the NCOP [see *Matatiele Municipality and Others v President of the Republic of South Africa* 2006 (5) BCLR 622].

ACTIVITY 26

- (1) What are the characteristics of the unitary system of government?
 - (2) Discuss the benefits of the federal system of government over the unitary system.
 - (3) Discuss how the South African system of governance is designed to improve the quality of life of all South Africans.
 - (4) With reference to case law, discuss the importance of the relationship between the various spheres of government.
 - (5) What are the fundamental values and principles that govern friendly relations between the different spheres of government?
 - (6) Explain the various methods according to which the authority of the state is distributed among the spheres of government.
-

6.3 INTERGOVERNMENTAL RELATIONS AND PUBLIC ADMINISTRATION

Intergovernmental relations are central to the successful execution of many public initiatives. In a federal system of government, which the South African system of government resembles, the constitutional values and the principles of public administration as entrenched in section 195 of the Constitution provide a sound framework by means of which the management of public administration can be driven. The development of sound intergovernmental relations and the principles of public administration are intertwined with good management practices which involve the process of working in collaboration with and through one

another in order to achieve government goals in a more efficient and effective manner. Without focusing on all the principles in section 195, the following will provide a deeper understanding of a principled system of public administration and management in South Africa for the determination of the significance of the principles of cooperative governance:

- (1) *The promotion and maintenance of a high standard of professional ethics, which require:*
 - the government not only to develop legislation and related policies, but also to ensure that these policies are effectively implemented
- (2) *Efficient, economic and effective use of resources, which also requires:*
 - managers to clearly understand the priorities of the government and to ensure that the resources are used within the framework of those priorities in order to:
 - determine the impact of resource allocation in the course of service delivery
 - critically establish and maintain an integrated and consistent system for monitoring
- (3) *Accountable public administration, which further requires:*
 - managers in the public service to be subject to public scrutiny and to be answerable for their conduct and activities, as the public institutions have been delegated important management and regulatory powers and are expected to exercise these powers within the context of accountability
- (4) *Good human resource management and career development practices, which require:*
 - managers to develop sound human resource management strategies in order to promote and encourage both professional and personal growth in the public service so as to bring about an effective system of cooperative governance. [There are also factors that have an influence on good human resource management practices, such as the establishment of an organisational structure, conflict resolution, flexibility, and justice in enhancing the management and leadership style in the development of substantive principles of public administration (see Swart & Malan at 67–80).]

These principles are further given effect to by the Public Service Act, Proclamation 103 of 1994 (PSA), which seeks to regulate and improve governance in public administration in support of the vision of efficiency and increased public participation in governance. The system of effective governance is further strengthened by the establishment of the Public Service Commission in terms of Section 46 of the Constitution, as the

Commission is empowered to monitor and evaluate management and administrative systems for the planning and implementation of all government programmes.

The legislative framework supplements the constitutional principles for an effective system of intergovernmental relations which entails the coordination of government programmes that seek to bring about improved performance and acceptable levels of efficiency in public administration. Performance is further enhanced by the quality of leadership, the citizenry, and the attitude and political culture that exist in the public service. The intergovernmental relations also affirm the accountability of public officials for the manner in which they execute their duties in consolidating the basic principles of public governance. The importance of the accountability of public officers is further entrenched as a founding value in section 1(d) of the Constitution, which provides that the Republic of South Africa is one sovereign, democratic state founded on the following values:

accountability, responsiveness and openness

Section 1(d) must further be read with section 92(3), which is also intertwined with the basic principles and values of public administration as entrenched in section 195. The significance of these principles was given effect to by the Supreme Court of Appeal in the case of *Sankie Mthembu-Mabanye v Mail & Guardian Ltd and Another* (054/2003) [2004] ZASCA 67, where Coram J held that:

it is necessary to hold members of government accountable to the public in order to allow robust and frank comment in the interest of keeping members of society informed about what the government does [at para 65].

The accountability of public officials further endorses the “reasonableness” of government action in the regulation and fostering of cooperation among the spheres of government which may effectively advance the principles of public administration for service delivery. The development of substantive principles of cooperative governance requires “legitimacy” or “reasonableness” in the exercise of public power, which may be determined objectively. The justification of government action in relation to the development of substantive principles of cooperative governance and those of public administration was endorsed by Ackerman J in *S v Makwanyane* 1995 (6) BCLR 665 as follows:

We have moved from a past characterised by much which was arbitrary and unequal in the operation of the law to a present and a future in a constitutional state where state action must be such that it is capable of being analysed and justified rationally. The idea of the constitutional state presupposes a system whose operation can be rationally tested against or in terms of the law. Arbitrariness, by its

very nature, is dissonant with these core concepts of our new constitutional order. Neither arbitrary action nor laws or rules which are inherently arbitrary or must lead to arbitrary application can, in any real sense, be tested against the precepts or principles of the Constitution [at para 156].

It is against this background that Van der Westhuizen J affirmed the “reasonableness principle” or the “rationality test” in *Merafong Demarcation Forum and Others v President of the Republic of South Africa* 2008 (10) BCLR 968 (CC) as follows:

In a constitutional state arbitrariness or the exercise of public power on the basis of naked preferences cannot pass muster. The “rationality test” requires the means adopted by the legislature to be linked to the end sought to be achieved [at para 62].

The regulation of government authority among the spheres of governance for the purpose of efficient public administration and management is premised on the reasonableness of government action which is founded on the democratic values and principles of a constitutional state. It can therefore be deduced that the system of intergovernmental relations has been informed by the pieces of legislation and the rulings of the Courts, noted above, which seek to contextualise government relations for an effective system of public administration.

ACTIVITY 27

The Minister of Transport adopts a policy on the regulation of the transport system in South Africa which gives the national department sole discretion to ensure its implementation without having consulted the other two spheres of government and the taxi industry that is directly affected by the policy. With reference to the above:

- (1) Discuss the importance of intergovernmental relations in the execution of state authority.
- (2) Explain the role of public participation in the development of substantive principles of public governance.
- (3) Analyse the importance of accountability in public governance.
- (4) Examine the significance of the “reasonableness principle” in fostering friendly relations among the three spheres of governance and its potential for the development of substantive principles of public administration.

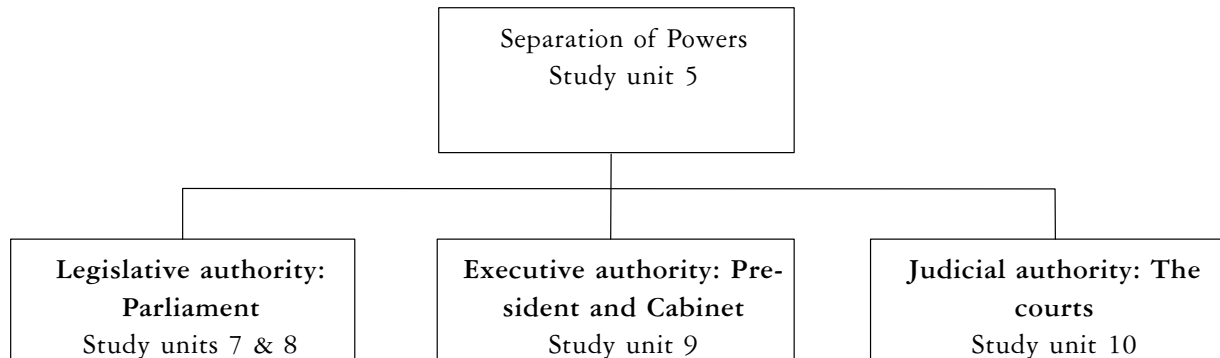
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STUDY UNIT 7

National legislative authority



What you should focus on before attempting this study unit:

Make sure you understand, and can define and explain (for examination purposes), the following concepts:

- principles of cooperative government and federalism
- separation-of-powers doctrine
- state
- government
- constitutional supremacy
- parliamentary sovereignty
- spheres of government
- branches of government
- representative democracy
- participatory democracy

OVERVIEW

By now you should be able to distinguish between the separation-of-powers doctrine and the principles of cooperative government. If you still cannot distinguish between the two ways in which state authority is distributed, then you need to revise the study units that discuss these before you start working through this study unit.

In study unit 4, which dealt with concepts of constitutional law, you learnt that representative democracy means that the electorate elects people to represent it and to express its wishes in Parliament. In study unit 5, which dealt with separation of powers, you learnt that this doctrine distinguishes between legislative, executive and judicial authority and expressly

delineates the powers and functions of these separate manifestations of state power. In study unit 6, which dealt with cooperative government, you learnt about the distribution of state authority among the three spheres of government. In this study unit, you will learn more about the first branch of government or organ of state. In particular, we will emphasise the following salient points:

- the power to make law at the national level
- the composition of Parliament and why Parliament is made up of two houses
- the two most commonly used electoral systems and the one adopted by South Africa
- the advantages and disadvantages of each electoral system
- the distinction between the free-mandate and imperative-mandate theory of representation, and the theory of representation adopted by South Africa
- the issue of parliamentary privileges
- the role of parliamentary committees

UNIT OUTCOMES

After you have studied the material in this study unit, you should be able to do the following:

- explain that Parliament is a branch of government and not a sphere of government
- describe the composition of Parliament and explain why it is necessary to have two houses of Parliament
- discuss the functions of (a) the National Assembly and (b) the National Council of Provinces
- critically evaluate, with reference to case law, in which circumstances adult citizens may be deprived of the right to vote
- distinguish between territorial and proportional representation, list the advantages and disadvantages of each, and explain which system is applied in South Africa
- distinguish between the free-mandate and imperative-mandate theory of representation, and explain which system is used in South Africa
- demonstrate an understanding of the issue of parliamentary privileges and analyse whether their exercise is subject to judicial review
- discuss the role of parliamentary committees

PRESCRIBED STUDY MATERIAL

- Sections (1)–(d), 19, 36(1), and 42 to 82 of the 1996 Constitution
- The following Court cases as contained in the *Revised Reader* (hereafter “the *Reader*”):
 - *August v Electoral Commission* 1999 (4) BCLR 363 (CC)
 - *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders* (NICRO) 2004 (5) BCLR (CC)

- *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (12) BCLR 1399 (CC)
- *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* 2008 (5) SA 171
- *Richter v Minister of Home Affairs and Others (DA and Others Intervening)* 2009 (5) BCLR 448 (CC)
- *The AParty v Minister of Home Affairs; Moloko v Minister of Home Affairs* 2009 (6) BCLR 611 (CC)

7.1 RELEVANT SECTIONS OF THE CONSTITUTION

Which sections of the Constitution deal specifically with national legislative authority?

For examination purposes, you must study the sections of the Constitution that we have provided. These sections will highlight the following issues in relation to the national legislative authority:

- the body that is vested with national legislative authority
- the powers and functions of the national legislative authority
- the power of the national legislative authority to regulate and control its own internal proceedings
- the privileges enjoyed by the members of the national legislative authority

Section number	Title of section	Content
Section 42	Composition of Parliament	<p>(1) Parliament consists of: –</p> <p>(a) the National Assembly; and</p> <p>(b) the National Council of Provinces.</p> <p>(2) The National Assembly and the National Council of Provinces participate in the legislative process in the manner set out in the Constitution.</p> <p>(3) 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 scrutinising and overseeing executive action.</p>

Section number	Title of section	Content
		<p>(4) 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.</p> <p>(5) The President may summon Parliament to an extraordinary sitting at any time to conduct special business.</p> <p>(6) The seat of Parliament is Cape Town, but an Act of Parliament enacted in accordance with section 76(1) and (5) may determine that the seat of Parliament is elsewhere.</p>
Section 43	Legislative authority of the Republic	<p>In the Republic, the legislative authority: –</p> <p>(a) of the national sphere of government is vested in Parliament, as set out in section 44;</p> <p>(b) of the provincial sphere of government is vested in the provincial legislatures, as set out in section 104; and</p> <p>(c) of the local sphere of government is vested in the Municipal Councils, as set out in section 156.</p>
Section 44	National legislative authority	<p>(1) The national legislative authority as vested in Parliament: –</p> <p>(a) confers on the National Assembly the power: –</p> <p>(i) to amend the Constitution;</p> <p>(ii) to pass legislation with regard to any matter, including a matter within a functional area listed in Schedule 4, but excluding, subject to subsection (2), a matter within a functional area listed in Schedule 5; and</p>

Section number	Title of section	Content
		<ul style="list-style-type: none"> (iii) to assign any of its legislative powers, except the power to amend the Constitution, to any legislative body in another sphere of government; and (b) confers on the National Council of Provinces the power: – <ul style="list-style-type: none"> (i) to participate in amending the Constitution in accordance with section 74; (ii) to pass, in accordance with section 76, legislation with regard to any matter within a functional area listed in Schedule 4 and any other matter required by the Constitution to be passed in accordance with section 76; and (iii) to consider, in accordance with section 75, any other legislation passed by the National Assembly.
Section 44(4)		When exercising its legislative authority, Parliament is bound only by the Constitution, and must act in accordance with, and within the limits of, the Constitution.
Section 46(1)	Composition and elections	<p>(1) Subject to Schedule 6A, as amended by 5.1 of Act 2 of 2003 the National Assembly consists of no fewer than 350 and no more than 400 women and men elected as members in terms of an electoral system that: –</p> <ul style="list-style-type: none"> (a) is prescribed by national legislation; (b) is based on the national common voters roll; (c) provides for a minimum voting age of 18 years; and (d) results, in general, in proportional representation.

Section number	Title of section	Content
Section 55	Powers of National Assembly	<p>(1) In exercising its legislative power, the National Assembly may: –</p> <ul style="list-style-type: none"> (a) consider, pass, amend or reject any legislation before the Assembly; and (b) initiate or prepare legislation, except money Bills. <p>(2) The National Assembly must provide for mechanisms: –</p> <ul style="list-style-type: none"> (a) to ensure that all executive organs of state in the national sphere of government are accountable to it; and (b) to maintain oversight of <ul style="list-style-type: none"> (i) the exercise of national executive authority, including the implementation of legislation; and (ii) any organ of state.
Section 57	Internal arrangements, proceedings and procedures of National Assembly	<p>(1) The National Assembly may: –</p> <ul style="list-style-type: none"> (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.
Section 58	Privilege	<p>(1) Cabinet Ministers, Deputy Ministers and members of the National Assembly: –</p> <ul style="list-style-type: none"> (a) have freedom of speech in the Assembly and in its committees, subject to its rules and orders; and (b) are not liable to civil or criminal proceedings, arrest, imprisonment or damages for: – <ul style="list-style-type: none"> (i) anything that they have said in, produced before or submitted to the Assembly or any of its committees; or

Section number	Title of section	Content
		(ii) anything revealed as a result of anything that they have said in, produced before or submitted to the Assembly or any of its committees.

7.1 DEFINITION OF LEGISLATIVE AUTHORITY

What is legislative authority?

One of the ways in which state authority is distributed is through the application of the doctrine of separation of powers. In terms of this doctrine, state authority is divided among three branches of government, namely the legislative, the executive and the judicial authority. In study unit 5, we saw that legislative authority is the power to enact, amend and repeal rules of law. In simple terms, legislative authority is the power to make laws which are binding on the people within a state and on the organs of the state.

Another way in which state authority can be divided is through the application of the concept of federalism. As we saw in study unit 6, federalism (in the domestic sense of the word) refers to the division of the state's legislative and executive authority between the national/central government and regional/territorial or provincial governments.

In modern states which subscribe to a system of government based on cooperative federalism, legislative authority is not granted to a single institution. Instead, legislative authority is distributed among the three spheres of government national, provincial and local which are required to interact with one another for the common good of the nation as a whole. In this and the next study unit, we focus primarily on legislative authority in the national sphere of government.

This study unit furthermore focuses on the **institutional** aspect of legislative authority. In short, this study unit answers the question: **who** is responsible for legislative authority in the national sphere of government? In other words, it deals with the **distribution of state authority**. The next study unit, on the other hand, focuses on the **legislative process** in the national sphere of government. It therefore answers the question: **how** is legislative authority in the national sphere of government **exercised**? In other words, it deals with the **exercise** of state authority.

In the discussion on the delegation of legislative authority, you will learn more about this particular role of the national legislature.

In the national sphere of government, there are various bodies that are involved in the law-making process, for example Parliament, the head of state and the electorate. The national legislature is increasingly involved in the formulation of statutory guidelines and norms with which subordinate legislation and other rules must comply.

7.2 PARLIAMENT AS THE SEAT OF NATIONAL LEGISLATIVE AUTHORITY IN SOUTH AFRICA

In whom is the highest legislative authority at the national level vested and what is the composition of Parliament?

The South African Constitution, unlike the Constitutions of America and Germany, clearly sets out the legislative authority in the different spheres of government. The legislative authority of the Republic, in the national sphere of government, is vested in Parliament.

Study section 43(a) of the 1996 Constitution.

Although most parliaments consist of only one house, there are a number of parliaments that consist of two houses, or chambers, which function separately. The South African Parliament is a bicameral legislature. This means that Parliament consists of two houses, namely:

- the National Assembly, and
- the National Council of Provinces

Study section 42(1) of the 1996 Constitution.

You may well ask why it is necessary to have a two-chamber Parliament. Would a one-chamber Parliament not be less expensive and eliminate unnecessary duplication?

Why is a bicameral legislature better than a unicameral legislature?

There are a number of reasons why some countries have two houses, or chambers, of Parliament. According to Rautenbach and Malherbe (at 113–114), these reasons include the following:

- better representation in heterogeneous societies — if the constitution of the second house differs from that of the first house, interests (eg of a population group or a particular province) that are underrepresented in one house may well be more adequately represented in the other house
- alleviation of parliament's workload
- thorough consideration of matters before Parliament is encouraged (matters are often debated separately by both houses)
- the two houses of Parliament act as a check on each other (since each represents a different interest group)

Although Parliament is made up of two chambers/houses, it is the primary roleplayer in the exercise of legislative authority. This stems from the fact that Parliament is the organ of state that represents the voters.

ACTIVITY 28

Read the following passage:

You are a law student involved in a street law project. As part of your training, you are required to present lectures to Grade 11 and 12 students on legislative authority. You must address the students on the following issues:

- In a constitutional state, where do laws originate?
- What is the difference between an organ of state and a sphere of government?
- What is the meaning of “legislative authority”?
- Which body exercises legislative authority in South Africa?
- What is the composition of this body?
- Why is the composition of this body better than that of a unicameral model?

Your task:

Draw up a lesson plan in which you set out the most important and relevant points pertaining to each of the questions posed above. (15)

7.3 THE FUNCTIONS OF PARLIAMENT

What does Parliament do?

A recent trend in modern democratic states is to create a Parliament which has more than just a legislative function. The South African Constitution recognises that the national legislative authority which is embodied in Parliament has a greater role to play than just law-making.

You should study the following provisions:

This recognition is confirmed by an analysis of section 42(3) and section 55 of the 1996 Constitution, which sets out the powers and functions of the National Assembly (NA). Section 42(4), read with section 68, sets out the functions of the National Council of Provinces (NCOP).

The core functions of the NA are as follows:

- **Representation of the electorate.** Representative government is based on the concept that qualified voters will choose certain individuals to act for them for a fixed period of time. This function entails that:
 - the NA will represent the people in the decision-making process in the national sphere of government
 - the NA will represent the people and articulate their interests
 - the NA will serve as a communication channel between the national government and the electorate so that there is full discussion and ventilation of all matters
- **The election of the President.** Read section 86.
- **Public consideration of issues.** In study unit 2, you learnt that vigorous public debate is the lifeblood of a democracy. Parliament provides a forum in which Bills, government policy, the exercise of executive authority, the performance of state administration, and a wide range of other issues are debated on an ongoing basis. Parliamentary debate is not confined to members of Parliament: sections 59(1) and 72(1) provide that the NA and NCOP respectively

must facilitate public involvement in the legislative and other processes of the Assembly/Council and their committees. The business of the NA and NCOP must be conducted in an open manner, and sittings must be held in public, although reasonable measures may be taken to regulate public access. Moreover, the public, including the media, may not be excluded from a sitting of a committee unless it is reasonable and justifiable to do so in an open and democratic society [ss 59(2) and 72(2)]. This means that the public has the right to know what is said and decided in Parliament, and that parliamentary debate should serve to stimulate debate in other forums, such as in the press and in other organs of civil society.

- **Passing legislation.** Parliament's most important function is to debate, amend and approve the Bills submitted to it by executive committees or individuals. In the next study unit, we shall see that the Constitution prescribes the manner in which the NA and NCOP participate in the consideration and approval of Bills. See also section 55(1).
- **Scrutinising and overseeing executive action.** The NA exercises control over state spending (through its scrutiny of the budget), inquires into state administration, and analyses and criticises government policy through questioning and debate.

Study section 55(2) of the Constitution, which deals with accountability of, and legislative oversight over, the executive.

Section 42(4) sets out the following functions of the NCOP:

- representation of the provinces in the national sphere of government
- participation in the national legislative process (read with s 68)
- public consideration of issues affecting the provinces

This means that, like the NA, the NCOP is constitutionally mandated to facilitate public involvement in its legislative and other processes and those of its committees [see ss 59(1)(a) in respect of the NA, 72(1)(a) in respect of the NCOP, and 118(1)(a) in respect of provincial legislatures]. This is referred to as “participatory democracy” and simply means that individuals or institutions must be given an opportunity to take part in the making of decisions that affect them (Currie & De Waal at 15). As Ngcobo J held in *Matatiele Municipality and Others v President of the Republic of South Africa and Others (No 2)* 2007 (1) BCLR 47 (CC):

Our Constitution contemplates a democracy that is representative, and that also contains elements of participatory democracy. As the Preamble openly declares, what is contemplated is “a democratic and open society in which government is based on the will of the people”. Consistent with constitutional order, section 118(1)(a) calls upon the provincial legislatures to facilitate involvement in [their] legislative and other processes, including those of their committees. As was held in *Doctors for Life International v Speaker of the National Assembly and*

Others (CCT 12/05), our Constitution calls for open and transparent government and requires legislative organs to facilitate public participation in the making of laws by all legislative organs of the State.

At paragraph 68, he continued as follows:

The nature and degree of public participation that is reasonable in a given case depends on a number of factors. These include the nature and the importance of the legislation and the intensity of its impact on the public. The more discrete and identifiable the potentially affected section of the population, and the more intense the possible effect on their interests, the more reasonable it would be to expect the legislature to ensure that the potentially affected section of the population is given a reasonable opportunity to have a say.

In the *Doctors for Life* judgment, one of the issues that the Court had to consider was the nature and scope of the duty to facilitate public involvement comprehended in sections 72(1)(a) and 118(1)(a) of the Constitution. The Court declared that Parliament had 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. It was held that, as a consequence, these Acts had been adopted in a manner that was inconsistent with the Constitution and were thus invalid.

ACTIVITY 29

Study sections 59(1)(a) and 72(1)(a) of the Constitution and the following prescribed cases on access to, and public involvement in, both the NA and the NCOP. Then answer the questions that follow:

- *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (12) BCLR 1399 (CC) (paras 115, 118–129 and 204)
 - *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* 2008 (5) SA 171 (paras 26–27, 44–46, 50–61, and 116)
- (1) What do you understand by the standard of reasonableness in determining whether the NCOP carried out its duty to facilitate public involvement in its legislative and other processes? (10)
 - (2) What do you understand by “participatory democracy”? (5)
 - (3) What is the relationship between representative and participatory democracies? (5)
 - (4) What steps should the NCOP take to fulfil its duty to facilitate public involvement in its processes? (5)
-

Read the following passage:

Some constitutional law commentators argue that, since Parliament is allowed to assign its legislative functions to the executive, Parliament performs more of a legitimising than a legislative function. They argue that there is nothing wrong with this, because such a transfer of government activities is necessary owing to the complexities and increased responsibilities of the modern state. There are other commentators who argue that, even though this may be how modern commentators perceive the role of Parliament, it does not mean that the legislative function of Parliament is insignificant.

First, Parliament still spends most of its time on the consideration of Bills.

Second, the involvement of Parliament in the legislative process usually still has an impact on the content of the legislation — directly through the amendments adopted by Parliament and indirectly in that the executive still has to anticipate, during the formulation of legislation, the role of Parliament as the focus of publicity, public debate, interest articulation and compromise.

Third, Parliament's approval remains a constitutional prerequisite without which no Bill can acquire the force of law. Parliament's consent to Bills remains a crucial legislative action which cannot be brushed off as mere legitimating.

Fourth, legislation approved by Parliament is usually of fundamental importance, since such legislation lays down guidelines and norms and provides the framework upon which other rules of law, including the mass of subordinate legislation, are based and within which they are applied.

Parliamentary legislation provides directives to administrative bodies for the execution of government policy, including the establishment of administrative institutions, the laying down of norms for administrative action, and the allocation of funds and other resources. Parliamentary legislation contains fewer particulars for direct implementation and concentrates more on the provision of general norms. The nature of parliamentary legislation has changed, but the content still materially affects society and, therefore, the legislative function of Parliament remains of decisive importance.

Now answer the following questions:

- (1) Critically evaluate the submission that Parliament's role in the legislative process has diminished and state whether you agree or disagree with that submission. (10)
- (2) Briefly discuss the role that parliamentary legislation plays in a modern democracy. (10)

- (3) List the other key functions of Parliament as discussed in the above passage. (8)
- (4) “The most important function of Parliament is the control function.” True or false? If false, identify the most important function of Parliament. (3)
-

7.4 ELECTIONS

7.4.1 General

So far, you have learnt that legislative authority is the power to make laws and that this power is vested in Parliament in the national sphere of government. You have also learnt that Parliament is a form of representative government in terms of which the citizens of a state make a choice as to who should govern them and represent their interests in the national sphere of government. The question that now arises is: how do ordinary people have a direct influence on Parliament?

In study unit 2, you learnt that, in representative democracies, elections are the most important means whereby the government is held accountable to the people. Section 19(2) guarantees the right of every citizen to “free, fair and regular elections for any legislative body established in terms of the Constitution”. Section 190 also provides for an Electoral Commission which must manage elections, ensure that they are free and fair, and declare the results within a period specified by legislation. The Constitution provides for elections for national, provincial and municipal legislatures. In this study unit, we shall focus only on elections in the national sphere (ie elections for the NA — the members of the NCOP are not directly elected by the people). However, most of the information contained in this study unit also applies to the election of the provincial legislatures [s 46(1) read with s 105(1)].

ACTIVITY 31

On 22 April 2009, general elections were held in South Africa for the third time since the advent of democracy in 1994. There was a general view that the elections were free and fair and that they reflected a matured level of democracy in South Africa. Do you agree? If not, give reasons. You can refer to any relevant source in this regard and you can compare these elections with recent elections in other African states such as Zimbabwe and Malawi.

Before you read further, make sure that you are familiar with the content of sections 1(d), 19, 46 and 190–191.

7.4.2 The right to vote

The underlying principle in representative democracies is that people must elect persons to represent them in Parliament. This can be achieved if people enjoy the parliamentary right to vote. Section 19(3)(a) of the 1996 Constitution guarantees the right of every adult citizen to “vote in elections for any legislative body established in terms of the Constitution, and to do so in secret”. This right is not absolute and voting qualifications, such as the imposition of a minimum voting age, are acceptable, provided that such qualifications do not derogate from the voting rights guaranteed in the Bill of Rights. There are provisions in the Constitution and in legislation (eg the Electoral Act of 1998) which restrict the right to vote in certain circumstances.

Section 19(3) was the subject of much constitutional litigation in the run-up to the 1999 and the 2009 elections. Prior to the 1999 elections, this section came under the spotlight in the context of whether prisoners are entitled to vote. Recently, in the run-up to the 2009 elections, the right to vote was again a subject of litigation in the context of whether expatriates (expats) are entitled to vote.

7.4.2.1 Are prisoners entitled to vote?

In *August v Electoral Commission*, the constitutionality of actions by the Electoral Commission, which had denied prisoners the right to vote, came under judicial scrutiny. The Court unanimously found that it was unconstitutional for the Electoral Commission to deny prisoners the right to vote. We have included extracts from this decision in the *Reader*.

The Constitutional Court held that the right to vote by its very nature imposes positive obligations upon the legislature and the executive. The Electoral Commission Act also imposes an affirmative obligation on the Commission to take reasonable steps to ensure that eligible voters are registered. By omitting to take any steps, the Commission failed to comply with its obligation to take reasonable steps to create the opportunity to enable eligible prisoners to register and vote. In effect, the omission would have disenfranchised all prisoners without constitutional or statutory authority therefore. The Court accordingly ordered the Electoral Commission to make reasonable arrangements to ensure that people who were imprisoned during the periods of registration could register, and that all registered prisoners could vote on election day. The Constitutional Court explicitly stated that its judgment in *August* should not be read as deciding that Parliament was unable to disenfranchise certain categories of prisoners, but simply that any such attempt at disenfranchisement was a limitation of the right to vote and therefore had to be by law of general application to stand any chance of justification. Shortly prior to the 2004 elections, Parliament amended the Electoral Act by way of the Electoral Laws Amendment Act 34 of 2003. The amendment effectively

disenfranchised prisoners serving sentences of imprisonment without the option of a fine, as it prevented them from registering as voters and from voting while in prison. Unsentenced prisoners and those who were incarcerated because they could not pay imposed fines, could register and vote.

The constitutionality of the amendment was challenged in *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO)*. Following the decision in *August*, the provisions were treated as a limitation of the right to vote, and therefore could survive only if a justifiable limitation in terms of section 36. The government's rationale for introducing the amendment to the Electoral Act was to preserve the integrity of the voting process.

Voting other than at a polling station entailed the use of mobile voting facilities or special votes, with both procedures involving risks to the integrity of the vote and requiring special measures to counter these risks. The provision of special arrangements of this nature placed a strain on the logistical and financial resources available to the Commission. For these reasons, the decision had been made to limit the categories of people for whom special voting arrangements had to be made. The favoured categories were people unable to travel to polling stations because of physical infirmities, disabilities or pregnancy, persons and members of their household absent from the Republic on government service, and people who would be absent from their voting districts on election day because of duties connected with the elections.

As for prisoners, the decision was to distinguish three classes of prisoners. Awaiting-trial prisoners were not to be excluded from voting. Prisoners sentenced to a fine with the alternative of imprisonment who were in custody because they had not paid the fine would be allowed to vote. It was thought, however, that it was reasonable to deny the vote to prisoners serving sentences of imprisonment without the option of a fine. They had been deprived of liberty by a Court after a fair trial and had to accept that a consequence of this was that special provisions would not be made for them to register and vote. Further, there were policy justifications for the singling-out of convicts in this way; this was that it was important for the government to denounce crime and to communicate to the public that the rights of citizens (such as the right to vote) are related to fulfilling their duties and obligations as citizens.

The Constitutional Court disposed of the logistics and costs leg of this argument on the basis that its establishment entailed an evidential burden on the state, a burden it made little effort to discharge: "The factual basis for the justification based on cost and the lack of resources has not been established. Apart from asserting that it would be costly to do so, no information as to the logistical problems or estimates of the costs involved were provided"

Read the passage below:

Parliament passes a law which states that certain persons are not allowed to vote. The Act does not specify that prisoners may not register and vote. An electoral commission is created to oversee the voting process and all matters ancillary to this process. The Commission fails to make provisions for the registration of prisoners.

Now answer the following questions:

- (1) Critically assess whether or not the action of the Electoral Commission is constitutional. (18)
- (2) Would your answer remain the same if the Act excluded prisoners from voting? (12)

To answer these questions, you have to do the following:

Make a summary of the Court's decision in the *August* and the *NICRO* cases and make sure that you cover the following issues in your summary:

- Decide on the question before the Court. (1)
- State the provision of the Constitution which tells you who is entitled to vote. (2)
- Draw a distinction between the provisions of the 1996 Constitution and the corresponding provision(s) in the interim Constitution and explain what this difference implies. (3)
- State what the Electoral Act of 1998 says about who is entitled to vote and who is disqualified from voting in terms of this Act. (3)
- Set out the finding of the Court. (6)
- Explain the reasons for the Court's decision. (7)

7.4.2.2 Are expats entitled to vote?

Very recently, in two important judgments, the Constitutional Court had an opportunity to consider whether South Africans living abroad (expats) have a right to vote, namely in *Richter v Minister of Home Affairs and Others* (09/09) [2009] ZACC 3 (12 February 2009) and *The AParty and Another v Minister of Home Affairs and Others* (06/09) [2009] ZACC 4 (12 March 2009).

On 12 March 2009, the Court handed down its decision on various applications challenging the constitutional validity of certain sections of the Electoral Act and its regulations. On 9 February 2009, Ebersohn AJ of the Gauteng North High Court ruled that section 33 of the Electoral Act and some of its regulations were unconstitutional. This was in response to an urgent application brought by Willem Richter, a South African teacher who was a registered voter, but lived and worked in the United Kingdom at the time. The Minister of Home Affairs applied to the Constitutional

Court for permission to appeal against the Gauteng North High Court ruling, and opposed the Richter application and two similar applications. The Court also decided on the application of the *AParty* for an order declaring not only section 33 of the Act unconstitutional, but also sections 7, 8, 9 and 60. It contended that these sections violated the right to vote and the right to equal treatment of South African citizens living abroad. Two separate judgments were handed down at the same time.

The Court decided unanimously that South Africans living abroad had the right to vote if they were registered. The Court further held that section 33 of the Electoral Act unfairly restricted the right to cast special votes while abroad to a very narrow class of citizens. This section was therefore declared unconstitutional and invalid. The implication of this judgment for the elections which were to be held on 22 April 2009 was that all citizens who were at that time registered voters, and who would be out of the country on the date of the elections, would be allowed to vote in the national, but not provincial, elections “provided they give notice of their intention to do so, in terms of the Election Regulations, on or before 27 March 2009 to the Chief Electoral Officer and identify the embassy, high commission or consulate where they intend to apply for the special vote”.

Handing down the first of the two separate judgments, O’Regan J held that the right to vote had a symbolic and democratic value and that those who were registered should not be limited by unconstitutional and invalid limitations in the Electoral Act. However, a second judgment by Ngcobo J found that unregistered voters who were overseas could not vote. This was due to the fact that the limitations of the right to vote of South Africans living abroad, who did not fall within certain categories, had been in effect since 2003 and the applicants had not explained why they had only challenged these so late.

ACTIVITY 33

Please study both the *Richter* and the *AParty* judgments and then answer the following questions:

- (1) Ms Selepe is a South African citizen who is working on a two-year contract as a nurse in Vancouver, Canada. Her contract expires at the end of this year and she wants to return to South Africa when her contract expires. She is a registered voter and she voted in the 1994, 1999 and 2004 general elections. She wishes to vote in the 2013 general elections, but she will not be in the country on the election date and will thus be unable to vote like other citizens who will be in the country on that date. With reference to authority, advise Ms Selepe whether she is entitled to vote. (10)
- (2) Would your answer have been different if she was not registered as a voter? (5)

7.4.3 Electoral systems

What are electoral systems?

In the preceding section, you learnt that people have the right to vote and that, through the process of voting, are able to select their representatives in Parliament. What makes voting possible? Surely there must be some device or mechanism in place in terms of which people can exercise their right to vote? The answer is simple. There must be an electoral system in place.

What are the objectives of an electoral system?

But what is an “electoral system”? First of all, an electoral system is the mechanism by means of which the electorate exercises its right to vote for the representative of its choice. An electoral system sets out the procedures for the election of political representatives, that is, the way in which the votes cast are translated into seats in the legislature. An electoral system usually consists of a body of rules which regulate the following:

- the franchise
- the method of voting
- the frequency of elections
- the manner in which the number of votes are converted into the number of representatives in the legislature
- the qualification and nomination of candidates
- the determination and declaration of the results of an election

See also section 105(1), which contains a similar provision in relation to provincial legislatures, and section 157(2), which deals with the election of Municipal Councils.

Section 46(1) of the Constitution provides that members of the NA must be elected in terms of an electoral system that is prescribed by national legislation, and which results, in general, in proportional representation. The main organisations which take part in elections are, of course, political parties.

Forms of electoral systems

Which are the two most common electoral systems?

There are numerous electoral systems by means of which the citizens of a country exercise the right to vote for Parliament. We will discuss the two main ways in which political parties (or political organisations) can participate in elections, namely:

- (1) territorial/regional representation
- (2) proportional representation

Territorial/regional representation

What is territorial representation all about? Territorial/regional representation is a characteristic of the Westminster electoral system. This form of electoral system featured prominently in South Africa's system of government prior to the adoption of the 1996 Constitution.

What are the essential characteristics of a regional system of representation? Briefly, the principle of territorial/regional representation functions within the following framework:

- The national territory is divided into a number of geographical units called a "constituency".
- Voters residing in each constituency elect a single member to represent that constituency in Parliament.
- A single constituency could have more than one candidate, but voters are required to select only one candidate to represent that particular geographical area (constituency) in Parliament.
- A candidate with one more vote than any of the other candidates is elected.

In the system of territorial/regional representation with single-member constituencies, the winner of an election is the person who is "first past the post" (ie the one who has balloted more votes than the next-best candidate, but not necessarily more than all his or her opponents put together). This system of representation may, therefore, incorrectly reflect the relative strengths of the political parties by favouring stronger parties and tending to eliminate weaker ones. The way in which the constituencies are demarcated can exacerbate this imbalance: a government may have a substantial majority in Parliament, but, in terms of votes cast, may well not have nearly so much support among the people themselves.

The following example should illustrate the way in which the first-past-the-post system operates:

A Parliament of 100 seats will be filled by members elected from 100 geographically delineated constituencies. Suppose that, in the Pretoria constituency, Glenda, Thabo and Paul stand for election to Parliament. Glenda obtains 10 000 votes, Thabo 10 001 votes and Paul 10 002 votes. Paul will be elected as the representative of Pretoria because he obtained a relative majority of the votes cast in that constituency. The votes that Glenda and Thabo obtained do not carry any weight.

What are the advantages of regional representation? The advantages of territorial/regional representation are as follows:

- It is simple.
- It is conducive to a strong and stable government.
- It results in a closer bond between the representative and the voter, since the representative represents a particular geographic constituency (eg Pretoria North or Sea Point). Voters in that area can complain to

their representative in Parliament if they are not satisfied with the government's performance.

What are the disadvantages of regional representation? "Gerrymandering" refers to the drawing of constituency lines in a manner which dilutes support for certain political parties or for certain cultural or racial groups.

The disadvantages are the following:

- It incorrectly reflects the relative strengths of the parties.
- It tends to favour stronger parties to the detriment of weaker ones.
- The artificial delineation of constituencies can give rise to an imbalance between constituencies.
- It allegedly leads to gerrymandering.

ACTIVITY 34

- (1) Explain what you understand by an electoral system. (5)
- (2) List the two electoral systems that you have come across in your study of constitutional law. (2)
- (3) Briefly discuss the salient features of a regional electoral system. (8)
- (4) Tabulate the advantages and disadvantages of a regional electoral system. (8)

Advantages	Disadvantages

Proportional representation

What is proportional representation?

Proportional representation means that all parties participating in an election obtain representation in Parliament that directly reflects the votes cast for these parties in such election.

There are different types of proportional systems, namely:

- the Saint-Lague system
- the D'Hondt system
- the single-transferable-vote system
- the list system

These systems are, however, complex and you need not concern yourself with them further. (Those who are interested in this topic can consult Asmal & De Ville at 1–24 and De Villiers at 43ff.)

Proportional representation can be regarded as the most inclusive system of representation, because both majority parties and minority parties are given the right to represent their constituencies in the legislative authority.

The following example illustrates how the proportional system of representation works:

The strength of representation of a party in Parliament is directly proportional to its support among the electorate. Suppose that Party A obtains 40 percent of all the votes cast in an election. Party B gets 35 percent of all votes and Party C gets 25 percent. In a 100-seat Parliament, Party A would have 40 members, Party B would have 35 members and Party C would have 25 members. All the votes cast thus carry the same weight.

What are the advantages of proportional representation?

The advantages of proportional representation can be summarised as follows:

- It provides a fair reflection of voter opinion.
- It eliminates the problem of the delimitation of electoral districts.
- All votes carry the same weight owing to the absence of artificially delimited constituencies.
- It accommodates a wider representation of parties than territorial/regional representation does.
- Minorities can form coalitions against a majority party and thus prevent dominance by a major party.

What are the disadvantages of proportional representation?

The disadvantages of proportional representation can be summarised as follows:

- It may lead to a weak, unstable government, because it may make it impossible for any one party to obtain an absolute majority (ie more than 50 percent of seats in Parliament).
- It is impersonal, in that there is no contact between the voter and the representative. (Voters vote for a party, and not a particular individual, to represent their interests.)
- It is often complicated and difficult to understand.
- It often fails to produce a clear and workable majority.
- By-elections do not operate as indicators of political trends. (When someone vacates his or her seat in Parliament, he or she is automatically replaced by the next person on the party's list. By-elections are therefore not held.)

Although the above are listed as disadvantages, this is not necessarily the case. For instance, proportional representation does not necessarily lead to

weak or unstable government. A weak or unstable government may result where there are no major parties, but only a number of small parties (which may lead to a coalition). However, where, as in South Africa, one party has an overwhelming majority, proportional representation does not weaken the government in any way.

ACTIVITY 35

- (1) Distinguish between regional and proportional electoral systems. (4)
- (2) You are a law student. You belong to the Unisa Debating Society which is holding a competition. The topic for the debate is: Electoral systems — which electoral system is better suited to South Africa and why? Prepare your argument for this debate. (10)
- (3) There are four models of the proportional electoral system. What are they? (4)
- (4) Tabulate the advantages and disadvantages of the proportional system of representation. (10)

Advantages	Disadvantages

Which electoral system does South Africa follow?

Prior to 1994, South Africa had a Westminster-style electoral system. This entailed dividing the national territory into a number of geographical constituencies, with voters resident in each constituency electing a single member to represent that constituency in Parliament. However, this was replaced by a list-based proportional representation system.

The interim Constitution of 1993 provided for the use of the rigid party-list system of proportional representation. In terms of this list system, only one choice is offered to the voter: to vote for the political party of his or her choice. The voters therefore vote for a particular party, and the seats are allocated to the parties in proportion to the votes polled by them. According to Currie and De Waal (at 131), this is a system of party government.

Section 46(1) of the 1996 Constitution leaves it to an Act of Parliament to spell out the electoral system, and specifies only that such system must result, in general, in proportional representation. Such legislation has been enacted in the form of the Electoral Act (73 of 1998). Section 5 of the Act provides for a national common voters roll and requires the Chief Electoral Officer to compile and maintain it.

The current electoral system has been criticised mainly for not promoting the values of accountability and representation. In the absence of constituency representatives, voters feel alienated from the elected representatives.

In the 2009 election campaign, the majority of opposition political parties proposed changes to the electoral system, such as a mixed-member proportional representation system and a directly elected President. Progress was made in granting more credibility to the electoral system when floor-crossing was abolished by two pieces of legislation, namely the Constitution Fourteenth Amendment Act of 2008, in respect of the national and provincial legislatures, and the Constitution Fifteenth Amendment Act of 2008, in respect of Municipal Councils. Electoral reform might follow though.

7.5 MEMBERSHIP AND TERM OF OFFICE

7.5.1 General

Section 47(1) and (2) prescribes who is eligible to be a member of the NA, while section 47(3) stipulates the conditions under which a person loses membership of the NA. Section 61 prescribes how delegates to the NCOP are to be appointed — section 62(1)–(3) prescribes who is eligible to be nominated as permanent delegates, while section 62(4) tells us when a person ceases to be a permanent delegate.

Section 49 deals with the duration of the NA, and section 50 provides for the dissolution of the NA before the expiry of its term.

You may read all the above provisions, but you are not required to know them in detail.

7.5.2 Theories of representation

Free or imperative
mandate.

An interesting question relating to membership of the NA is whether the Constitution prescribes a free- or imperative-mandate theory of representation. In brief, the free-mandate theory holds that members of Parliament are not bound by the mandates given to them by the electorate, but that they must act in accordance with the dictates of their conscience and in the interests of the country as a whole. In contrast, the imperative-mandate theory holds that representatives are bound by the mandates given to them by their principals (the electorate).

Let's suppose that there is a conflict between representatives' allegiance to their parties and their duty to the country in general (ie where they no longer wish to remain members of particular parties). The general rule, according to the **free-mandate theory**, is that members must act in

accordance with the dictates of their conscience, and that they do not have a legal duty to resign. They may, for instance, retain their seats in Parliament.

In terms of an **imperative mandate**, members who experience conflicts with their parties and who resign their membership of such parties must also vacate their seats in Parliament. Such members cannot remain in Parliament as independent members or join another party without having resigned their seats in Parliament.

Does South Africa follow a free or imperative mandate?

The imperative-mandate theory, which advocates that members who change party allegiance must also vacate their seats, applied during the 1993 Constitution and during the transitional period under the 1996 Constitution. For instance, when Bantu Holomisa and Roelf Meyer resigned from the African National Congress and the National Party respectively, they lost their seats in Parliament and were replaced by members of the political parties from which they had resigned. The interim Constitution's endorsement of the imperative mandate gave rise to much criticism. It was said to place political parties in an unassailable position, and to stifle political debate within party caucuses. Members of Parliament had to toe the party line or else face expulsion.

Item 13 of Schedule 6A of the 1996 Constitution expressly provided that the imperative-mandate theory could be abolished by an Act of Parliament passed within a reasonable period of time. In June 2002, Parliament passed four separate Acts: the Constitution of the Republic of South Africa Act 21 of 2002 and the Loss and Retention of Membership of National and Provincial Legislatures Act, which regulated the position of members in Parliament and the provincial legislatures; and the Constitution of the Republic of South Africa Amendment Act 18 of 2002 and the Local Government Municipal Structures Amendment Act 20 of 2002, which regulated the position of Municipal Councils.

In *United Democratic Movement v The President of the Republic of South Africa* (1) 2002 (11) BCLR 1179 (CC), the applicants contested the validity of all four Acts of Parliament. The Constitutional Court found that the legislation which applied to members of Parliament and the provincial legislatures was invalid because it had not been passed within a reasonable period of time as mandated under Schedule 6A. The Constitutional Court held that a period of five years was unreasonable, given that Parliament had received recommendations as early as 1998 and had not taken steps to regulate the issue of floor-crossing.

Immediately after this judgment, two constitutional amendments were effected to regulate the issue of floor-crossing in Parliament and the provincial legislatures: the Constitution of the Republic of South Africa

Amendment Act 2 of 2003 and the Constitution of the Republic of South Africa Second Amendment Act 3 of 2003. The effects of the legislation for those members wishing to defect were as follows:

- (1) Immediately after the amendments were effected, members were given a 15-day window period within which they could change party allegiance without losing their seats.
- (2) The amendments make provision for a 15-day period in September of the second or fourth year after a general election when members are allowed to “cross the floor” without losing their seats.
- (3) Parties that are represented in Parliament are also entitled to merge or separate during these periods.
- (4) Permission to “cross the floor” and for parties to divide is only required if at least ten percent of the members of a party defect or break away.

Note: We do not expect you to study the *UDM* judgment in full, giving a background on the floor-crossing before it was abolished.

However, as stated above, floor-crossing in South Africa has been abolished by two pieces of legislation, namely the Constitution Fourteenth Amendment Act of 2008, in respect of the national and provincial legislatures, and the Constitution Fifteenth Amendment Act of 2008 in respect of Municipal Councils. As indicated in the long titles of these constitutional amendments, the effect of these amendments is basically to abolish the right of a member of the legislature from becoming a member of another political party whilst retaining membership of such a legislature and also to abolish the right of an existing political party to merge with another political party, or to subdivide into more than one political party, or to subdivide and to permit any of the subdivisions to merge with another political party, while allowing a member of the legislature affected by such changes to retain membership of such legislature.

ACTIVITY 36

- (1) Distinguish between the free- and imperative-mandate theory of representation. (6)
- (2) Daisy is a first-year law student who lives with her grandmother (Rose) in Sunnyside. Rose has been listening to the news and she has heard things about floor-crossing and politicians, et cetera. Rose does not understand the meaning or implication of these concepts. Rose asks Daisy to explain the following to her:
 - the meaning of floor-crossing
 - the theory of representation that applies in South Africa currently
 - the involvement of the United Democratic Movement in this whole controversy (10)

7.6 FUNCTIONING OF PARLIAMENT

7.6.1 General

Sections 51 to 59 of the Constitution contain precepts relating to the day-to-day functioning of the NA. Sections 63 to 72 contain similar guidelines regarding the functioning of the NCOP. The following matters are, *inter alia*, addressed:

- sittings and recess periods (ss 51, 63)
- presiding officers (ss 52, 64)
- quorums [s 53(1)(a)–(b)]

Rautenbach and Malherbe (at 129) define a quorum as “the prescribed minimum number of members necessary for Parliament to be competent to perform its functions”.

- decision-making procedures and majorities [ss 53(1)(c), 65]
- participation by members of the national executive (ss 54, 66) and local government representatives (s 67)
- powers of the NA (s 55) and NCOP (s 68)
- evidence or information (ss 56, 69)
- privileges and immunities (ss 57–58, 70–71)
- public access and involvement (ss 59, 72)

ACTIVITY 37

(1) Fill in the missing words:

As a rule, the time and duration of sittings of the NA are determined by the (a) _____. The presiding officers of the NA are the (b) _____ and the (c) _____. The presiding officers of the NCOP are the (d) _____ and two (e) _____.

- (2) The Criminal Procedure Amendment Bill is before the NA. Advise the Speaker whether the Assembly may vote on the Bill if only 150 of its 400 members are present.
- (3) The President may vote in the NA. True or false?
- (4) The Minister of Finance may vote in the NCOP. True or false?
- (5) Parliament may conduct its business in secret if it is in the national interest to do so. True or false?

In the remainder of this section, we shall focus on the following two matters:

- parliamentary privileges and immunities
- the role of parliamentary committees

7.6.2 Privileges (internal procedures)

General

What are parliamentary privileges? Where did parliamentary privileges come from?

Parliamentary privileges are the powers and privileges enjoyed by members of Parliament that enable them to perform their functions without hindrance.

Historically, parliamentary privileges developed in Britain to protect Parliament against interference from the monarch. Today, parliamentary privileges still serve to protect Parliament and its members from outside interference. Examples of such privileges are:

- The privilege of Parliament to punish persons for contempt and to determine its own procedures.
- The freedom of members to say anything in Parliament, without having to fear that they will be held liable in a Court of law.
- Parliamentary privileges under the 1996 Constitution.

Has the concept of parliamentary privileges survived the 1996 Constitution?

The privileges of the South African Parliament are enshrined in the Constitution and the particulars are regulated by the Powers and Privileges of Parliament and Provincial Legislation Act 94 of 2004. Some of the most important privileges enjoyed by members of Parliament are as follows:

Study section 57(1) of the 1996 Constitution.

The NA is competent to determine and control its own internal arrangements, proceedings and procedures, and to make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement.

- Members of the NA are guaranteed freedom of speech in the Assembly and its committees, provided that they adhere to the internal rules of debate. For example, they are not allowed to use offensive or unbecoming language. Members of Parliament thus enjoy absolute freedom of speech and are further exempt from civil or criminal liability for anything they have said or produced before the Assembly or its committees. Sections 70 and 71 contain similar provisions relating to the NCOP. You should read these sections.
- Parliament and its committees are competent to summon persons to give evidence and submit documents (14–17 of the privilege Act 4 of 2004).
- Parliament is entitled to enforce its own internal disciplinary measures for contempt of Parliament and other infringements of the Act. Examples of contemptuous behaviour are disorderliness, failure to comply with an order or decision of Parliament, failure to submit documents upon request, perjury, et cetera.
- Members of Parliament are not allowed to vote on any matter in which they have a financial interest.

Is the exercise of parliamentary privileges subject to judicial review? Can the exercise of parliamentary privileges be reviewed? What were the facts of the case? Is Parliament still supreme?

An interesting question is whether the exercise of parliamentary privilege is subject to the constitutional review power of the Courts. This question was answered in the affirmative by the Cape High Court in *De Lille v Speaker of the National Assembly* 1998 (7) BCLR 916 (C). Patricia de Lille, a PAC politician, was suspended for 15 days from the NA after having made allegations that certain ANC officials had been “spies for the apartheid regime”. De Lille challenged the decision of the NA in Court. Her lawyers argued that she had not had a fair hearing, and that several of her constitutional rights had been infringed.

Counsel for the Speaker of the NA argued that the Assembly had exercised its parliamentary privilege to control its own affairs, and that the exercise of parliamentary privilege is not subject to the review power of the Courts. He relied on section 5 of the Powers and Privileges of Parliament Act, which provides that a Court must stay proceedings before it if the Speaker issues a certificate stating that the matter in question is one which concerns the privilege of Parliament. The matter will then be deemed to be finally determined. The Court held, however, that the exercise of parliamentary privilege is subject to the Constitution. Hlope J (at para 25) said the following:

The National Assembly is subject to the supremacy of the Constitution. It is an organ of state and therefore it is bound by the Bill of Rights. All its decisions and acts are subject to the Constitution and the Bill of Rights. Parliament can no longer claim supreme power subject to limitations imposed by the Constitution. It is subject in all respects to the provisions of our Constitution. It has only those powers vested in it by the Constitution expressly or by necessary implication or by other statutes which are not in conflict with the Constitution. It follows therefore that Parliament may not confer on itself or on any of its constituent parts, including the National Assembly, any powers not conferred on them by the Constitution expressly or by necessary implication.

What did the Court say about the scope and ambit of the section 57 powers of Parliament?

Hlope J then considered the argument that the NA had acted within its power in terms of section 57(1) to determine and control its internal arrangements, proceedings and procedures and to make rules and orders concerning its business, with due regard to representative and participatory democracy. He made the following statements (at para 27):

I am of the view that, upon a proper interpretation of section 57(1)(a), the power to determine and control the Assembly’s internal arrangements does not embrace the power to suspend a member as a punishment for contempt. Clearly, the powers under section 57(1)(a) of the Constitution are meant to facilitate the proper exercise of powers and functions by the Assembly which the Constitution intended. Had Parliament intended otherwise, one would have certainly expected the Constitution to say so in so many words, particularly because the principles of representative democracy lie at

the heart of our Constitution. For example, section 1(d) of the Constitution states that the Republic is one, sovereign democratic state founded on values which include “a multi-party system of democratic government”. Section 42(3) provides that the National Assembly is elected to represent the people and to ensure government by the people under the Constitution. And, moreover, section 57(1)(b) and 57(2)(b) require the rules and orders of the National Assembly to be made with due regard to representative and participatory democracy and to provide for the participation in the proceedings of the Assembly and its committees of minority parties represented in the Assembly in a manner consistent with democracy. It follows, therefore, that a suspension of a member of the Assembly from Parliament for contempt is not consistent with the requirements of representative democracy. That would be a punishment which is calculated to penalise not only the member in contempt, but also his or her party and those of the electorate who voted for that party who are entitled to be represented in the Assembly by their proportionate number of representatives.

He concluded as follows (at paras 33–34):

When is the exercise of parliamentary privileges subject to judicial review?

[T]he nature and exercise of parliamentary privilege must be consonant with the Constitution. The exercise of parliamentary privilege, which is clearly a constitutional power, is not immune from judicial review. If a parliamentary privilege is exercised in breach of constitutional provisions, redress may be sought by an aggrieved party from law Courts

This is not an interference with the independence of Parliament and its right to control its own procedures and discipline its members; the Court does not seek to dictate to Parliament and may not do so [s 57(1)]. It recognises the separation of powers and the desirability thereof. It also acknowledges that the proper exercise of parliamentary privilege is a matter for Parliament alone. However, where the Court can and must interfere is where Parliament has improperly exercised that privilege and has acted mala fide or capriciously and in defiance of the constitutionally inherent rights of a member — such as the right to just administrative action.

The judge found that Ms De Lille’s suspension constituted an unjustified infringement of her constitutional rights to freedom of speech [ss 16 and 58(1)], just administrative action (s 33) and access to Court (s 34). Hlope J (at para 40) had the following to say about the Speaker’s reliance on section 5 of the Powers and Privileges of Parliament Act:

The Speaker’s contention in her answering affidavit that the mere issue of a certificate obliges the Court to stay the proceedings which shall thereupon be deemed to be finally determined is clearly untenable. To the extent that section 5 of the Act purports to place

issues of parliamentary privilege beyond judicial scrutiny and thus beyond the supremacy of the Constitution on the mere ipse dixit of the Speaker, it is undoubtedly unconstitutional.

The decision in this case was upheld by the Supreme Court of Appeal in *Speaker of the National Assembly v Patricia de Lille*.

Study section 1 of the 1996 Constitution.

Parliament can no longer claim to be the supreme bearer of authority and is subject to the limitations imposed by the Constitution and must act in accordance with its provisions. In particular, the constitutional power of legislatures to regulate their own internal proceedings is a narrow power which must be exercised within the four corners of the Constitution and the Bill of Rights.

ACTIVITY 38

Read the following passage:

Loud Speaker is a member of the Talk-a-Lot political party. During one of the parliamentary sessions she was so enraged with the conduct of members of other political parties that she accused certain members of the Freak-a-Zoid party of being spies and criminals. Pursuant to her outburst, she was suspended for 50 days by Parliament. Loud Speaker is furious about her suspension and claims that Parliament has violated a number of her fundamental rights.

Now answer the following question:

- (1) Critically evaluate whether Loud Speaker's suspension is constitutional or not. (15)

To answer this question, you have to do the following:

- Determine the area of the law that is specific to the topic under discussion.
 - Determine whether Parliament acted according to the precepts of the Constitution.
 - Determine the extent to which Parliament can regulate its own internal procedures.
 - Determine whether Parliament exceeded the powers conferred upon it in terms of sections 57 and 58 of the Constitution.
 - Determine whether parliamentary sovereignty or constitutional supremacy is the norm.
 - Determine whether the Courts will interfere with the conduct of Parliament if Parliament acts in accordance with the provisions of the Constitution.
 - Refer to the *De Lille* case.
-

7.7 COMMITTEES

Parliamentary committees play an important role in modern parliaments. The Constitution expressly recognises the role of committees in the functioning of Parliament. Study sections 45, 56-59, 66, 69–72, 73, 76 and 78 for more on this.

The need for parliamentary committees arises from the size of Parliament and the range and complexity of matters before it. It is wholly unrealistic to expect the Houses of Parliament to attend to all parliamentary matters during plenary sessions (ie sessions where all members of a House are expected to be present). For this reason, committees are charged on behalf of Parliament to fulfil certain functions. A parliamentary committee consists of a smaller group of members of Parliament who are chosen to perform a particular task. In this way, committees “alleviate the workload of Parliament and facilitate thorough consideration of matters” (Rautenbach & Malherbe at 131). The committee system encourages transparency in government and also allows and encourages public input into the law-making process.

The rules of Parliament provide for various types of committees. Both Houses of Parliament have their own committees, but there are also joint committees consisting of members of both the NA and NCOP. A distinction is also made between standing committees and ad hoc committees. A standing committee exists for the duration of Parliament, whereas an ad hoc committee is appointed to execute particular functions, after which the committee dissolves.

Whilst we cannot give you an overview of the entire committee system, the following few examples should give you some idea of the role and importance of parliamentary committees:

- (1) **Portfolio committees in the NA.** There is a portfolio committee for every government department. For instance, there is a portfolio committee for health, and one for safety and security. Each committee consists of about 17 members of Parliament. The committees consider Bills falling within their respective portfolios, and monitor the activities of their government departments. They may investigate and make recommendations relating to the legislative programme, budget, functioning, staff and policies of a government department or organ of state falling within their portfolio.
- (2) **Select committees in the NCOP.** These committees fulfil a role similar to that of the portfolio committees in the NA.
- (3) **The Committee on Public Accounts in the NA.** This committee must consider the financial statements and audit reports of all executive organs of state, and may report on any of those statements or reports to the NA. It may also initiate an investigation into alleged

irregularities. The Committee on Public Accounts has an important role to play in the prevention of corruption and financial mismanagement.

- (4) **The Mediation Committee.** This is a joint committee which must be appointed to resolve disagreements (about Bills) between the NA and the NCOP. See section 78 of the Constitution.

The members of committees are drawn from different political parties. The Rules of the NA provide (Rule 125) that, as a general rule, political parties are entitled to be represented in committees in substantially the same proportion as they are represented in Parliament. Where practically possible, each party is entitled to at least one representative in a committee.

For the sake of greater openness and public involvement in parliamentary proceedings, committees meet in public.

7.8 COMMON MISTAKES AND PROBLEM AREAS

Students often confuse the principle of parliamentary privileges with prerogatives.

Note: prerogatives refer to the common law discretionary powers that the monarch exercised by virtue of his or her status as supreme head of government. Parliamentary privileges apply to the legislative authority and all members of Parliament.

7.9 SELF-ASSESSMENT QUESTIONS

Today, legislation is used as a mechanism to regulate people's behaviour. Before a law becomes legally binding, the body that creates it must have the authority to pass such a law. The power to pass laws cannot be exercised in an unlimited manner, and this means that limits must be prescribed. In this study unit, the questions are designed to determine whether you are familiar with the source of Parliament's powers; the bearer/s of this authority; how members of the legislature hold office; the different forms of representation that exist; and the form of representation adopted by South Africa.

- (1) Define legislative authority and state in whom it is vested in the national and provincial spheres of government. (4)
- (2) Parliament consists of two Houses. What are they? Discuss the reasons for this kind of dual structure. (8)
- (3) Briefly list the functions of the following:
 - (a) the National Assembly (NA) (5)
 - (b) the National Council of Provinces (NCOP) (5)

See section 42(3) read with section 44(a), and section 42(3) read with section 44(b).

- (4) Explain the circumstances in which adult citizens may be deprived of the right to vote. Refer to case law in your answer. (20)

Study the August NICRO Richter and the *AParty* cases in your *Reader*.

In the light of these cases, consider the following points when formulating your answer:

- Introduction: which provision guarantees the right to vote?
 - Why is the right to vote important?
 - Analyse the *August*, *NICRO*, *Richter* and *AParty* cases.
 - What were the facts in these cases?
 - What were the issues before the Court?
 - Compare the provisions of the 1993 and 1996 Constitutions to determine the categories of people who were/are prohibited from voting. Are the provisions of both Constitutions identical? If not, what are the material differences?
 - What did the 1993, 1998 and 2003 Electoral Acts state? Are there any differences between these three Acts?
 - Do prisoners forfeit their personal rights by virtue of their status as prisoners?
 - What was the mandate of the Electoral Commission and did it fulfil this mandate in the above cases?
 - What objections did the Commission raise and what did the Court say in response to each of these objections in the above cases?
- (5) (a) Distinguish between territorial and proportional representation. (5)
- (b) List the advantages and disadvantages of each of these electoral systems. (12)
- (c) Which system has South Africa adopted? Explain. (3)
- (6) What do you understand by the free-mandate and imperative-mandate theory of representation? (4)
- (7) Which theory of representation has South Africa chosen? Explain. (10)
- (8) Explain what parliamentary privileges are and whether their exercise is subject to judicial review. Refer to case law in your answer. (15)

Consider the following points when formulating your answer:

- How would you define this concept?
- Where did it originate?
- What are some of the examples of privileges enjoyed by parliamentarians?
- How is parliamentary privilege regulated under South African Law?
- What are some of the key provisions that describe the privileges enjoyed by members of Parliament?

- Which case dealt with the issue of review of parliamentary privileges?
- What were the facts of the case?
- What was the issue?
- What was the finding of the Court?
- What was the reasoning of the Court? Why did it come to this conclusion?

Please note that the reasoning of the Court carries more marks than the actual finding of the Court or the facts of the case. Study the extracts of the judgment that appear in your study guide.

(9) Discuss the role of parliamentary committees. (5)

7.10 CONCLUSION

The principle of representation is one of the most fundamental ingredients of a democratic system. This is manifested in a number of ways:

- the franchise, free and fair elections, the choice of electoral systems, and the right to freely form political parties and to participate in elections

From the above discussion it is clear that the new South African constitutional order seeks to achieve the ideal of government of the people, by the people and for the people.

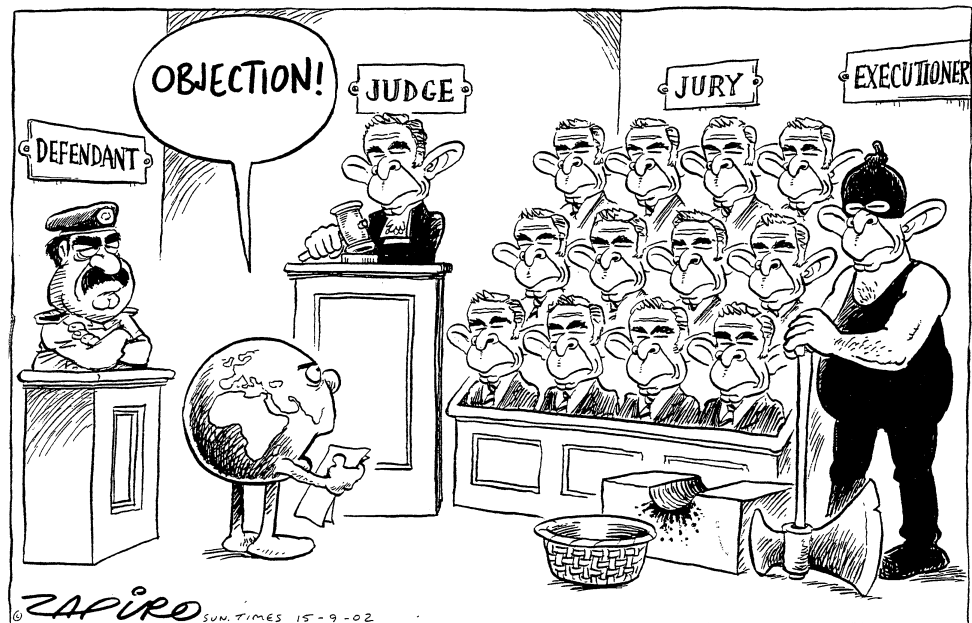
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STUDY UNIT 8

National legislative process

See limitations on Parliament's legislative capacity (8.7).



What you should know before attempting this study unit:

Before attempting this study unit, you must make sure you understand, and that you can define and explain (for examination purposes), the following concepts:

- legislative authority
- electoral systems
- Parliament
- National Assembly
- National Council of Provinces
- territorial representation
- proportional representation
- parliamentary committees

OVERVIEW

In the previous study unit, you learnt about the institutional design of a constitutional state based on constitutional supremacy. You were introduced to the institution/body/branch of government — Parliament which is the highest legislative authority of the state. Remember that this law-making authority is exercised within the framework of the Constitution and the principles of cooperative government embodied in sections 40

and 41 of the Constitution. In other words, Parliament shares legislative authority with the provincial legislatures and Municipal Councils and is not the sole bearer of state authority.

Now that you know a little more about Parliament, we will take you one step further and concentrate on the following:

- the legislative competence of Parliament
- whether, and in what circumstances, a Court may intervene to decide whether a decision by the executive to initiate legislation is unlawful
- the procedures that Parliament must follow to enact national legislation
- whether, and in what circumstances, a Court can intervene in the legislative process at the stage where legislation has been initiated and introduced in Parliament prior to consideration/deliberations of such legislation by Parliament
- the situation that arises when Parliament and the provincial legislatures pass laws that are in conflict with each other
- the limitations that are placed on Parliament's legislative authority
- whether Parliament is entitled to delegate its legislative function
- whether the basic-structure doctrine has been absorbed into our legal system

UNIT OUTCOMES

After you have studied the material in this study unit, you should be able to do the following:

- discuss Parliament's legislative competence
- discuss whether, and in what circumstances, a Court may intervene to decide whether a decision by the executive to initiate legislation is unlawful
- discuss whether, and in what circumstances, a Court can intervene in the legislative process at the stage where legislation has been initiated and introduced in Parliament prior to consideration/deliberation of such legislation by Parliament
- describe the process prescribed for the adoption of:
 - Bills amending the Constitution
 - ordinary Bills affecting the provinces
 - ordinary Bills not affecting the provinces
- explain when the President may:
 - refer a Bill back to the National Assembly (NA) for reconsideration
 - refer a Bill to the Constitutional Court for a decision on its constitutionality
- state seven limitations on national legislative authority

- critically evaluate whether Parliament is permitted to delegate its legislative powers to another body or functionary
- critically assess whether the “basic-structure doctrine” is part of South African law

PRESCRIBED STUDY MATERIAL

- Sections 42–80 of the Constitution
- The following cases as contained in the Revised Reader (hereafter “the Reader”):
 - *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* 2000 (1) BCLR 1 (CC), paras 1–2, 6, 10–16 and 20
 - *Executive Council of the Western Cape v Minister of Provincial Affairs; Executive Council of Kwazulu-Natal v President of the Republic of South Africa* 1999 (12) BCLR 1353 (CC), paras 1, 22–30, 77–84 and 120–126
 - *Glenister v President of the Republic of South Africa and Others* (CCT41/08 [2008] ZACC 19 (22 October 2008)
 - *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (12) BCLR 1399 (CC), paras 1–11 and 31–72
- Chaskalson & Klaaren “National government” in Chaskalson *et al* (eds) *Constitutional Law of South Africa* (1996) 3–22 to 3–5

8.1 RELEVANT SECTIONS OF THE CONSTITUTION

Which sections of the Constitution are important for this study unit?

For examination purposes, you must study the sections of the 1996 Constitution that we have provided below. These sections will enable you to understand how laws come into existence. There are a number of different ways of creating laws, depending on whether one is dealing with a Schedule 4 or a Schedule 5 matter or simply an amendment to the Constitution itself. You need to learn about all of these processes.

Section number	Title of section	Content
Section 73(1)	All Bills	Any Bill may be introduced in the National Assembly.
Section 73(5)		A Bill passed by the National Assembly must be referred to the National Council of Provinces if it must be considered by the Council. A Bill passed by the Council must be referred to the National Assembly.

Section number	Title of section	Content
Section 74(1)	Bills amending the Constitution	Section 1 and this subsection may be amended by a Bill passed by: – (a) the National Assembly, with a supporting vote of at least 75 per cent of its members; and (b) the National Council of Provinces, with a supporting vote of at least six provinces.
Section 74(2)		Chapter 2 may be amended by a Bill passed by: – (a) the National Assembly, with a supporting vote of at least two thirds of its members; and (b) the National Council of Provinces, with a supporting vote of at least six provinces.
Section 74(3)		Any other provision of the Constitution may be amended by a Bill passed: – (a) by the National Assembly, with a supporting vote of at least two thirds of its members; and (b) also by the National Council of Provinces, with a supporting vote of at least six provinces, if the amendment: – (i) relates to a matter that affects the Council; (ii) alters provincial boundaries, powers, functions or institutions; or (iii) amends a provision that deals specifically with a provincial matter.
Section 75(1)	Ordinary Bills not affecting provinces	When the National Assembly passes a Bill other than a Bill to which the procedure set out in section 74 or 76 applies, the Bill must be referred to the National Council of Provinces and dealt with in accordance with the following procedure:

Section number	Title of section	Content
		<p>(a) The Council must: –</p> <ul style="list-style-type: none"> (i) pass the Bill; (ii) pass the Bill subject to amendments proposed by it; or (iii) reject the Bill. <p>(b) If the Council passes the Bill without proposing amendments, the Bill must be submitted to the President for assent.</p> <p>(c) If the Council rejects the Bill or passes it subject to amendments, the Assembly must reconsider the Bill, taking into account any amendment proposed by the Council, and may: –</p> <ul style="list-style-type: none"> (i) pass the Bill again, either with or without amendments; or (ii) decide not to proceed with the Bill. <p>(d) A Bill passed by the Assembly in terms of paragraph (c) must be submitted to the President for assent.</p>
Section 76(1)	Ordinary Bills affecting provinces	<p>When the National Assembly passes a Bill referred to in subsection (3), (4) or (5), the Bill must be referred to the National Council of Provinces and dealt with in accordance with the following procedure: –</p> <p>(a) The Council must: –</p> <ul style="list-style-type: none"> (i) pass the Bill; (ii) pass an amended Bill; or (iii) reject the Bill. <p>(b) If the Council passes the Bill without amendment, the Bill must be submitted to the President for assent.</p> <p>(c) If the Council passes an amended Bill, the amended Bill must be referred to the Assembly, and if the Assembly passes the amended Bill, it must be submitted to the President for assent.</p>

Section number	Title of section	Content
		<p>(d) If the Council rejects the Bill, or if the Assembly refuses to pass an amended Bill referred to it in terms of paragraph (c), the Bill and, where applicable, also the amended Bill, must be referred to the Mediation Committee, which must agree on: –</p> <p>(i) the Bill as passed by the Assembly;</p> <p>(ii) the amended Bill as passed by the Council; or</p> <p>(iii) another version of the Bill.</p> <p>(e) If the Mediation Committee is unable to agree within 30 days of the Bill's referral to it, the Bill lapses unless the Assembly again passes the Bill, but with a supporting vote of at least two thirds of its members.</p>
Section 79(1)	Assent to Bills	The President must either assent to and sign a Bill passed in terms of this Chapter or, if the President has reservations about the constitutionality of the Bill, refer it back to the National Assembly for reconsideration.

8.1 LEGISLATIVE CAPACITY OF PARLIAMENT

8.1.1 General

What are the core legislative functions of Parliament?

In study unit 6 (on cooperative government), you learnt that state power can be distributed among the three spheres of government, namely the national, provincial and local spheres of government. In the study unit on the separation-of-powers doctrine, you learnt that there is another way in which state power is distributed, namely among the legislature, executive and judiciary. You also know that, in the national sphere, legislative authority is vested in Parliament, in the provincial sphere, it is vested in the provincial legislatures, and, in the local sphere, legislative authority is vested in the Municipal Councils. From these discussions, you should have realised that Parliament shares legislative authority with the other legislatures that have been created and also enjoys certain distinct legislative competencies.

8.1.2 Exclusive competence of Parliament

The Constitution gives Parliament four kinds of law-making powers that only it can wield. These are as follows:

Later on in this study unit, you will learn why Parliament cannot delegate this power to any other body.

- Parliament enjoys exclusive powers to amend and repeal its own laws.
- Parliament enjoys exclusive powers to make laws on those areas which have been expressly given to it by the various provisions of the Constitution. For example, section 33(3), which is the just administrative action provision, clearly provides that national legislation must be enacted to give effect to the right to just administrative action and to provide for judicial review of administrative action. This principle applies even if the law deals with a matter that falls within the exclusive or concurrent competence of the provinces. But more about this later on.

For another example, see section 235 of the Constitution in relation to cultural matters.

- We also submit that Parliament has exclusive competence to amend the Constitution in terms of section 74 of the Constitution.
- Parliament has residual legislative capacity to make laws relating to those areas that are not enumerated in the Constitution or mentioned in Schedule 4 and 5 of the Constitution. For example, Parliament is entitled to make laws regulating topics such as defence, foreign affairs, and most matters relating to the police force.

When Parliament makes laws which fall within its exclusive legislative function as set out above, it must use the procedure prescribed in section 75 of the Constitution.

8.1.3 Concurrent legislative competence of Parliament

What is the meaning of the term “concurrent” in the legislative context? See section 44(3) in the previous study unit. This issue is dealt with in greater detail in study unit 11.

Parliament has concurrent legislative authority with the provincial legislatures to make laws pertaining to matters listed in Schedule 4. This means that both Parliament and the provincial legislatures share the power to make laws for matters that are listed in Schedule 4. Should a conflict arise between a national law and a provincial law relating to a concurrent matter, then the national law usually prevails over the provincial law, provided that the criteria set out in section 146(2) and (3) are met.

8.1.4 National legislative power to intervene

Study section 44(2) of the 1996 Constitution. This issue is dealt with in detail in this study unit.

Schedule 5 sets out those matters over which the provincial legislature enjoys exclusive competence. This means that only the provincial legislatures may make laws dealing with those matters that are listed in Schedule 5. However, this power is not absolute and is subject to intervention by Parliament. This means that, in certain instances, Parliament may intervene in the areas of exclusive provincial competence listed in Schedule 5, for example when it is necessary to maintain essential national standards. Now that you have a basic idea of what the national legislature — Parliament — can and cannot do, it is important to understand how laws come into existence, that is, to understand the national legislative process.

8.2 THE NATIONAL LEGISLATIVE PROCESS

8.2.1 Definition

How do laws come into effect?

What is the meaning of “the legislative process”?

The legislative process is a series of actions that must take place before a law is formulated and considered, refined and approved by the competent government body in order to be valid and to have the force of law. In this part of the study unit, we are concerned with the legislative process that takes place when Parliament decides to enact a piece of legislation which falls within its competence. Under the previous heading, we dealt with the matters that fall within Parliament’s competence. Thus, the procedures that have to be followed depend ultimately on the category of laws that Parliament wants to enact or make. This means that Parliament:

- will use the form-and-manner provisions set out in section 75 if it intends making laws in those areas where it has exclusive competence
- will use the form-and-manner provisions of section 76 if it intends making laws in those areas where it shares legislative competence with the provincial legislatures

8.2.2 Initiation of legislation — generally

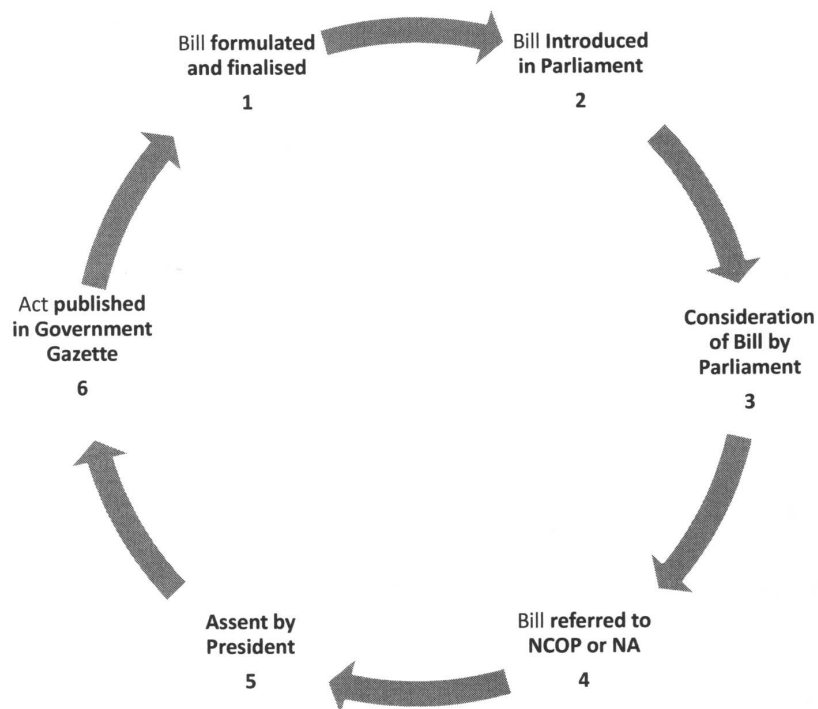


Figure 1: General stages in the legislative process

It is clear from figure 1 that the legislative process consists of a number of stages. The various stages are highlighted below:

During the first stage, draft legislation is **formulated and finalised** with a view to its introduction in Parliament. Most legislation is drafted by the executive authority. Since the executive is responsible for the execution and administration of laws, it is better equipped (in terms of expertise and infrastructure) to determine the need for new, or adapted, laws to regulate a particular sphere of interest. For instance, a Bill dealing with the powers and procedures of Courts would normally be formulated and finalised by the Department of Justice, while Bills dealing with schools would be initiated by the Department of Education. There are other institutions involved in the initiation of Bills (eg a member of the NA or a committee of the Assembly). This stage is characterised by extensive consultation with interested people concerned. Rautenbach and Malherbe (at 151), write as follows:

... as a result of extensive prior consultation, Bills are, for the most part, so refined on their introduction, that often their contents are accepted as a foregone conclusion. That is why some regard the initiation of Bills as the most crucial phase of the legislative process.

ACTIVITY 39

A Bill is a detailed proposal by a competent institution or functionary for the enactment of a law of which Parliament has taken official notice.

At its national conference held prior to elections, the Affirmative Action Convention (AAC), a majority party in Parliament, passes a resolution that reads partly as follows:

The constitutional imperative that there should be a single police service should be implemented. The Directorate of Special Operations (DSO) should be dissolved. Members of the DSO performing policing functions must fall under the South African Police Service (SAPS).

This party wins the subsequent elections. Under the new government of the AAC, the Department of Justice drafts three Bills aimed at fulfilling the AAC resolution, Cabinet approves these Bills, and the Bills are introduced in Parliament. The stated aim of the Bills is to “strengthen the country’s capacity to fight organised crime and to give effect to the decision to relocate the DSO from the National Prosecuting Authority to the SAPS”. Mr Fairfield, an affluent businessperson, challenges the legality of the initiation of these Bills and the Cabinet decision to approve the Bills. Please study paragraphs 1–4, 9–16, 18–20, and 25–57 of the *Glenister* case and then answer the following questions:

- (1) What was the issue before the Court in this case? (3)
- (2) What do you understand by the doctrine of separation of powers? (7)
- (3) Can a Court intervene in the legislative process at the stage where legislation has been initiated and introduced in Parliament prior to consideration/deliberation of such legislation by Parliament? (5)

- (4) If (3) is answered in the affirmative, what are the circumstances that would permit judicial interference in the legislative process at this stage? (7)
- (5) Did the circumstances in this case warrant judicial interference? (5)
-

The second stage is the **introduction** of Bills in Parliament. This means that a competent functionary must place a Bill on the order paper of Parliament. Section 73 prescribes who may introduce Bills and in which House such introduction must take place.

The third stage is the **consideration/deliberation** of Bills by Parliament. Bills are debated both in committees and in plenary sessions of the Houses of Parliament in order to determine their background and purpose, and the principles involved. After a Bill has been considered, it is put to the vote. Normally, a Bill must be **passed** by a majority of the members of the House concerned. However, Bills amending the Constitution require a greater majority (s 74).

A Bill passed by the NA must be **referred** to the National Council of Provinces (NCOP) (except if it is a Bill which needs to be considered only by the NA), and a Bill passed by the NCOP must be referred to the NA [s 73(5)]. The Bill must then be considered and put to the vote in the House to which it has been referred.

Once a Bill has been adopted by the relevant Houses of Parliament, it is referred to the President for **assent** (s 79). A Bill assented to and signed by the President becomes an Act of Parliament. However, it takes effect only once it has been **published** in the *Government Gazette*, or on a later date determined in terms of the Act itself (s 81).

Now that you are familiar with the general process that takes place for a Bill to become a law, we can move on to a discussion of the more specific issues relating to the form-and-manner provisions.

If you are interested in the detailed legislative process, you may consult (but not for examination purposes) Rautenbach and Malherbe (at 149–169), Currie and De Waal (at 169–198) or Devenish (at 238–249).

8.2.3 Can the Constitutional Court intervene in Parliament's law-making process?

In *Doctors for Life International*, at paragraph 40, Ngcobo J held that:

[t]here are three identifiable stages in the law-making process — first, the deliberative stage, when Parliament is deliberating on a Bill before passing it; second, the Presidential stage, that is, after the Bill

has been passed by Parliament but while it is under consideration by the President; and third, the period after the President has signed the Bill into law but before the enacted law comes into force

The issue, however, is, at what stage of the legislative process can the Constitutional Court intervene in order to enforce Parliament's obligation to facilitate public involvement?

ACTIVITY 40

Please study paragraphs 1–11 and 31–72 in *Doctors for Life International* and then answer the following questions:

- (1) Is it competent for the Constitutional Court to intervene in parliamentary proceedings in order to enforce Parliament's obligation to facilitate public involvement in the law-making process:
 - (a) before Parliament has concluded its deliberations on a Bill? (5)
 - (b) after Parliament has passed the Bill, but before the Bill has been signed by the President? (5)
 - (c) after the Bill has been signed by the President, but before it has been brought into force? (5)

8.3 BILLS AMENDING THE CONSTITUTION

Let us begin the discussion with Bills that are introduced with the intention of amending provisions of the Constitution.

This section is vitally important and should be studied in detail.

In study units 3 and 4, you learnt that the South African Constitution is an example of an inflexible constitution that requires special procedures and special majorities for its amendment. The aim of these procedures and majorities is to try to ensure that the Constitution is not amended without careful consideration of, and deliberation on, the issues involved. The requirements for constitutional amendments are contained in section 74.

After you have studied section 74, you may ask why section 74(1) prescribes such stringent majorities. Rautenbach and Malherbe (at 166) suggest that the answer is quite simple. Section 1 contains the values and principles which are given effect to by various provisions throughout the Constitution. It is necessary to protect section 1, and the provisions that give effect to section 1, by entrenching a stricter amendment procedure. If this had not been done, it would be extremely easy to undermine the values embodied in section 1 by a less strict procedure, thereby resulting in section 1 becoming useless. An example is the Bill of Rights. The values of human dignity and equality which are mentioned in section 1 form the basis of the Bill of Rights and its objectives. Any amendment to the Bill of Rights which has the effect of violating these values or of inhibiting the advancement of human rights would require a 75 percent majority of the

NA and the support of six provinces in the NCOP. However, it is still uncertain whether the Courts will adopt this interpretation if there is no consensus regarding the amendment.

ACTIVITY 41

- (1) Study section 74 two or three times, and then summarise its contents. In your summary, make sure that you discuss the following matters:
 - the majorities required to amend different parts of the Constitution [s 74(1)–(3)]
 - the special procedures required to prevent Parliament from amending the Constitution without careful consideration [s 74(4)–(8)] (10)

- (2) Kesh is a law student at Unisa. After he graduates, Kesh would like to pursue a career as a legislative drafter (involved in the creation of laws that regulate the conduct of people). He can begin his training by doing the following:
 - (a) explaining what he understands by legislative authority (3)
 - (b) distinguishing between the exclusive and concurrent legislative capacity of Parliament (4)
 - (c) defining what is meant by the legislative process (3)
 - (d) describing the general process that takes place before a law is formulated and adopted by the competent legislative authority (10)

8.4 ORDINARY BILLS AFFECTING THE PROVINCES (S 76 BILLS)

8.4.1 General

Which section deals with this issue?

Sections 75 and 76 deal with the adoption of ordinary Bills, that is, Bills that do not amend the Constitution. Section 75 sets out the procedure for the adoption of ordinary Bills not affecting the provinces, while section 76 deals with ordinary Bills affecting the provinces.

It is vitally important that Parliament correctly identify an ordinary Bill as one that either affects or does not affect the provinces. If a Bill affecting the provinces is passed in accordance with the procedure laid down for the adoption of Bills not affecting the provinces, or vice versa, the adopted Bill is not properly enacted and does not become law (see Chaskalson & Klaaren at 3–25/3–26.) However, it is often difficult to characterise a Bill as either the one or the other. According to Murray and Simeon:

at first blush, the scheme that ss 75 and 76 introduce seem clear cut and decisions concerning the classification — or tagging as it is referred to in Parliament — of Bills has often been very difficult. Furthermore they indicate that “the language of the Constitution

provides little assistance in classifying such Bills. Section 44(1)(b)(ii) says that “legislation with regard to any matter within the functional area listed in Schedule 4 ...” must follow the s 76 route. This wording is echoed in s 76(3) which states, *inter alia*, that a Bill that “falls within a functional area listed in Schedule 4” follows the s 76 route.

In *Ex Parte the President of the RSA: In re Constitutionality of the Liquor Bill* 2000 (1) BCLR 1 (CC), paragraph 27, the Constitutional Court stated that “any Bill whose provisions in substantial measure fall within a functional area listed in Schedule 4 [must] be dealt with under section 76”.

According to Murray and Simeon (at 261), the test in this regard must focus on the impact of the Bill on the provinces rather than on the “pith and substance” of the Bill itself. They argue (at 256) that a wider contextual reading of sections 44 and 76 suggests that the following questions would help to determine whether a Bill should be passed according to section 76:

- (1) Does the Bill expect provinces to implement any part of it under section 125(2)(b) of the Constitution? If so, the Bill should follow the section 76 procedure.
- (2) Does the Bill contain provisions that would normally fall for implementation by the provinces under section 125(2)(b), but over which the national government retains the responsibility for implementation? If so, the Bill should follow the section 76 procedure.
- (3) Could this law, in future, conflict with a provincial law? Or, in other words, are there provisions in this law that deal with matters over which a province has jurisdiction? If so, the Bill should follow the section 76 route.
- (4) Does the Bill have implications for any policy or law which provinces are already implementing or may implement? If so, the Bill should follow the section 76 procedure.
- (5) Is the intention of the national Bill on a Schedule 4 matter, trivial? If so, the Bill should follow the section 75 route.

You must study this section.

Section 76 procedure:

Section 76(3)–(5) sets out when a Bill is to be regarded as one affecting the provinces. You do not need to know section 76(3)–(5) in any detail. However, it is important to note that section 76(3) refers, *inter alia*, to Bills falling within a functional area listed in Schedule 4. Remember that Schedule 4 contains a list of functional areas over which both the national legislature (Parliament) and provincial legislatures have the power to make laws. A Bill dealing with a matter listed in Schedule 4 must therefore be regarded as one affecting the provinces, and must be adopted in accordance with section 76(1)–(2).

ACTIVITY 42

Study Schedule 4 carefully. (You will find the schedules at the back of the Constitution.) Then determine whether the following Bills should be adopted in terms of section 75 or section 76. Give reasons for your answers:

- (1) the Housing Amendment Bill
- (2) the University of Gauteng Bill
- (3) the Public Transport Bill
- (4) the Defence Amendment Bill
- (5) the Municipal Building Regulations Bill (15)

Section 76(1) deals with the adoption of Bills that have been introduced in, and passed by, the NA. Such Bills must then be referred to the NCOP. Section 76(2) deals with Bills introduced in, and passed by, the NCOP. Such Bills must then be referred to the NA. If a Bill passed by one House is also passed by the other, the Bill obviously becomes an Act and is presented to the President for assent. But what happens if the second House rejects the Bill, or passes an amended Bill? This is where section 76(1) and (2) really becomes important, for these two subsections prescribe in detail what should happen when a second House rejects a Bill. You need to know section 76(1) and (2) for examination purposes.

ACTIVITY 43

Summarise section 76(1) and (2). Make sure that you address the following questions in your summary:

- (1) In which House(s) of Parliament may Bills affecting the provinces be introduced? (Have another look at s 73.) (2)
 - (2) What happens if a Bill has been passed by both Houses? (2)
 - (3) What happens if a Bill passed by one House is rejected by the other, or is passed with amendments? (2)
 - (4) What is the role of the Mediation Committee in the legislative process? (2)
 - (5) How is the Mediation Committee composed? (See s 78.) (4)
 - (6) If the NA and the NCOP cannot reach agreement on the adoption of a Bill after all the steps in subsections (1)(c)–(i) and (2)(c)–(i) have been followed, can (a) the NA adopt the Bill without the further cooperation of the NCOP, or can (b) the NCOP adopt the Bill without the further cooperation of the NA? (4)
-

Guidelines on how to approach the questions in the above activity:

What follows is not intended to be a “model answer” to the last question, but should give you some guidance on how to answer a question on the adoption of Bills affecting the provinces.

Section 73(1) and (3) makes it clear that a Bill affecting the provinces may be introduced in either the NA or the NCOP. Section 73(2) and (4) tells us who may introduce it.

We now get to the heart of the question: how is such a Bill adopted? You will see that subsections (1) and (2) of section 76 are very similar. Subsection (1) deals with Bills passed by the NA, which must then be referred to the NCOP. Subsection (2) deals with Bills passed by the NCOP, which must then be referred to the NA.

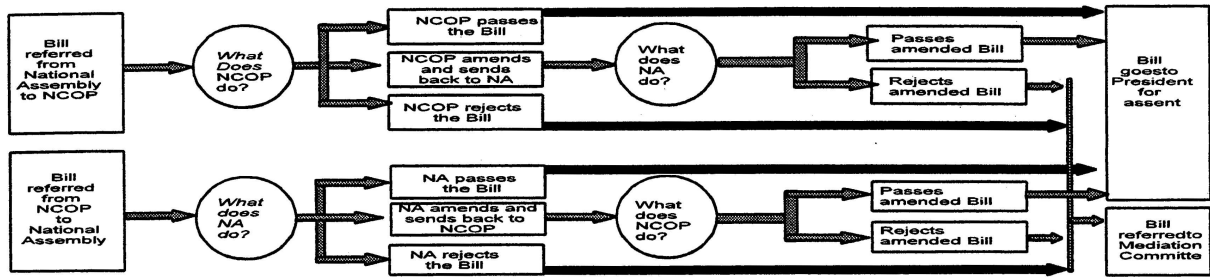
If a Bill passed by one House is also passed by the other, it is referred to the President for assent. But what happens if the second House rejects the Bill, or passes an amended Bill? If the second House rejects the original Bill, or the first House rejects the Bill as amended by the second House, the matter is referred to the Mediation Committee. The Mediation Committee may agree on the Bill in its original or amended form, or on a different version altogether. If the Mediation Committee agrees on:

- (1) the Bill passed by the first House, that Bill is then referred to the second House
- (2) the Bill passed by the second House, that Bill is then referred to the first House
- (3) another version of the Bill, it is referred to both Houses

If the Bill is then passed by the House(s) concerned, it is referred to the President for assent. If it is not passed, the Bill lapses. However, if the NCOP rejects the Bill, the NA may again pass it with a two-thirds majority, in which case the Bill is referred to the President for assent. Note, however, that the NCOP does not have a similar power to override the NA.

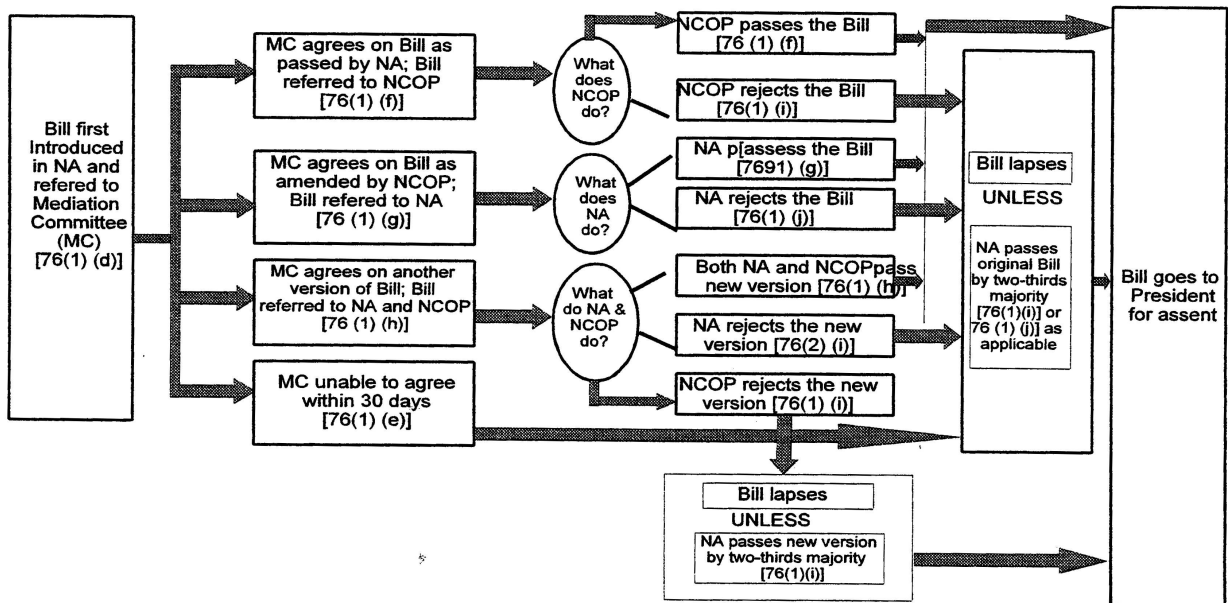
Section 76 procedure in schematic form

National legislative process: s 76 bills

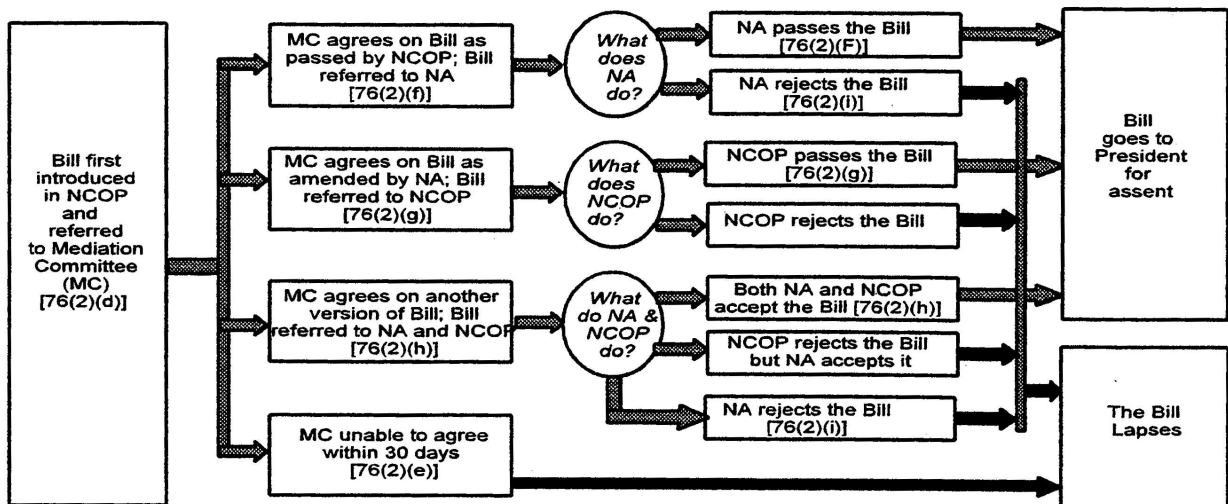


Mediation Committee process: Bills referred to in s 76(3), (4) and (5), and first introduced in the NA

Bill first introduced in NA and referred to Mediation Committee (MC) [s 76(1)(d)]



Mediation Committee process: Bills referred to in s 76(3), and first introduced in NCOP



8.5 ORDINARY BILLS NOT AFFECTING THE PROVINCES (S 75 BILLS)

Which section deals with this issue? If an ordinary Bill does not fall within a functional area listed in Schedules 4 and 5 and does not provide for legislation envisaged in any of the sections mentioned in section 76(3–5), it is considered a Bill not affecting the provinces and must be adopted in terms of section 75.

Note

Earlier on, we learnt that Schedule 4 sets out the functional areas over which both Parliament and the provincial legislatures have legislative competence. A Bill falling within a functional area listed in Schedule 4 must be adopted in accordance with section 76. By contrast, Schedule 5 lists the functional areas over which the provinces have exclusive legislative competence. This means that Parliament may not adopt legislation falling within any of these functional areas unless it is authorised to do so in terms of section 44(2). This would be the case if, for instance, the legislation is needed to protect national security or maintain economic unity. Study Schedule 5 and section 44(2) carefully, and then answer the following question:

A Bill dealing with ambulance services has just been introduced in the NA. Advise the Speaker of the NA on the following matters:

- (1) whether Parliament is, generally speaking, competent to adopt this bill
- (2) in what circumstances Parliament would be competent to adopt this bill
- (3) assuming that Parliament is competent, the process that would have to be followed for the adoption of this bill

ACTIVITY 44

Pumi is an LLB student. She has been selected to attend a six-week internship at the offices of Parliament. Pumi does not want to appear totally ignorant when she attends the internship and therefore asks you to explain to her the process that takes place for an ordinary Bill not affecting the provinces to become law. Make a summary of section 75, using your own words. In your explanation to Pumi, make sure that you answer the following questions:

- (1) In which House(s) of Parliament may Bills not affecting the provinces be introduced? (Have another look at s 73.) (3)
- (2) What happens if a Bill has been passed by both Houses? (2)
- (3) What happens if a Bill passed by one House is rejected by the other, or is passed with amendments? (2)
- (4) Does the Mediation Committee feature at all in the adoption of Bills not affecting the provinces? (2)

- (5) May the NA pass a Bill that has been rejected by the NCOP, or passed with amendments, without the further cooperation of the NCOP? Is it easier or more difficult to do this in the case of Bills affecting the provinces? (3)
 - (6) What, in your opinion, are the main differences between the processes prescribed by section 75 (ordinary Bills not affecting the provinces) and section 76 (ordinary Bills affecting the provinces)? (8)
-

Guidelines on the last question in activity:

Just a brief note on the last question: We can think of at least four differences between the processes prescribed by sections 75 and 76 (see the *Liquor Bill* decision, para 25). In the first place, section 76, unlike section 75, provides for a Mediation Committee in the case of a conflict between the two Houses.

Secondly, “if the NCOP raises objections to a version of the Bill approved by the Mediation Committee in circumstances where the Bill was introduced in the NA, the Bill lapses unless the NA passes it again with a two-thirds majority” (*Liquor Bill* case, para 25).

A third difference follows from the first two: section 76 gives more weight to the NCOP than section 75. The latter section makes it easy for the NA to “override” the NCOP: if the NCOP rejects a Bill or passes it subject to amendment, the NA may pass the Bill again, in which case it is submitted to the President for assent.

Finally, when the NCOP votes on a question under section 75, each delegate in a provincial delegation has one vote and the question is decided by a majority of votes cast [s 75(2)]. However, when it considers a Bill in terms of section 76, each province has a single vote, and such a Bill has to be adopted by at least five of the nine provinces in the NCOP [s 65(1)].

8.6 ASSENT BY THE PRESIDENT (S 79)

Section 79 deals with assent to Bills. In terms of subsection (1), the President may refer a Bill back to the NA for reconsideration if he or she has reservations about the constitutionality of the Bill. This amounts to a greater power than under the interim Constitution, in terms of which the President could refer the Bill back to Parliament only if a procedural defect had occurred in the legislative process. Under the final Constitution, the President can also refer the Bill back if he or she believes that it does not meet the substantive requirements of the Constitution (eg if it infringes the Bill of Rights). However, the final Constitution does not go as far as the United States Constitution, which gives the President a veto over legislation adopted by Parliament (or “Congress”, as the US Parliament is

known). Unlike the President of the United States, his South African counterpart does not have the power to refuse to sign a Bill. He or she only has the power to refer it back to the NA if he or she has reservations about its constitutionality. If the reconsidered Bill fully accommodates the President's reservations, then he or she must sign it. If not, the President must either assent to and sign the Bill, or refer it to the Constitutional Court for a decision on its constitutionality [s 79(4)]. If the Constitutional Court decides that the Bill is constitutional, the President must assent to and sign it [s 79(5)]. In 1999, the President referred the Liquor Bill to the Constitutional Court for a decision on its constitutionality. In *Ex Parte the President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* 2000 (1) BCLR 1(CC), the Constitutional Court spelled out (1) the circumstances in which the President is allowed to refer a Bill to the Constitutional Court, and (2) the scope of the Court's power to consider the constitutionality of the Bill.

ACTIVITY 45

Study paragraphs 1–2, 6, 10–16 and 20 of the *Liquor Bill* decision and then answer the questions that follow.

- (1) State the three ways in which the constitutionality of legislation passed by Parliament can come under judicial consideration. (6)
 - (2) What were the three main questions the Court considered in this part of the judgment? (6)
 - (3) Briefly summarise the Court's findings in relation to these three questions. (10)
-

8.7 LIMITATIONS ON PARLIAMENT'S LEGISLATIVE AUTHORITY

8.7.1 Introduction

The power of Parliament, like that of other branches of government, is derived from the Constitution. This implies that Parliament's powers are also limited by the Constitution. Chaskalson and Klaaren (at 3–1/3–9, 3–21 and 3–27) identify a number of limitations or constraints on the legislative power of Parliament. Among these are the following:

- Fundamental-rights limitations. Parliament is bound by the Bill of Rights and may not limit the rights contained in it except in accordance with the limitation clause in section 36.
- Federalism limitations. See the discussion under 8.7.2 below.

Refer to study unit 5 for a detailed discussion on this doctrine.

Separation-of-powers limitations. Refer to the cartoon that appears at the beginning of this study unit. What does it tell you? If you look closely at the illustration, you will find that the same person acts as judge, jury and executioner, which is totally in violation of the separation-of-powers

Refer to study unit 10 for a full discussion of section 165 of the 1996 Constitution.

doctrine. Parliament may not usurp the functions of the executive or judiciary, or allow them to usurp its own powers. The principle of the independence of the judiciary is of particular importance: Parliament may not do anything to compromise the independence of the Courts or to unduly restrict free access to the Courts.

- Delegation limitations. See the discussion under 8.7.3 below.
- Limitation of the power to amend the Constitution. See the discussion under 8.7.4 below.
- Procedural limitations. As we have already seen, Parliament must correctly identify a Bill as (1) one amending the Constitution, or (2) one affecting the provinces, or (3) one not affecting the provinces, and must then follow the prescribed procedure for the adoption of such a Bill.
- Extraparliamentary consultation. The Constitution provides that certain categories of Bills may not be passed by Parliament unless certain bodies have been consulted or have had the opportunity to make representations beforehand. For instance, section 154(2) provides that organised local government, municipalities and other interested persons must have an opportunity to make representations regarding draft legislation that affects local government before such legislation becomes law.

8.7.2 FEDERALISM LIMITATIONS

Refer to study unit 6, which deals with the concept of federalism.

We learnt above that Parliament may not pass any laws regarding Schedule 5 matters (over which the provincial legislatures have exclusive jurisdiction) unless it does so in accordance with section 44(2). In addition, Parliament may not pass laws in any other area over which the Constitution allocates legislative authority to the provincial or local spheres. In *Executive Council of the Western Cape v Minister for Provincial Affairs; Executive Council of Kwazulu-Natal v President of the RSA* 1999 (12) BCLR 1353 (CC), the Constitutional Court considered the question whether Parliament can make laws about matters which the Constitution entrusts to provincial legislatures and municipalities. The Court rejected the argument that, except for matters falling within Schedule 5, Parliament has concurrent powers with the provinces and municipalities. It emphasised that Parliament's legislative authority must be exercised "in accordance with, and within the limits of, the Constitution" [s 44(4)]. The Court found, *inter alia*, that section 13 of the Local Government: Municipal Structures Act 117 of 1998 encroached upon the power of the provinces to decide which type of municipality to establish in a particular area, and was accordingly unconstitutional.

Study paragraphs 1, 22–30, and 77–84 of *Executive Council of the Western Cape v Minister for Provincial Affairs*, and then answer the questions that follow:

- (1) What was the “concurrency argument” advanced by the national government? Why did the Court reject it? (8)
 - (2) Why did the Court find that section 13 of the Act was unconstitutional? (6)
-

8.7.3 The delegation of legislative authority

Definition

The delegation of legislative authority to other bodies or functionaries is a regular feature of modern states. Parliaments often leave it to provincial legislatures or members of the national executive to “fill in the gaps” in parliamentary legislation by means of proclamations or regulations. However, under the interim Constitution, the question arose whether there are limits to Parliament’s authority to delegate its legislative power.

Delegation of legislative authority to the executive

This question was answered in the affirmative by the Constitutional Court in *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 877 (CC); 1995 (10) BCLR 1289 (CC). The case concerned section 16A of the Local Government Transition Act, which conferred on the President the power to amend the Act by proclamation. The President used this power to transfer certain powers from the provincial to the national government. The provincial government attacked the constitutionality of (1) section 16A of the Act, and (2) the proclamation issued in terms of it. Chaskalson P, as he then was, formulated the question before the Court as follows (at para 47):

whether under our Constitution, Parliament can delegate or assign its law-making powers to the executive or other functionaries, and if so under what circumstances, or whether such powers must always be exercised by Parliament itself in accordance with the [relevant provisions] of the Constitution.

Chaskalson P also wrote as follows (at para 51):

The legislative authority vested in Parliament under section 37 of this [the interim] Constitution is expressed in wide terms — “to make laws for the Republic in accordance with this Constitution”. In a modern state, detailed provisions are often required for the purpose of implementing and regulating laws, and Parliament cannot be expected to deal with all such matters itself. There is nothing in

the Constitution which prohibits Parliament from delegating subordinate regulatory authority to other bodies. The power to do so is necessary for effective law-making. It is implicit in the power to make law for the country and I have no doubt that under our Constitution Parliament can pass legislation delegating such legislative functions to other bodies. There is, however, a difference between delegating authority to make subordinate legislation within the framework of a statute under which the delegation is made, and assigning plenary legislative power to another body, including, as section 16A does, the power to amend the Act under which the assignment is made.

Chaskalson P noted that South African Courts have, in the past, given effect to Acts of Parliament which vested plenary power in the executive (ie which gave the executive the power to amend or repeal parliamentary legislation). Such legislation is also considered valid in English law, and in most Commonwealth countries. By contrast, Courts in the United States and in Ireland have held that legislative power may be delegated only within prescribed limits, and that the delegation may not be so broad or vague that the executive effectively takes over the function of the legislature.

However, the question is not what the position used to be in South Africa before the adoption of the Constitution or what the position is in other countries, but what the Constitution, construed in the light of South African history, provides (at paras 61–62):

Our history, like the history of Commonwealth countries such as Australia, India and Canada was a history of parliamentary supremacy. But our Constitution of 1993 shows a clear intention to break away from that history The new Constitution establishes a fundamentally different order to that which previously existed. Parliament can no longer claim supreme power subject to limitations imposed by the Constitution; it is subject in all respects to the provisions of the Constitution and has only the powers vested in it by the Constitution expressly or by necessary implication.

Chaskalson P continued (at para 62):

[I have already explained why] it is a necessary implication of the Constitution that Parliament should have the power to delegate subordinate legislative powers to the executive. To do so is not inconsistent with the Constitution; on the contrary it is necessary to give efficacy to the primary legislative power that Parliament enjoys. But to delegate to the executive the power to amend or repeal Acts of Parliament is quite different. To hold that such power exists by necessary implication from the terms of the Constitution could be subversive of the “manner and form” provisions of sections 59, 60

and 61. [Ss 59, 60 and 61 of the interim Constitution prescribed the process to be followed for the adoption of different types of Bills, and can be compared to ss 74–76 of the final Constitution.] Those provisions are not merely directory. They prescribe how laws are to be made and changed and are part of a scheme which guarantees the participation of both houses in the exercise of the legislative authority vested in Parliament under the Constitution, and also establish machinery for breaking deadlocks Sections 59, 60 and 61 of the Constitution are part of an entrenched and supreme Constitution. They can only be departed from where the Constitution permits this expressly ... or by necessary implication. In the present case neither of these requirements is present.

ACTIVITY 47

Answer the following questions in view of the judgment in the *Western Cape* decision:

- (1) Explain the difference between the delegation of subordinate legislation to the executive, and the assignment of plenary legislative power to the executive. Why is this distinction important? (6)
 - (2) Did the doctrine of separation of powers have any bearing on this decision? Explain. (4)
 - (3) Why did the Court consider it important that we now have a supreme Constitution? (4)
 - (4) Do you think the *Western Cape* decision also reflects the position under the 1996 Constitution? Why do you say this? (5)
-

In a later decision, the Constitutional Court found that section 24 of the Municipal Structures Act constituted an impermissible delegation of Parliament's legislative authority. In *Executive Council of the Western Cape v Minister for Provincial Affairs; Executive Council of Kwazulu-Natal v President of the RSA* 1999 (12) BCLR 1353 (CC), the Court held that the Constitution does not authorise the delegation of the power to determine the term of a Municipal Council.

Study paragraphs 120–126 of the *Executive Council* decision. Pay particular attention to paragraph 125, in which the Court lays down an important guideline for determining whether the Constitution authorises the delegation of a particular legislative power.

Delegation of legislative authority to the provincial legislature

So far, we have dealt only with the delegation of legislative powers to the executive. But what about the assignment of legislative powers to provincial legislatures or Municipal Councils? Section 44(1)(a)(iii) of the Constitution authorises the NA “to assign any of its legislative powers,

except the power to amend the Constitution, to any legislative body in another sphere of government”. According to Chaskalson and Klaaren (at 3–27), such assignment of legislative competence proceeds by Act of Parliament, and may not take place by proclamation.

8.7.4 Constitutional amendment

We learnt earlier on that section 74 prescribes certain special procedures and special majorities to amend the Constitution. In addition, it can be argued that an amendment which contravenes the basic structure or spirit of the Constitution would be invalid even if the required procedure was followed.

ACTIVITY 48

Study the arguments of Chaskalson and Klaaren (in “National government”) in the *Reader*, and then answer the questions that follow.

- (1) Is Parliament still bound by the Constitutional Principles in Schedule IV of the interim Constitution? (Refer back to study unit 3 if you are uncertain what the Constitutional Principles are.) (5)
- (2) Discuss the meaning and origin of the “basic-structure” doctrine of constitutional amendment. (6)
- (3) Discuss the possible relevance of the basic-structure doctrine to South African constitutional law. (4)

ACTIVITY 49

Suppose a new Electoral Bill has been introduced in the NA. This Bill contains, among others, the following provisions:

- Section 4 makes provision for the registration of voters on a national voters roll.
- Section 5 provides that only citizens above the age of 18 who are in possession of a newly introduced identity card may vote. It also excludes all prisoners from the right to vote.
- Section 6 provides that the next election for the NA will be held in April 2004. Thereafter, elections for the NA will be held every ten years.

You are summoned to appear before the portfolio committee responsible for the consideration of this Bill. Advise the committee on the following matters:

- (1) whether the provisions referred to above are constitutional
- (2) if the provisions referred to above are not constitutional, whether the Constitution can be amended
- (3) how such a Bill amending the Constitution should be adopted

- (4) whether there are any substantive barriers to such a constitutional amendment (10)
-

8.8 COMMON MISTAKES MADE BY STUDENTS

- The processes outlined in sections 74, 75 and 76 are usually confused. For example, students often mention the operation of a mediation committee when they are asked to discuss the process for the adoption of ordinary Bills not affecting the provinces. This is incorrect, since it is section 76, and not section 75, that makes provision for a Bill to be referred to a mediation committee if the NA and the NCOP are unable to agree on a particular version of a Bill.
- The limitations that apply to the legislative competence of Parliament are often confused with the parliamentary mechanisms that exist to control the conduct of the executive.
- The concept “delegation” is often taken out of its legislative context and defined as “delegation” in the sense of a group of representatives or people in general. “Delegation”, in the legislative context, refers to the power of the Parliament to lawfully assign some of its law-making authority to another functionary.

8.9 SELF-ASSESSMENT QUESTIONS

As you know, it is the task of Parliament to enact, amend and repeal laws. The questions in this study unit are designed to test your understanding of the following: the process that takes place before legislation is tabled in Parliament; the majorities required for an amendment to various parts of the Constitution to be legitimate; and the delegation of legislative authority by Parliament.

- (1) Discuss the process required for the adoption of:
 - (a) Bills amending the Constitution (10)
(See s 74 of the Constitution.)
 - (b) ordinary Bills affecting the provinces (10)
(See s 76 of the Constitution. Remember that this provision deals with the enactment of legislation at national level by Parliament, and not by the provincial legislatures.)
 - (c) ordinary Bills not affecting the provinces (5)
(See s 75 of the Constitution.)
- (2) What are the main differences between 1(a) and (b) above? (4)
- (3) Briefly explain when the President may send a Bill back to the NA. Give us the exact provision of the Constitution dealing with this aspect of the law. (3)
- (4) Briefly explain when the President may refer a Bill to the

Constitutional Court for a decision on its constitutionality. Refer to the *Liquor Bill* case in your answer. (15)

Consider the following points when answering this question:

- Which provision deals with presidential referrals?
- Which case dealt with this issue?
- What were the facts of the case, briefly?
- Which two issues did the Court have to deal with?
- What was the finding of the Court?
- What was the finding of the Court in respect of the following:
 - i What are the three routes by which laws passed by Parliament can come under judicial consideration? (See para 6 of the judgment.)
 - ii What were the three issues that the Court considered in analysing section 79 of the Constitution? (See para 11 of the judgment.)
 - iii What did the Court hold in respect of each subissue? (Read the entire case for this part of your answer.)

(5) Discuss the seven limitations on Parliament's power to make laws. (14)

(6) It is universally accepted in modern democracies that Parliament cannot attend to every single task that it is enjoined to perform, particularly when it comes to making laws aimed at regulating the conduct of its subjects. Parliament cannot foresee every single occurrence that may require regulation and usually, therefore, drafts laws in skeletal form. In the light of the above statement, briefly discuss what you understand by the term "delegation of legislative authority" and discuss whether or not Parliament may delegate its functions to:

- (a) the executive (9)
 - (b) the provincial legislature (3)
- (Refer to case law in your answer.)

Consider the following points when answering this question:

- What do you understand by the term "delegation" in the constitutional sense?
 - Why do you think delegation is important?
 - Which case dealt with the issue of delegation?
 - What were the facts, issue, finding and reasoning of the Court?
 - Can Parliament delegate its legislative authority to the provincial legislature?
- (7) Does the "basic-structure doctrine" apply in South Africa? Explain briefly. (5)
- (Refer to the article by Chaskalson & Klaaren in the *Reader*.)

Consider the following points when answering this question:

- Where did this doctrine originate?
- What is the content of this doctrine?
- Has South Africa adopted this doctrine, and, if not, why not?
- What have our Courts stated in this regard?

8.10 CONCLUSION

The Constitution clearly draws a distinction between ordinary Bills, money Bills and constitutional amendments. In particular, the Constitution expressly mentions the procedure that must be followed for the legislative adoption of such Bills. It is important to follow the correct procedure, otherwise a law adopted according to the wrong procedure may be declared invalid.

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STUDY UNIT 9

The executive authority: national sphere

OVERVIEW

In this study unit, the main focus is on the executive authority in the national sphere of government as provided for in South Africa's Constitution, 1996. Of particular interest is the focus on:

- the powers and functions of the national executive
- how these powers and functions are to be exercised
- who takes responsibility for the exercise of executive authority
- constraints on the national executive authority

The executive authority of governance (in what is referred to as the “broader approach”) is discussed interchangeably with the traditional system as practised and lived by various communities since time immemorial. Of utmost importance in this discussion is the transformation of the institution of traditional leadership, which has passed through various stages dating from the colonial and apartheid era to the new constitutional dispensation. The new dispensation has further resulted in the evolution of the traditional system of governance through legislative and judicial developments. It is worth noting that the system of traditional leadership has its own hierarchical structure which exercises authority from the headman (*USibondaor Induna*) up to the Senior Traditional Leader (the King or Queen).

The new developments have taken note of the diverse groups in South Africa and of the fact that the system of customary law is not uniform; hence the legislative developments to ensure the significance of a coordinated function of authority without actually trampling the character of the system itself. Without providing a historical background on these developments, we shall focus primarily on the institution of traditional leadership as a legitimate institution of authority within the framework of the customary law system and principles in contributing to the advancement and upholding of the rule of law at local level.

The general principles of customary law are dealt with in African Customary Law (LCP405M). To avoid any duplication, this study unit provides a brief overview of authority as exercised by traditional leaders under customary law, the Constitution and other related legislation. The purpose is also not to make a substantive analysis of the role, challenges and other issues that may be related to the institution itself, but to provide a theoretical framework for the exercise of executive authority within the system of traditional leadership (see Ifeka at 115–123).

The executive authority is vested in other spheres of government such as the provincial and local spheres (see Ch 6 & 7 of the Constitution), but, as noted above, the greater emphasis will be on the two corresponding systems (the modern and the traditional system of authority in the national sphere). It is also worth mentioning that the institution of traditional leadership has its own hierarchical structure which starts at the local level and culminates in the National House of Traditional Leaders (see the National House of Traditional Leaders Act 22 of 2009 as envisaged by Ch 12, s 212 of the Constitution). Therefore, authority is vested in such other spheres, as it applies equally in the constitutional system of authority (the “broader system”).

The system of executive authority falls within the framework of the doctrine of separation of powers (as we discovered in study unit 5) and of cooperative governance (as we saw in study unit 6). The system of cooperative governance applies equally within the system of traditional authority, as there is a need for an efficient and proper system of public governance and administration. The traditional system of governance has a double-edged function of cooperative governance, as it is required to develop the principles of governance within the institution itself (from the local level up to the National House) and in matters involving the broader system of governance.

The intersection of the doctrine of separation of powers, cooperative governance and executive authority entails the distribution of state authority in order to prevent the usurpation of the function of each branch (legislature, executive and judiciary), sphere of government (national, provincial and local) and houses of traditional leadership.

UNIT OUTCOMES

After you have studied the material in this study unit, you should be able to do the following:

- state who is responsible for the exercise of executive authority in the national sphere for both the President and the Chairperson of the National House of Traditional Leaders
- discuss the powers and functions of the President
- explain how the President must exercise his or her powers
- discuss the question whether the President can be ordered to give evidence in a civil matter in relation to the performance of his or her official duties
- explain what is meant by individual and collective ministerial responsibility
- discuss parliamentary, judicial and other forms of control over the executive
- explain when the President will be bound to comply with section 33 (just administrative action) of the Constitution

- distinguish the traditional system of governance from the broader approach of executive authority as envisaged in the Constitution
- discuss the limitation of the powers of the Chairperson and the executive of the National House of Traditional Leaders

PRESCRIBED STUDY MATERIAL

President of the RSA v South African Rugby Football Union 1999 (10) BCLR 1059 (see the *Revised Reader* — hereafter “the Reader”)

RECOMMENDED MATERIAL

Currie I & De Waal J with De Vos P, Govender K & Klug H *The New Constitutional and Administrative Law* (2001) Volume 1, Juta Publishers, chapter 5, 226–266

Jobodwana ZN “Customary Courts and human rights: comparative African perspectives” (2000) Volume 15, *SA Public Law/Reg*, 26–49

Rautenbach IM & Malherbe EFJ *Constitutional Law* (2004) Butterworths Publishers, chapter 9, 175–215

In re: Certification of the Constitution of the Republic of South Africa 1996 (10) BCLR 1253 (CC); 1996 (4) SA 744 (CC)

President of the Republic of South Africa v Hugo 1997 (4) SA 1 (CC)

RELEVANT SECTIONS OF THE CONSTITUTION

You must summarise and study sections 83–92, 95–97, 101–102, and 211–212.

Basically, these sections focus on the role of the President and his or her Cabinet in ensuring the proper implementation of the ideals of the new constitutional dispensation.

You must also take note of other provisions of the Constitution that deal with the relationship of the President with other bodies as reflected in the text of this study unit.

PLEASE NOTE: These sections are taken directly from the Constitution, which is available at www.info.gov.za/documents/constitution/1996 .

Section number	Title of section	Content
Section 83	The President	<p>The President: –</p> <ul style="list-style-type: none"> (a) is the Head of State and head of the national executive; (b) must uphold, defend and respect the Constitution as the supreme law of the Republic; and (c) promotes the unity of the nation and that which will advance the Republic.
Section 84	Powers and functions of President	<ul style="list-style-type: none"> (1) The President has the powers entrusted by the Constitution and legislation, including those necessary to perform the functions of Head of State and head of the national executive. (2) The President is responsible for: – <ul style="list-style-type: none"> (a) assenting to and signing Bills; (b) referring a Bill back to the National Assembly for reconsideration of the Bill's constitutionality; (c) referring a Bill to the Constitutional Court for a decision on the Bill's constitutionality; (d) summoning the National Assembly, the National Council of Provinces or Parliament to an extraordinary sitting to conduct special business; (e) making any appointments that the Constitution or legislation requires the President to make, other than as head of the national executive; (f) appointing commissions of inquiry; (g) calling a national referendum in terms of an Act of Parliament; (h) receiving and recognising foreign diplomatic and consular representatives; (i) appointing ambassadors, plenipotentiaries, and diplomatic and consular representatives; (j) pardoning or reprieving offenders and remitting any fines, penalties or forfeitures; and (k) conferring honours.

Section number	Title of section	Content
Section 85	Executive authority of the Republic	<p>(1) The executive authority of the Republic is vested in the President.</p> <p>(2) The President exercises the executive authority, together with the other members of the Cabinet, by: –</p> <ul style="list-style-type: none"> (a) implementing national legislation except where the Constitution or an Act of Parliament provides otherwise; (b) developing and implementing national policy; (c) co-ordinating the functions of state departments and administrations; (d) preparing and initiating legislation; and (e) performing any other executive function provided for in the Constitution or in national legislation.
Section 86	Election of President	<p>(1) At its first sitting after its election, and whenever necessary to fill a vacancy, the National Assembly must elect a woman or a man from among its members to be the President.</p> <p>(2) The Chief Justice must preside over the election of the President, or designate another judge to do so. The procedure set out in Part A of Schedule 3 applies to the election of the President.</p> <p>(3) An election to fill a vacancy in the office of President must be held at a time and on a date determined by the Chief Justice, but not more than 30 days after the vacancy occurs.</p>
Section 87	Assumption of office by President	When elected President, a person ceases to be a member of the National Assembly and, within five days, must assume office by swearing or affirming faithfulness to the Republic and obedience to the Constitution, in accordance with Schedule 2.

Section number	Title of section	Content
Section 88	Term of office of President	<p>(1) The President's term of office begins on assuming office and ends upon a vacancy occurring or when the person next elected President assumes office.</p> <p>(2) No person may hold office as President for more than two terms, but when a person is elected to fill a vacancy in the office of President, the period between that election and the next election of a President is not regarded as a term.</p>
Section 89	Removal of President	<p>(1) The National Assembly, by a resolution adopted with a supporting vote of at least two thirds of its members, may remove the President from office only on the grounds of: –</p> <p>(a) a serious violation of the Constitution or the law;</p> <p>(b) serious misconduct; or</p> <p>(c) inability to perform the functions of office.</p> <p>(2) Anyone who has been removed from the office of President in terms of subsection (1) (a) or (b) may not receive any benefits of that office, and may not serve in any public office.</p>
Section 90	Acting President	<p>(1) When the President is absent from the Republic or otherwise unable to fulfil the duties of President, or during a vacancy in the office of President, an office-bearer in the order below acts as President: –</p> <p>(a) The Deputy President.</p> <p>(b) A Minister designated by the President.</p> <p>(c) A Minister designated by the other members of the Cabinet.</p> <p>(d) The Speaker, until the National Assembly designates one of its other members.</p>

Section number	Title of section	Content
Section 88	Term of office of President	<p>(2) An Acting President has the responsibilities, powers and functions of the President.</p> <p>(3) Before assuming the responsibilities, powers and functions of the President, the Acting President must swear or affirm faithfulness to the Republic and obedience to the Constitution, in accordance with Schedule 2.</p> <p>(4) A person who as Acting President has sworn or affirmed faithfulness to the Republic need not repeat the swearing or affirming procedure for any subsequent term as Acting President during the period ending when the person next elected President assumes office.</p>
Section 91	Cabinet	<p>(1) The Cabinet consists of the President, as head of the Cabinet, a Deputy President and Ministers.</p> <p>(2) The President appoints the Deputy President and Ministers, assigns their powers and functions, and may dismiss them.</p> <p>(3) The President: –</p> <p>(a) must select the Deputy President from among the members of the National Assembly;</p> <p>(b) may select any number of Ministers from among the members of the Assembly; and</p> <p>(c) may select no more than two Ministers from outside the Assembly.</p> <p>(4) The President must appoint a member of the Cabinet to be the leader of government business in the National Assembly.</p> <p>(5) The Deputy President must assist the President in the execution of the functions of government.</p>

Section number	Title of section	Content
Section 92	Accountability and responsibilities	<p>(1) The Deputy President and Ministers are responsible for the powers and functions of the executive assigned to them by the President.</p> <p>(2) Members of the Cabinet are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions.</p> <p>(3) Members of the Cabinet must: –</p> <ul style="list-style-type: none"> (a) act in accordance with the Constitution; and (b) provide Parliament with full and regular reports concerning matters under their control.
Section 95	Oath or affirmation	<p>Before the Deputy President, Ministers and any Deputy Ministers begin to perform their functions, they must swear or affirm faithfulness to the Republic and obedience to the Constitution, in accordance with Schedule 2.</p>
Section 96	Conduct of Cabinet members and Deputy Ministers	<p>(1) Members of the Cabinet and Deputy Ministers must act in accordance with a code of ethics prescribed by national legislation.</p> <p>(2) Members of the Cabinet and Deputy Ministers may not: –</p> <ul style="list-style-type: none"> (a) undertake any other paid work; (b) act in any way that is inconsistent with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests; or (c) use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person.

Section number	Title of section	Content
Section 97	Transfer of functions	The President by proclamation may transfer to a member of the Cabinet: – (a) the administration of any legislation entrusted to another member; or (b) any power or function entrusted by legislation to another member.
Section 101	Executive decisions	(1) A decision by the President must be in writing if it: – (a) is taken in terms of legislation; or (b) has legal consequences. (2) A written decision by the President must be countersigned by another Cabinet member if that decision concerns a function assigned to that other Cabinet member. (3) Proclamations, regulations and other instruments of subordinate legislation must be accessible to the public. (4) National legislation may specify the manner in which, and the extent to which, instruments mentioned in subsection (3) must be: – (a) tabled in Parliament; and (b) approved by Parliament.
Section 102	Motions of no confidence	(1) If the National Assembly, by a vote supported by a majority of its members, passes a motion of no confidence in the Cabinet excluding the President, the President must reconstitute the Cabinet. (2) If the National Assembly, by a vote supported by a majority of its members, passes a motion of no confidence in the President, the President and the other members of the Cabinet and any Deputy Ministers must resign.
Section 211	Recognition	(1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.

Section number	Title of section	Content
		<p>(2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.</p> <p>(3) The Courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.</p>
Section 212	Role of traditional leaders	<p>(1) National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities.</p> <p>(2) To deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law: –</p> <p>(a) national or provincial legislation may provide for the establishment of houses of traditional leaders; and</p> <p>(b) national legislation may establish a council of traditional leaders.</p>

9.1 DEFINITION OF EXECUTIVE AUTHORITY

What is executive authority?

Currie and De Waal (at 228) indicate that defining the word “executive” is not an easy task, but that, for purposes of constitutional and administrative law, the use of the term is reserved for political appointees who collectively head the government. It is within the framework of collective responsibility that executive authority is defined as the power to execute rules of law on matters that do not fall within the functional areas of other branches of government (legislature and judiciary).

Rautenbach and Malherbe (at 175) mention the following three reasons for the importance of the national executive in the exercise of its functions and why public attention normally focuses more on the activities of the executive than on those of legislative and judicial bodies:

- The highest executive offices are nearly always occupied by national political leaders.

- In all states, extensive (large in number or quantity) powers are assigned to executive bodies to create rules of law through subordinate legislation.
- Executive organs of state plan, coordinate and manage state activities. They fulfil a key role in “planning” policy and the contents of rules of law which legislative bodies approve.

In South Africa, these reasons apply equally to the system of traditional governance. The traditional system of governance is distinct from the modern approach to executive authority, as those elected to the House are not elected by popular rule, but by virtue of being born within the royal family. As a result of changes that have since taken place, the evolution of the traditional system of governance is regulated by legislation. The establishment of the National House of Traditional Leaders in terms of Act 10 of 1997, as amended by Act 85 of 1998, which has been once again repealed by Act 22 of 2009, in terms of section 2, provides an oversight and overarching role on the regulation and functioning of the traditional system of executive authority, gives effect to, and regulates, the traditional system of executive authority.

Those elected to the National House of Traditional Leaders as envisaged in section 4 of the National House of Traditional Leaders Act are required to ensure the coordination of events, to play an influential role in the development of legislation and policies that seek to govern the institution of traditional leadership, and to contribute to the general wellbeing of the country. Their role is not limited to a focus on developed legislation, but is also to ensure that such legislation gives due recognition to the treasures of African heritage that have evolved since time immemorial. This means that the great component of customary law is not written down, as it develops and evolves with the changes that are taking place; hence the reason why the system of traditional leadership and governance is referred to as “dynamic”.

The intersection of the broad and the traditional system of executive authority is enhanced by the need to address the social, economic and political imbalances created by apartheid. The executive authority must devise policies and initiate legislation to effect a more equitable distribution of wealth and power. It must both implement these laws and policies and oversee the transformation of the public service. This can only be done by a strong, effective executive authority.

The need for a strong executive must, however, be balanced against the constitutional values of openness, accountability and the rule of law. The executive not only derives its powers from the Constitution and the law of the land, but its powers are also circumscribed, and thus limited, by the Constitution and other laws. As noted above, the executive system of

traditional leadership does not only derive its power from legislation as developed by the state, but also through being born within the royal family and elected to the National House of Traditional Leaders.

Moreover, the Constitution provides for a number of mechanisms by means of which other institutions, such as the legislature, the judiciary and the general public can exercise control over the executive [see Ch 4 (Parliament), Ch 8 (Courts and Administration of Justice) & Ch 9 (State Institutions Supporting Constitutional Democracy) of the Constitution].

The main functions of the executive authority are set out in section 85(2). This provision prescribes specific functions of the national executive as an organ of state as provided for not only in the Constitution but also in other related legislation (see the definition of “organ of state” in s 239 of the Constitution).

The exercise of executive authority within the traditional system of governance is set out in section 11 of the National House of Traditional Leaders Act, which is not limited to the legal and constitutional duty, but is also aimed at ensuring the promotion of moral fibre and regeneration in our various societies.

ACTIVITY 50

- (1) Why is the system of customary law referred to as “dynamic”?
 - (2) Discuss three reasons why the public focuses more on the activities of the executive than on the legislature or judiciary.
 - (3) Explain the importance of the intersection between the broad and the traditional system of governance.
 - (4) Discuss the importance of executive authority in the regulation of government conduct.
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9.2 THE DISTRIBUTION OF EXECUTIVE AUTHORITY

9.2.1 The national executive authority

The executive authority of the Republic is exercised by, and is vested in, various executive bodies such as the President, ministers and public officials. The functionaries are required to execute legal rules within the different spheres of state administration (national, provincial and local spheres). The Constitution provides that the national executive authority is vested in the President in terms of section 85. The President is the Head of State and of the national executive (s 83). The President has only those powers entrusted to him or her by law, and may not exercise powers that have been conferred (given or granted to) on Cabinet ministers or government officials (s 84).

The Constitution as well recognises and protects the institution of traditional leadership, which creates a dual system of governance. Effectively, the Constitution prohibits Parliament from making laws that will interfere with the institution of traditional leadership. The question which arises is: does the Constitution create a system of “divided legitimacy” between the systems of authority as vested in the institution of traditional leadership vis-à-vis the postapartheid system of governance? Although it appears that there is a system of “divided legitimacy”, the Constitution endorses the basis for traditional leadership that was, and continues to be, rooted in moral and social authority by making organised communities the primary focus of authority (Jobodwana at 26–49).

The exercise of executive authority is not the sole responsibility of the President, for such authority is exercised together with other members of the executive as well [s 85(2)]. Further, the exercise of executive authority entails individual and collective responsibility of members of the Cabinet for the exercise of their powers and the performance of their functions [s 92(2)]. Rautenbach and Malherbe (at 178–179) draw a distinction between the individual and collective responsibility of members of the executive. They hold that the former entails the individual accountability of the President and members of the executive for the exercise of their powers and duties, whilst the latter entails joint responsibility before Parliament for the way in which each member exercises and performs his or her powers and functions.

The collective system of responsibility applies equally to the system of traditional leadership, as it puts more emphasis on the House, which is headed by the Chairperson (see s 13 of the National House of Traditional Leaders Act).

PLEASE NOTE: See the discussion of the Presidential and Parliamentary systems of government in study unit 4.

ACTIVITY 51

The Institute for the Rule of Law approaches you as a constitutional law student at Unisa for advice regarding the establishment of the National House of Traditional Leaders by the government. The envisaged establishment seeks to ensure the parallel development of the systems of governance brought about by South Africa’s diverse population.

The Institute argues that the establishment of the House will confuse the nation, as the creation of the two systems of governance carries the risk of divided legitimacy of authority.

Please advise the Institute on the importance of such establishment and how it will contribute, or not contribute, to the advancement of South Africa’s democracy.

9.2.2 The election, term of office and removal of the President

Section 86 of the Constitution provides for the election of the President by the National Assembly from among its members. Part A of Schedule 3 sets out the procedure to be followed during such an election.

Section 87 governs the assumption of office by the President by affirming faithfulness to the Constitution in accordance with Schedule 2 of the Constitution. In addition, section 88 deals with the term of office of the President and lays down that he or she may not hold office for more than two terms. Lastly, section 89 makes provision for the removal, on the following grounds, of the President by the National Assembly by way of a resolution adopted with a supporting vote of at least two-thirds of its members:

- a serious violation of the Constitution or the law,
- serious misconduct, or
- inability to perform the functions of office

The traditional system of governance does not provide for the election of the *Kgosi* (chief) to chieftaincy. Traditional leaders are given the status of holding public office by “birth”, which was reserved for the first-born male heir until the cardinal rule of the customary law of succession to chieftaincy was invalidated by the Constitutional Court in *Shilubana v Nwamitwa* 2009 (2) SA 66 (CC). It is the leaders born within the royal family (both men and women as a result of the *Shilubana* judgment) who are eligible to hold office and who should be elected by way of the normal election processes to the National House of Traditional Leaders (s 4 of the National House of Traditional Leaders Act). The members of the House, including the Chairperson, may be removed from office in terms of section 5 of that Act. Section 5 furthermore disqualifies a person from being a member of the House if he or she is a member of a Municipal Council, provincial legislature or Parliament.

The system should be distinguished from the broad approach to holding public office. It should also be distinguished from holding office as *Inkosi* (chief) within the royal family for a particular traditional community and holding executive authority in the National House of Traditional Leaders. The system of authority in relation to the holding of office for a particular traditional community allows for an acting *Kgosi* when the legitimate successor is still young, or for some other reason. The executive authority in the National House of Traditional Leadership is vested in the Chairperson, in collaboration with other members of the national executive (see s 9 of the National House of Traditional Leaders Act), who is eligible for election by the provincial houses.

Finally, section 90 provides for an Acting President. This will normally be the Deputy President. If the Deputy President is not available, it will be a

Minister designated by the President, or, if the President has not designated anyone, a Minister designated by the Cabinet. If neither the President nor the Cabinet has designated an Acting President, it will be the Speaker until the National Assembly designates one of its members. Section 9(4) and (5) also provides for an Acting Chairperson in terms of the rules and orders of the National House of Traditional Leaders.

The system of election of the President to public office, and of his or her removal from such office, is not without its shortcomings in South Africa. In September 2008, the Republic of South Africa witnessed the unprecedented removal from office of former President Thabo Mbeki by the ruling party (the African National Congress). Such removal occurred after Mr Jacob Zuma (who subsequently became President of the Republic of South Africa) had been implicated in corruption in a case heard in the Durban High Court and was subsequently prosecuted for such act. The removal from office resulted from the fact that it was found that Mr Mbeki and two of his Cabinet members, Dr Penuel Maduna (former Minister of Justice) and Mr Bulelani Ngcuka (former National Director of Public Prosecutions), had interfered with Mr Zuma's prosecution (*Zuma v National Director of Public Prosecutions* (8652/08) [2008] ZAKZHC 71).

Although the above judgment was overturned by the Supreme Court of Appeal in *National Director of Public Prosecutions v Zuma* (573/08) [2009] ZASCA 1, it left many questions unanswered, such as whether the ruling party has powers over those of Cabinet members in determining with sufficient certainty the alleged gross violation of the Constitution by the President which warrants his or her removal from office as required by section 89.

After the removal of Mr Mbeki from office, the current Deputy President of the Republic of South Africa, Mr Kgalema Motlanthe, was elected as an acting or caretaker President until the general elections that were held on 22 April 2009.

ACTIVITY 52

- (1) Discuss the circumstances in which the President may be removed from office and how such removal may be effected in terms of customary law.
 - (2) What distinguishes the traditional system of governance from the broad system of governance?
 - (3) Distinguish the individual responsibility of Cabinet members from their collective responsibility.
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9.3 POWERS AND FUNCTIONS OF THE PRESIDENT

Having read section 84(1), one could say that the President has the following powers:

- powers entrusted by the Constitution
- powers entrusted by other legislation
- implied powers, that is, powers necessary for the exercise of powers expressly conferred by the Constitution or other legislation

This is not an exhaustive list of what the President is required to do, as other powers and functions may be prescribed by legislation. The powers vested in the President enable him or her to act in order to fulfil his or her constitutional responsibilities, which are intertwined with the duties to refrain from acting in a way that may undermine the state itself and the rule of law. Therefore, the powers and duties of the President form part of his or her functions as envisaged in section 84 in order to fulfil his or her constitutionally entrusted duties.

Currie and De Waal (at 236) contend that the interpretation of section 84 precludes the argument that the President may derive his or her powers from the common law (prerogative). They substantiate their argument by relying on the judgment of the Constitutional Court in *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), at paragraph 8, where it was held that “there are no powers derived from the royal prerogative which are conferred on the President other than those enumerated in the Constitution”.

Rautenbach and Malherbe (at 191–192) argue that the common law powers which have not been written into the Constitution or legislation, and which may still exist, are those powers in relation to acts of state. They hold that the President, for example, no longer retains the prerogative powers to issue passports and to perform acts of state. The authority to issue passports is now regulated by the South African Passports and Travel Documents Act 4 of 1994. This Act provides that the powers and duties in respect of passports which vested in the State President prior to the coming into operation of the 1993 Constitution are now vested in the government of the Republic. The power to issue and control passports is therefore no longer a prerogative power, but a statutory power.

The exercise of these constitutional powers is, moreover, subject to constitutional review. This follows from the fact that the Constitution is supreme (s 2), and that all branches of government, including the executive, are bound by the Constitution [s 8(1)]. The Constitutional Court in *In re: Certification of the Constitution of the Republic of South Africa* 1996 (10) BCLR 1253 (CC); 1996 4 SA 744 (CC), at paragraph 116, endorsed the review of constitutional powers, as it held that

“the President derives this power not from antiquity but from the

Constitution itself that proclaims its own supremacy. Should the exercise of the power in any particular instance be such as to undermine it, that conduct would be reviewable”.

The exercise of executive powers by the President should be distinguished from those of the Chairperson of the House. Despite the powers vested in the Chairperson by natural birth, his or her executive powers are regulated by legislation as mandated by the Constitution. Section 212(2) of the Constitution lays down that national legislation may provide for the establishment of houses of traditional leaders and establish a council of traditional leaders. Therefore, the Chairperson of the House is required to exercise the powers entrusted to him or her in terms of section 9 of the National House of Traditional Leaders Act (see also ss 11–13 of the said Act).

ACTIVITY 53

The President of the Republic of South Africa receives an application for a pardon from a convicted fraudster and drug dealer. The President refers the application to the Minister of Correctional Services, as he says that it is the function of the Minister to deal with such applications.

With reference to the literature and case law, discuss the powers of the President and whether it is appropriate for the President to delegate this task to the minister.

9.3.1 The exercise of Presidential powers and functions

The Constitution not only sets out the powers of the President, but also prescribes how such powers must be exercised. There are, of course, a number of constitutional provisions the President must observe in the exercise of his or her powers. For instance, the President must:

- respect and promote the Bill of Rights
- where applicable, observe the rules of administrative law
- respect the separation of powers between the legislative, executive and judicial organs of state
- respect the constitutional status, institutions, powers and functions of government in the provincial and local spheres [see also s 83(a)–(c)]

However, in this section we are concerned only with procedural requirements, that is, requirements relating to the manner in which the President must exercise his or her powers. Rautenbach and Malherbe (at 188) contend that attention must be paid to the manner in which the President exercises his or her powers, which may include:

- the rules in respect of powers which the President exercises as head of the national executive
- the rules in respect of powers which the President does not exercise in that capacity
- the meaning of certain expressions which are used to describe the requirements for the exercise of certain powers of the President

There are four categories of constitutional requirements relating to the manner in which the President exercises his or her functions. **First**, the President is required to exercise certain powers “together with” the other members of the Cabinet in terms of section 85(2). This raises two questions:

- When does the President exercise executive authority?
- What does it mean to act “together with the other members of the Cabinet”?

It is clear from the Constitution that not all the President’s powers involve the exercise of executive authority. For instance, sections 83(a) and 84(1) distinguish between powers exercised by the President as Head of State and those exercised by the President as head of the national executive, while section 85(2) mentions some of the President’s functions in exercising executive authority. Rautenbach and Malherbe (at 189) hold that the expression “together with the other members of the Cabinet” indicates that decisions on the powers and functions of the President as head of the national executive are normally taken at Cabinet meetings. The degree of consent needed from other members of the Cabinet depends on the decision-making procedures followed in the Cabinet.

The Presidential powers as head of the national executive authority may concern the making of appointments, which includes the power to appoint:

- judges [s 174(3)]
- the National Director of Public Prosecutions [s 179(1)(a)]
- the National Commissioner of the South African Police Service [s 207(1)]
- the head of an intelligence service [s 209(2)]
- an inspector monitoring the intelligence service (s 210)
- members of the Financial and Fiscal Commission [s 221(1)]

This role requires the President to be sensitive not only to the members of the Cabinet who have elected him or her, but also to the general public who voted for the political party that has won the elections and who have thus voted it into Parliament.

In this regard, the dismissal of the former National Director of Public Prosecutions, Advocate Vusumzi Pikoli, after an investigation by the Ginwala Commission to establish whether he was fit to hold office, has created a lot of uncertainty over the presidential powers “to hire and fire”

people holding the highest office in government administration. Apart from recommending the tightening and affirmation of a proper and effective system of administration in the prosecutorial services in South Africa, the Commission recommended to the President that Adv Pikoli be found fit to hold office. Despite this recommendation, the then caretaker President, Kgalema Motlanthe, dismissed Adv Pikoli. Although this matter was settled out of Court, Adv Pikoli could not back down and challenged his dismissal in Court. Whilst the matter was still pending in the Northern Gauteng High Court, President Zuma threatened to make an appointment to the position of National Director, but was prohibited from doing so by the launch of another application by Adv Pikoli not to appoint his successor whilst he was still challenging his dismissal (*Pikoli v President and Others* (8550/09) [2009] ZAGPPHC 99).

Secondly, the President is required to exercise his or her powers “after consultation with” other functionaries or bodies. For instance, section 174(3) requires the President to appoint the Chief Justice and his or her Deputy of the Constitutional Court and the President and his or her Deputy of the Supreme Court of Appeal after consulting the Judicial Service Commission (see the discussion of the role and function of the Judicial Service Commission in study unit 10 on judicial authority).

In this regard, the President exercises his or her powers as head of the national executive authority. This requires him or her to consult the relevant functionary or institution, but he or she is not bound by any recommendation.

The recent appointment of the Chief Justice of the Constitutional Court, Sandile Ngcobo, created a lot of controversy, as he was nominated by the President long before the Judicial Service Commission could finalise its interviews and provide the President with recommendations for his consideration.

Thirdly, the President is required to exercise his or her powers on the “recommendations or advice” provided in the execution of his or her duties. There are instances where the President is bound to follow the advice provided or to act in accordance with the recommendations received. Rautenbach and Malherbe (at 191) mention the following examples of situations where the President is bound to follow the advice or recommendation provided:

- A declaration of a state of national defence must be approved by Parliament [s 203(3)].
- Except in certain circumstances, the President appoints all judges on the advice of the Judicial Service Commission [s 174(6)].
- The President appoints acting judges on the recommendation of the Minister of Justice [s 175(1)], and the Public Protector, the Auditor-

General, and members of the Human Rights Commission, the Commission for Gender Equality and the Electoral Commission on the recommendations of the National Assembly [s 193(4)].

- The President removes a judge from office if the Judicial Service Commission has made a finding of gross misconduct and if the National Assembly calls for that judge to be removed by a majority of at least two-thirds of its members [s 177(2)].
- The President appoints some of the members of the Financial and Fiscal Commission as nominated by the executive councils of the provinces and by organised local government [s 221(1)(b) & (c)].

These provisions contain specific duties which the President must exercise with regard to the advice provided by the various constitutional bodies entrusted with the responsibility of promoting the rule of law.

The President is also not bound to follow the recommendations provided by the commissions of inquiry established by him or her in terms of section 84(2) of the Constitution. For instance, the former President, Mr Thabo Mbeki, established a commission of inquiry in terms of section 84(2)(f), led by Judge Sisi Khampepe, on 1 April 2005. The purpose of the Commission was to investigate and review the mandate of the Directorate of Special Operations (known as “the Scorpions”) as an investigative arm in the fight against special crimes. After the Commission had fulfilled its duty and submitted its report to the President recommending that the Scorpions should remain within the National Prosecuting Authority, but with reporting obligations to the Minister of Safety and Security (who was then Mr Charles Nqakula), President Mbeki, instead of taking into account the recommendations made by the Commission, decided to disband the crime-fighting unit. The disbanding of the Scorpions was received with mixed reaction by the general public and various political parties.

Fourthly, the decision taken by the President must be in writing if it is taken in terms of legislation or has legal consequences. If the decision concerns a function assigned to a member of the Cabinet, that member of the Cabinet must countersign the decision. This also does not mean that the powers entrusted to the President may be transferred or redirected to the Cabinet member. For example, section 84(2)(j) gives powers to the President to pardon or reprieve offenders and to remit any fines, penalties or forfeitures. The judgment of the Constitutional Court in *Minister of Justice and Constitutional Development v Chonco* (CCT 42/09) [2009] endorsed the contention that Presidential powers may not be transferred to a Cabinet member. The Court in this case had to deal with the relationship between the powers and functions of the President as Head of State and those that are entrusted to the national executive/Cabinet member (Minister of Justice), as well as with the obligations that accrue to each (see para 16). The Court held (at para 19) that:

it cannot be correct to divide the exercise of the constitutional power

to pardon into two, that being the preparatory preliminary stage and the making of the decision which is entrusted to the President. This would have the effect of shifting elements of the President's exclusive Head of State power to the Minister, in her capacity as a member of the national executive. Moreover, it would result in uncertainty as to what constitutional obligation is imposed upon whom and when it is so imposed.

The President is further required to take personal responsibility for the powers conferred upon him or her. It is a well-established legal principle that a functionary entrusted with a particular power must exercise that power personally, unless there has been a valid assignment of the power in question as envisaged in section 91(2) (see also *Chonco* at para 36).

The Constitutional Court considered the applicability of this principle to the President's constitutional powers in *President of the RSA v South African Rugby Football Union*. In this case, the constitutional validity of the appointment of a commission of inquiry into the administration of rugby was in issue (see paras 1, 2, 24, and 33–41).

It was found in the Court *a quo* that the President had abdicated his responsibility to appoint a commission of inquiry in terms of section 84(2)(f) of the Constitution, and that the decision to appoint such a commission was taken by the Minister of Sport. The President merely rubber-stamped the Minister's decision. The appointment of the commission was therefore found to be invalid. The Constitutional Court agreed that the President had to exercise the power personally, since both the Constitution and the Commissions Act 8 of 1947, as amended by the General Law Amendment Act 49 of 1996, confer the power to appoint commissions on the President alone.

However, that is not to say that it is inappropriate for the President to act upon the advice of the Cabinet and advisors. "What is important is that the President should take the final decision" (*South African Rugby Football Union* at para 41).

ACTIVITY 54

- (1) With reference to case law and the literature, discuss in detail the circumstances in which the President may exercise his or her powers.
- (2) The National Director of Public Prosecutions (NDPP) is accused of using his political connections to prosecute members of opposition parties who are alleged to have committed serious crimes. The Democrats of South Africa (a political party) write a letter to the President alleging that the NDPP is not fit to hold office, as he is bringing the entire system into disrepute.
 - (a) With reference to case law and the literature, what are the steps

that the President is required to take in order to probe the allegations against the NDPP? (b) Discuss whether the President is bound to follow the recommendations made by the body that he or she delegates to probe the allegations against the NDPP.

9.4 THE PRESIDENT AND THE COURTS

In *President of the RSA v South African Rugby Football Union*, the Constitutional Court had to consider the question whether the President can be ordered to give evidence in a civil matter in relation to the performance of his official duties. Moseneke (at 352) indicates the importance of President Mandela's appearance in Court, stating that it was:

[a] symbolic and important act because it underscored the rule of law and the principle that we are all equal before the law and it is the Constitution that requires us to obey, respect and support the Courts not because the judges are important or entitled to special deference but because the institution they serve in has been chosen by us collectively in order to protect the very vital interests of all and in particular of those who are likely to fall foul of wielders of public or private power [see Moseneke at 341–353].

The President, as is the case with ordinary citizens, has to give respect to the judiciary in order to promote the constitutional values and principles which accord equal responsibility for all actions taken, which may be interpreted as including actions undermining the rule of law.

ACTIVITY 55

The Institute of Social Networks accuses the President, as the Head of State, of failing to exercise his authority in a proper manner in ensuring the speedy delivery of low-cost housing. The Institute approaches the North Gauteng High Court for the President to appear before it (the Court) and explain why the state has, to date, not delivered on promises made since the dawn of democracy to build houses for everyone.

The Senior Legal Advisor in the Office of the President appears on behalf of the President, as the latter alleges that, as Head of State, he cannot appear before the Courts that are under his own leadership.

As a constitutional law student, explain why the President, like ordinary citizens, has to give respect to the judiciary.

9.5 THE CABINET

9.5.1 Composition and functioning of the Cabinet

Section 91 deals with the composition of the Cabinet and with the appointment of Cabinet members other than the President. The Cabinet, which consists of the President as Head of Cabinet, the Deputy President and ministers, is vested with final responsibility for the exercise of executive authority at national level. Section 85(2) affirms that the President exercises his or her functions together with the members of the Cabinet. Cabinet members are required to act in accordance with the Constitution and to provide Parliament with regular reports concerning matters under their control [s 92(3)].

9.5.2 ACCOUNTABILITY

Section 92(1) stipulates that the Deputy President and Ministers are responsible for the powers and functions of the executive assigned to them by the President. Section 17 of the National House of Traditional Leaders Act also endorses the accountability of the National House of Traditional Leaders, which must submit reports on an annual basis to Parliament. In giving effect to section 17, the traditional system of authority also provides for the accountability of traditional leaders through the holding of *Imbizos* or *Lekgotlas* in the exercise of executive authority within the framework of customary law (see Oomen at 73–104).

Section 92(2) provides that members of the Cabinet are accountable, individually and collectively, to Parliament for the exercise of their powers and the performance of their functions. The notions of individual and collective ministerial responsibility first developed in British constitutional law.

Collective accountability

Collective responsibility signifies that the members of the Cabinet “act in unison to the outside world and carry joint responsibility before Parliament for the way in which each member exercises and performs powers and functions” (Rautenbach & Malherbe at 179). Ministers who disagree with a particular Cabinet decision must either support it in public or resign.

The principle of collective responsibility for all national powers and functions does have an important effect on the functioning of the Cabinet. Any member of the Cabinet may request that any matter within his or her individual area of responsibility be dealt with by the Cabinet.

This principle applies equally within the system of traditional leadership and governance, as it affirms the principle of communal responsibility based on a shared and common understanding.

Individual accountability

According to Venter (at 181, and quoted in Rautenbach & Malherbe at 178), the notion of individual responsibility entails three duties on the part of the Minister concerned:

- to explain to Parliament what happens in his or her department [study s 92(3), which places Cabinet members under an obligation to provide Parliament with full and regular reports concerning matters under their control].
- to acknowledge that something has gone wrong in the department and to see to it that the mistake is rectified
- to resign if the situation is sufficiently serious

Venter (at 181–182) states that a Minister is obliged to resign in the following circumstances:

- where the Minister is personally responsible for something that has gone wrong, or
- where the Minister is vicariously responsible for the actions of officials in his or her department, or
- where the Minister is guilty of immoral personal behaviour

However, the notion of vicarious responsibility for the actions of officials is fairly controversial. It is doubtful whether a Minister has to resign over decisions about which the Minister could not be informed. In the majority of cases, it will be sufficient if the Minister informs Parliament of the mistake, and then promises to rectify it.

Asmal (at 29) states that we do not yet have any clear guidelines on the question as to when a Minister should resign. However, he states, surely it can be agreed that, if a Minister is guilty of serious misconduct, corruption, the gross dereliction of duty, a cover-up or making scapegoats of officials, he or she should resign. Also, if a Minister is lazy or indifferent, and therefore did not know but ought to have known, then this is also a strong case for “a head to roll”.

But can a Minister be forced to resign? It is clear that Parliament does not have the power to dismiss a Minister. It cannot, for instance, adopt a motion of no confidence in an individual Minister. However, Parliament can exert considerable moral and political pressure on a Minister to resign. If that pressure is backed up by an outcry on the part of the general public, the Minister may have little choice but to resign.

The President is also likely to dismiss a Minister whose continued presence has become an embarrassment to the rest of the Cabinet. Former President Nelson Mandela fired his former wife, Mrs Winnie Madikizela-Mandela, as the Deputy Minister of Arts, Culture, Science and Technology, for

attending a women's conference in Beijing in 1995 without having followed proper procedures pertaining to state administration (see the report by Pope).

9.5.3 Conduct of Cabinet members

Section 96 deals with the ethical conduct of Cabinet members and Deputy Ministers. This provision requires Cabinet members to conduct themselves according to the highest ethical standards both in their professional and individual capacities in order to protect the integrity of Parliament.

Shortly after the 2009 general elections, the Minister of Transport, Mr Sibusiso Ndebele, received a Mercedes Benz car as a gift from a construction company in Durban in acknowledgment of the role he had played whilst he was still a Minister and Premier of KwaZulu-Natal. The gift raised many questions, such as whether Cabinet members may receive gifts in relation to the performance of their duties.

These questions resulted in him returning the gift (see the report by SAPA).

The application and enforcement of section 96 applies to Cabinet members. The substantive translation of section 96 into reality raises many questions relating to the manner in which it is enforced by Parliament itself. The Travelgate Scam, which saw a number of members of Parliament being hauled before the Courts without losing their seats, is another controversy that undermines the importance of enforcing high ethical standards among both Cabinet members and members of Parliament. A further example is that of Mr Mnyamezeli Boozi, Chairperson of the Portfolio Committee on Defence and former Chief Whip of the African National Congress (the ruling party), who pleaded guilty to defrauding Parliament and entered into a plea bargain with the National Prosecuting Authority.

It remains uncertain whether the new administration will be tougher on members of the Cabinet and members of Parliament who continue to bring the integrity of the state into disrepute.

ACTIVITY 56

- (1) Discuss the importance of individual and collective responsibility with regard to the exercise of executive authority.
- (2) Explain how the system of traditional executive authority differs from the system of executive authority in the broad approach.
- (3) The Minister of Transport, Dr Sibusiso Ndebele, is accused of misleading the nation by giving false statistics regarding the 2009

December road fatalities. Give a detailed account of the responsibilities attaching to Cabinet members with regard to the exercise of their authority.

9.6 CONTROL OVER THE EXECUTIVE

9.6.1 Parliamentary control

We have already seen that the principles of ministerial accountability and parliamentary oversight over the executive are central to the Constitution. These principles are central to the Constitution for a number of reasons, which may include the following:

- The apartheid political order was characterised, especially during the 1980s, by the concentration of power in the hands of the executive, and a lack of accountability on the part of executive organs of state. Abuses of power, human rights violations and corruption were the inevitable result.
- The Constitution seeks to move away from the old, authoritarian political culture, and aims to ensure accountability, responsiveness and openness in government [see s 1(d)].
- Members of Parliament are the elected representatives of the people, and it is their duty to ensure that the executive governs the country in the best interests of the people.
- Section 55(2) instructs the National Assembly to provide for mechanisms to ensure that all executive organs of state in the national sphere of government are accountable to it, and to maintain oversight over the exercise of national executive authority.

9.6.2 Types of parliamentary control over the executive

We have already discussed the principle of individual and collective ministerial accountability, as well as the duty of Cabinet members to provide Parliament with full and regular reports concerning matters under their control (see 9.5.2 above).

The following types of parliamentary control over the executive are currently in place:

- During question time in the Houses of Parliament, members may put questions to ministers on any aspect of the exercise of their powers and functions.
- Interpellations are used to enter into short debates with ministers on particular aspects of their responsibilities.
- Parliamentary committees often investigate and report on the activities of the executive. (See study unit 7 for a discussion of the role of parliamentary committees.)

- Section 101(4) refers to the tabling in, and approval by, Parliament of subordinate legislation, such as proclamations or regulations enacted by the President or a minister.
- Parliament has to authorise the raising of taxes and the spending of public funds by the executive. Parliamentary debates on the budget are one of the most important ways in which the performance of the executive and of individual ministers can be evaluated.
- Section 89 provides for the removal of the President from office (or for impeachment, as it is also known) by the National Assembly. Note that the resolution must be adopted with a two-thirds majority of the members of the National Assembly, and that it may occur only on the grounds of a serious violation of the Constitution or the law, serious misconduct or the inability to perform the functions of office.
- Section 102 provides for the adoption of motions of no confidence in the President, or in the Cabinet excluding the President. If a motion of no confidence in the President is adopted, he or she must resign, together with the other members of the Cabinet. If a motion of no confidence in the Cabinet excluding the President is adopted, the President must reconstitute the Cabinet.

9.6.3 Judicial control

The executive is bound by the Constitution as the supreme law, and any executive conduct which is inconsistent with the Constitution is invalid [see ss 2, 8(1), 83(b), 92(3) and 172(1)]. The Courts therefore have an important role to play in ensuring that the executive respects and observes the Constitution.

The Courts can test executive conduct against the following criteria:

- The Bill of Rights. The executive and the state administration may limit the rights entrenched in the Bill of Rights only to the extent that they are acting in terms of a law of general application, and that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom (s 36). The Bill of Rights also seeks to prevent the executive from abusing human rights during a state of emergency (s 37).
- During the apartheid years, the power of the Courts to inquire into the validity of executive and administrative conduct was often severely limited by the inclusion of ouster clauses in legislation. These clauses ousted the jurisdiction of the Courts to question the validity of government conduct in certain areas. Section 34 now guarantees the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a Court or, where appropriate, another independent and impartial tribunal or forum. This section, together with section 33(1), effectively bans ouster clauses. The Courts can therefore inquire into the validity of any executive action.

- The inclusion in the Bill of Rights of the right of access to information (s 32) and the right to just administrative action (s 33) is meant to ensure the accountability and openness of executive organs of state.
- The Constitution lays down certain procedural requirements for the validity of the President's action. If, for instance, the President fails to consult another functionary when required to do so, or if an executive decision taken in terms of legislation is not in writing, or is not countersigned by the relevant Cabinet member, the President's conduct will be invalidated.
- Executive organs must respect the doctrine of separation of powers, and may not usurp the functions of the legislature or do anything to compromise the independence of the Courts.
- Executive organs in the national sphere must respect the constitutional status, institutions, powers and functions of government in the provincial and local spheres.

See also study unit 10 on judicial authority.

9.6.4 Administrative law

The rules of administrative law constitute one of the most important checks on or controls over the power of the executive. Administrative law comprises rules and principles governing the performance of executive and administrative functions. It binds not only the executive authority, but also the state administration and private institutions wielding authority over their members. The rules of administrative law relate to the person who or body which may exercise a given power, to the scope and content of that power, to the procedure to be followed in exercising that power, to the reasonableness of administrative decisions, et cetera.

We have already referred to the fact that section 33 of the Constitution guarantees the right to just administrative action. This means that some of the rules and principles of administrative law now enjoy constitutional status. Executive organs of state and administrative officials are under a constitutional obligation to act in a manner which is lawful, reasonable and procedurally fair. We do not wish to discuss the content and scope of the right to just administrative action here you will learn all about it in Administrative Law (ADL101J). However, we would once again like to draw your attention to the judgment in *President of the RSA v South African Rugby Football Union* (the *Sarfu* case), which dealt, *inter alia*, with the question whether all acts of the executive must comply with section 33 of the Constitution.

It was argued in the *Sarfu* case that the President, in appointing a commission of inquiry into the administration of rugby, did not act in a manner that was procedurally fair. This was because the President did not give Sarfu the opportunity to make representations to him before deciding

to appoint the commission. The judge in the High Court agreed with this contention. However, the Constitutional Court found that the appointment of a commission in terms of section 84(2)(f) does not constitute “administrative action” as contemplated by section 33.

9.6.5 Control by other institutions

Apart from control by Parliament and the judiciary, the Constitution empowers a number of other institutions to investigate, criticise and report on the activities of the executive.

The most important institutions are the following:

- (1) The Public Protector. The Public Protector has the power to investigate any conduct of the government or administration that is alleged or suspected to be improper or to result in any impropriety or prejudice. It also has the power to report on that conduct and to take appropriate remedial action [s 182(1)]. The Public Protector is an independent and impartial institution [s 181(2)], and must report to the National Assembly at least once a year [s 181(5)].
- (2) The Auditor-General. The Auditor-General must audit and report on the accounts, financial statements and financial management of state departments and administrations [s 188(1)]. He or she must submit audit reports to any legislature (eg Parliament and/or a provincial legislature) that has a direct interest in the audit [s 188(3)]. The Auditor-General is an independent and impartial institution [s 181(e)].
- (3) Commissions of inquiry. The President has the power to appoint commissions of inquiry, *inter alia*, into any matters in connection with the executive [s 84(2)(f)]. The reports of such commissions are considered by Parliament.
- (4) In terms of the Special Investigating Units and Special Tribunals Act 74 of 1996, the President has the power to appoint special investigating units to investigate, *inter alia*, allegations of unlawful or improper conduct by employees of the state and of corruption.
- (5) The institution of traditional leadership as a legitimate authority may also exercise control over the executive concerning issues affecting not only the institution itself but also the nation.
- (6) The media has an important role in reporting on and criticising the performance of politicians and public officials. The right to freedom of the press and other media is guaranteed in section 16(1).
- (7) Finally, the general public can exercise control over the executive (and other branches of government) through public debate and criticism, and through a variety of interest and pressure groups such as consumer groups, trade unions, churches and cultural organisations (see *Minister of Health v Treatment Action Campaign* where the organisation successfully took the Minister of Health, Dr Manto Tshabalala Msimang, to Court for failing to provide equal access to

health care treatment with regard to mother-to-child transmission of HIV/AIDS.) The constitutional guarantees of freedom of speech (s 16), freedom of association (s 18) and freedom of access to information (s 32) contribute to this result.

ACTIVITY 57

Discuss in detail the different systems of control over the national executive.

9.7 CONCLUSION

The executive authority is the second branch of government or organ of state. The executive attends to the day-to-day functioning of the state.

Concentrate on who exercises executive authority. Also ensure that you are able to describe the powers exercised by the executive, can discuss whether there are any checks on the powers exercised by the executive, and can describe, in detail, the manner in which the executive carries out its functions. Lastly, make sure that you can contrast the broad approach with the traditional system of executive authority.

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STUDY UNIT 10

Judicial authority

OVERVIEW

In study unit 5, you learnt that the separation-of-powers doctrine is an integral part of the 1996 Constitution, even though no single provision unequivocally mentions this. You also learnt that the judiciary constitutes the third branch of government or organ of state, whilst the legislature and the executive are the other two branches of government. In this study unit, we will focus on the following issues pertaining to the judiciary:

- first, the definition of “judiciary”
- second, the judiciary in historical context by briefly sketching the history of the development of the judicial system in South Africa from 1910 to the present
- third, the structure of the current judicial system, the jurisdiction of the Courts to hear constitutional matters, and the appointment of judicial officers
- final, the interrelationship between the judiciary and the other two branches of government, with particular emphasis on the independence of the judiciary

UNIT OUTCOMES

After you have studied the material in this study unit, you should be able to do the following:

- define “judicial authority”
- sketch the comparative history of the judicial system in South Africa
- illustrate why judicial independence is indispensable to a constitutional state
- list the hierarchy of the Courts
- discuss constitutional jurisdiction of the various Courts
- critically evaluate the issues of independence of, and control over, the judiciary
- review the procedure for the appointment of judges

PRESCRIBED STUDY MATERIAL

- Sections 165–170, 172, 174, and 176–177 of the 1996 Constitution
- The following Court case, which you will find in the *Revised Reader* (hereafter “the *Reader*”):
SA Association of Personal Injury Lawyers v Heath 2001 (1) BCLR 77 (CC)

RELEVANT SECTIONS OF THE CONSTITUTION

Section number	Title of section	Content
Judicial authority in South Africa and the principle of non-interference		
165	Judicial authority	<p>(1) The judicial authority of the Republic is vested in the Courts.</p> <p>(2) The Courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.</p> <p>(3) No person or organ of state may interfere with the functioning of the Courts.</p> <p>(4) Organs of state, through legislative and other measures, must assist and protect the Courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the Courts.</p> <p>(5) An order or decision issued by a Court binds all persons to whom and organs of state to which it applies.</p>
166	Judicial system	<p>The Courts are: –</p> <p>(a) the Constitutional Court;</p> <p>(b) the Supreme Court of Appeal;</p> <p>(c) the High Courts, including any high Court of appeal that may be established by an Act of Parliament to hear appeals from High Courts;</p> <p>(d) the Magistrates' Courts; and</p> <p>(e) any other Court established or recognised in terms of an Act of Parliament, including any Court of a status similar to either the High Courts or the Magistrates' Courts.</p>

Section number	Title of section	Content
Jurisdiction of the Court		
167(3)	Constitutional Court	<p>The Constitutional Court: –</p> <ul style="list-style-type: none"> (a) is the highest Court in all constitutional matters; (b) may decide only constitutional matters, and issues connected with decisions on constitutional matters; and (c) makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter.
167(4)	Exclusive competence of the Constitutional Court	<p>Only the Constitutional Court may: –</p> <ul style="list-style-type: none"> (a) decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state; (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; (c) decide applications envisaged in section 80 or 122; (d) decide on the constitutionality of any amendment to the Constitution; (e) decide that Parliament or the President has failed to fulfil a constitutional obligation; or (f) certify a provincial constitution in terms of section 144.
167(5)	Confirmation of order of invalidity	<p>The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a Court of similar status, before the order has any force.</p>

Section number	Title of section	Content
167(6)	Direct access to Constitutional Court	National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court: – (a) to bring a matter directly to the Constitutional Court; or (b) to appeal directly to the Constitutional Court from any other Court.
168(3)	Supreme Court of Appeal	The Supreme Court of Appeal may decide appeals in any matter. It is the highest Court of appeal except in constitutional matters, and may decide only: – (a) appeals; (b) issues connected with appeals; and (c) any other matter that may be referred to it in circumstances defined by an Act of Parliament.
169	High Courts	A High Court may decide: – (a) any constitutional matter except a matter that (i) only the Constitutional Court may decide; or (ii) is assigned by an Act of Parliament to another Court of a status similar to a High Court; and (b) any other matter not assigned to another Court by an Act of Parliament.
170	Magistrates' Courts and other Courts	Magistrates' Courts and all other Courts may decide any matter determined by an Act of Parliament, but a Court of a status lower than a High Court may not enquire into or rule on the constitutionality of any legislation or any conduct of the President.
172(1)	Powers of Courts in constitutional matters	(1) When deciding a constitutional matter within its power, a Court: – (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

Section number	Title of section	Content
		(b) may make any order that is just and equitable, including: – (i) an order limiting the retrospective effect of the declaration of invalidity; and (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.
172(2)(a)		Similar to section 167(5).
Appointment of judicial officers		
174(1)	Fit and proper	Any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer. Any person to be appointed to the Constitutional Court must also be a South African citizen.
174(2)	Race and gender	The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.
174(3) (<i>as amended by s 13 of Constitution Sixth Amendment Act of 2001</i>)	Head of Constitutional Court and Supreme Court of Appeal	The President as head of the national executive, after consulting the Judicial Service Commission and the leaders of parties represented in the National Assembly, appoints the Chief Justice and the Deputy Chief Justice and, after consulting the Judicial Service Commission, appoints the President and Deputy President of the Supreme Court of Appeal.
174(4) (<i>as amended by s 13 of Constitution Sixth Amendment Act of 2001</i>)	Other judges of the Constitutional Court	The other judges of the Constitutional Court are appointed by the President, as head of the national executive, after consulting the Chief Justice and the leaders of parties represented in the National Assembly, in accordance [with a set procedure.] [words in brackets our words, as the rest of the section need not be studied]

Section number	Title of section	Content
174(6)	Judges of all other Courts	The President must appoint the judges of all other Courts on the advice of the Judicial Service Commission.
174(7)	Other judicial officers	Other judicial officers must be appointed in terms of an Act of Parliament which must ensure that the appointment, promotion, transfer or dismissal of, or disciplinary steps against, these judicial officers take place without favour or prejudice.
174(8)	Oath or affirmation	Before judicial officers begin to perform their functions, they must take an oath or affirm, in accordance with Schedule 2, that they will uphold and protect the Constitution.
176(1) (<i>as amended by s 15 of the Constitution Sixth Amendment Act of 2001</i>)	Terms of office and remuneration	A Constitutional Court judge holds office for a non-renewable term of 12 years, or until he or she attains the age of 70, whichever occurs first, except where an Act of Parliament extends the term of office of a Constitutional Court judge.
176(2)		Other judges hold office until they are discharged from active service in terms of an Act of Parliament.
176(3)		The salaries, allowances and benefits of judges may not be reduced.
177(1)	Removal	(1) A judge may be removed from office only if: – (a) the Judicial Service Commission finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct; and (b) the National Assembly calls for that judge to be removed, by a resolution adopted with a supporting vote of at least two thirds of its members.

Section number	Title of section	Content
180	Other matters concerning administration of justice	National legislation may provide for any matter concerning the administration of justice that is not dealt with in the Constitution, including: – (a) training programmes for judicial officers; (b) procedures for dealing with complaints about judicial officers; and (c) the participation of people other than judicial officers in Court decisions.

10.1 DEFINING JUDICIAL AUTHORITY

Section 165(1) states that the judicial authority of the Republic is vested in the Courts. As already mentioned, the legislature makes laws and the executive enforces them. So what does the judiciary do?

The judiciary performs an adjudicatory function. What does this mean? Adjudication takes place when a Court or a tribunal resolves legal disputes or controversies between subjects of the state, or between the state and its subjects, in accordance with the facts and the law and not according to the presiding officer's personal views and opinions. In exercising this function, the Courts are involved in interpreting and applying legal rules to concrete legal disputes, and thus enforcing legal rules with a view to imposing a sanction if they find that a rule has been breached.

Think about this: the adjudicatory function of the Court would make no sense if a legal rule existed without any remedy for enforcing it or if no sanction could be imposed in the event of a breach. This line of thought is consistent with the principle expressed by the maxim, *ubi ius ibi remedium* (Where there is a right, there is a remedy). Thus, in any constitutional system, it is imperative to make provision for an institution that will decide whether the provisions of the constitution or the ordinary law have been breached, and, if so, what remedy or sanction to impose.

The majority of constitutions expressly determine in whom judicial authority is vested, and the South African Constitution is no different. The judicial authority of the Republic, consisting of the Courts and the judiciary which staffs them, is the principal institution empowered to undertake the task of resolving disputes capable of being resolved through the application of the law.

To understand this principle better, consider the following scenario: a police officer enters your home and arrests you. An Act of Parliament expressly contains a provision which states that the police cannot enter your premises without a search warrant and cannot arrest you without a

warrant of arrest authorising them to make such an arrest. Now, the existence of such a rule would be pointless if the breach of the rule did not carry some sanction. Since the legislature is the one that made the rule and the police, which form part of the greater executive, are involved in the enforcement of the rule, they obviously cannot also be involved in meting out the sanction for breach of the relevant rule. Instead, an independent and unbiased body has to be created to impose the relevant sanction after interpreting the law and applying it to the facts placed before it. This body is referred to as “the judiciary”.

ACTIVITY 58

We have used a criminal law scenario to illustrate how the three organs of state function in relation to one another.

Read the following scenario:

Jedi is a student at Unisa. Whilst walking in Sunnyside, he is arrested and taken to the Sunnyside police station. Jedi has no knowledge of why he is being arrested and the police have not informed him of the charges against him, nor have they informed him of the right to remain silent or that he is entitled to obtain the services of an attorney. You are an intern at the Law School and, as part of your training, you have been sent to the police station to assist another accused. Jedi sees you and asks you for advice.

Now answer the following question:

Advise Jedi of the legal steps that he can take against the police who effected the arrest.

To answer this question, you have to be familiar with the Criminal Procedure Act of 1977. Why? Because this piece of legislation was enacted by Parliament to regulate, *inter alia*, the conduct of the police in effecting an arrest. [This is the enactment phase.]

Remember that members of the police service form part of the broader category of the executive and are bound to adhere to the provisions of the Act. For example, in terms of the said Act, a police officer is under a legal duty to inform you of the reason for your arrest and to tell you that you have the right to remain silent. [This is the implementation or enforcement phase.]

If a police officer fails to comply with the provisions of the Act, a victim such as Jedi can institute action against the Minister for Safety and Security, and against the individual police officer for unlawful arrest and detention.

If Jedi decides to take the matter to Court, the presiding officer who hears

the dispute will look at the provisions of the Act and determine whether the police officer was in violation of certain of its provisions. If the police officer was in breach of the provisions of the Act, then the presiding officer is empowered to impose an appropriate sanction. [This is the interpretation and application phase.]

10.2 THE JUDICIARY IN HISTORICAL CONTEXT

What was the status of the judiciary pre-1993?

Before you proceed with your study of the judiciary, it is important that you understand the role and the status of the judiciary in apartheid South Africa. To do this, we need to sketch the history of the judicial system in South Africa prior to 1994.

Between 1910 and 1994, South Africa followed a constitutional system based on the principles and philosophy of parliamentary sovereignty. In study unit 3, you learnt that parliamentary sovereignty is characterised by a system of government in which Parliament is the sole bearer of legislative authority and no competing authority or body exists to impose legal limitations upon this competence. Before 1993, this system of government had a profound effect on the role and status of the judiciary in South Africa.

Some of the implications of this system of government are highlighted below:

- The judiciary was seen as subordinate to the law-making authority of Parliament and had little or no room to manoeuvre against the apartheid ideologies and policies of the pre-1993 government.
- An undemocratically elected Parliament enacted laws that could not be tested by the Courts.
- The judiciary, being an organ of state, was viewed with great distrust and suspicion, since it effectively shared the responsibility for implementing and promoting the segregation and apartheid policies that originated with Parliament.
- Although Parliament was predominantly responsible for systematic political repression and the stifling of opposition in South Africa, the Courts were also considered instruments of oppression because they enforced the apartheid laws and policies that emanated from Parliament. The Courts predominantly accepted apartheid laws and the legal order as normal, right and the *boni mores* of society.
- Despite numerous attempts by the judiciary to oppose the government, such as in the second *Harris* case, it became clear that the power of the judiciary to test legislative and executive conduct was severely curtailed by the untrammelled power wielded by Parliament and by the absence of a Bill of Rights and a Constitution as the supreme law.

- The judiciary could only test whether the manner-and-form provisions or the procedure for the enactment of an Act of Parliament had been complied with, and not whether the Act was invalid or unconstitutional. Van der Westhuizen (2008) states that it was widely accepted that judges were simply obliged to apply laws on the statute book and were not to blame for their unfair nature.
- From a purely demographic point of view, the judiciary was predominantly staffed by conservative, elite, white males. Some commentators suggest that their ideological inclinations were consistent with the rest of the white state and thus informed the judgments that were delivered during this period. There were a few black magistrates in the homelands and townships, but they were not in a position to influence the legal culture and functioning of the Courts.

It is undisputed that, in a country which acknowledges the principle of parliamentary sovereignty, the role of the judiciary is severely constrained by this principle.

Thus far, we have mentioned only the disadvantages of parliamentary sovereignty as this functioned in South Africa. Note, however, that it would be untrue to say that, in every single instance, the judiciary functioned at the will of Parliament. If you review the history of the Courts of South Africa, you will almost certainly find a number of landmark cases which attempted to preserve, albeit moderately, at least the principles of freedom and justice. Furthermore, in the absence of a constitution as the supreme law, the dilemma would have been where to find any concrete or more or less objective higher law or grounding principle to override unfair laws.

The 1996 Constitution, which heralded a new era of democratic government based on a constitution that is supreme and on the promotion of democratic objectives, specifically sought to address the shortcomings inherent in a system of government premised on parliamentary sovereignty and to remove the constraints that were imposed on the judiciary prior to 1993.

10.3 THE ROLE OF THE JUDICIARY UNDER THE 1996 CONSTITUTION

Has the status of the Courts changed under the 1996 Constitution?

From the above discussion, we can deduce that the concept of parliamentary sovereignty is directly in conflict with the testing rights of the Courts. In a system where constitutional democracy has been entrenched, it is necessary for the judiciary to be given constitutional functions. In South Africa, the constitutional role of the judiciary has

changed fundamentally since 1994. The judiciary now plays a pivotal role in maintaining and upholding the Constitution which, as we have stated repeatedly, is the supreme law of the land. The judiciary now has a number of functions:

- By hearing cases involving alleged breaches of Chapter 2 rights, the Court seeks to preserve and foster basic human rights created under a constitutional state. In *Baloro & Others v University of Bophuthatswana and Others* 1995 (8) BCLR 1018 (B), Friedman J acknowledged (at 1063G–I) that the Courts are now cast in the additional role of social engineers and, indeed, social and legal philosophers. This is because the Courts are now called upon to promote the values underlying an open and democratic society based on freedom and equality.
- Constitutional supremacy has replaced parliamentary sovereignty, which means that the judiciary now exercises the power to test that all laws passed by Parliament and the provincial legislatures conform to the procedural and substantive provisions of the Constitution.
- The judiciary also performs a key “watchdog” function over the executive by ensuring that the executive adheres to the norms, values and principles set out in the Constitution.
- In *Baloro*, the Court also recognised that the Courts will not only be confined to interpreting existing laws, but will engage in the more creative activity of generating new laws, particularly where the existing law is felt to be “unjust, ambiguous, inefficient or simply obsolete” owing to changing circumstances. You will learn more about this aspect of the Courts’ role in the module on Interpretation of Statutes. Also remember that this creative law-making role does not mean that the Courts necessarily take over the law-making functions of the national and provincial legislatures. Law-making remains the preserve of Parliament and the provincial legislatures at both national and provincial levels respectively.

From the above discussion it is clear that the judiciary acts as the guardian of the Constitution and the guardian of its ethos and values.

ACTIVITY 59

- (1) Define “judicial authority”. (3)
- (2) Draw a diagram in which you:
 - (a) differentiate the three organs of state
 - (b) explain what each of these organs is responsible for (6)
- (3) Read the following passage:

The new Constitution establishes a fundamentally different order from that which previously existed. Parliament can no longer claim to be the supreme power. It is subject in all respects to the provisions of the Constitution and has only the powers vested in it by the

Constitution expressly or by necessary implication [per Chaskalson P (as he then was) in *Executive Council, Western Cape Legislature and Others v President of the Republic of South Africa & Others*].

Now answer the following questions:

- (a) Identify and set out the content of the provisions in the Constitution which confirms that Parliament is no longer supreme. (5)
- (b) Do you agree with the views expressed by Chaskalson P (as he then was) above? If you do, evaluate the effect that this metamorphosis has had on the capacity and the role of the judiciary. (15)

To answer question (1), you have to do the following:

- Refer to sections 1 and 2 of the Constitution.

To answer question (2), you have to consider the following points when formulating your answer:

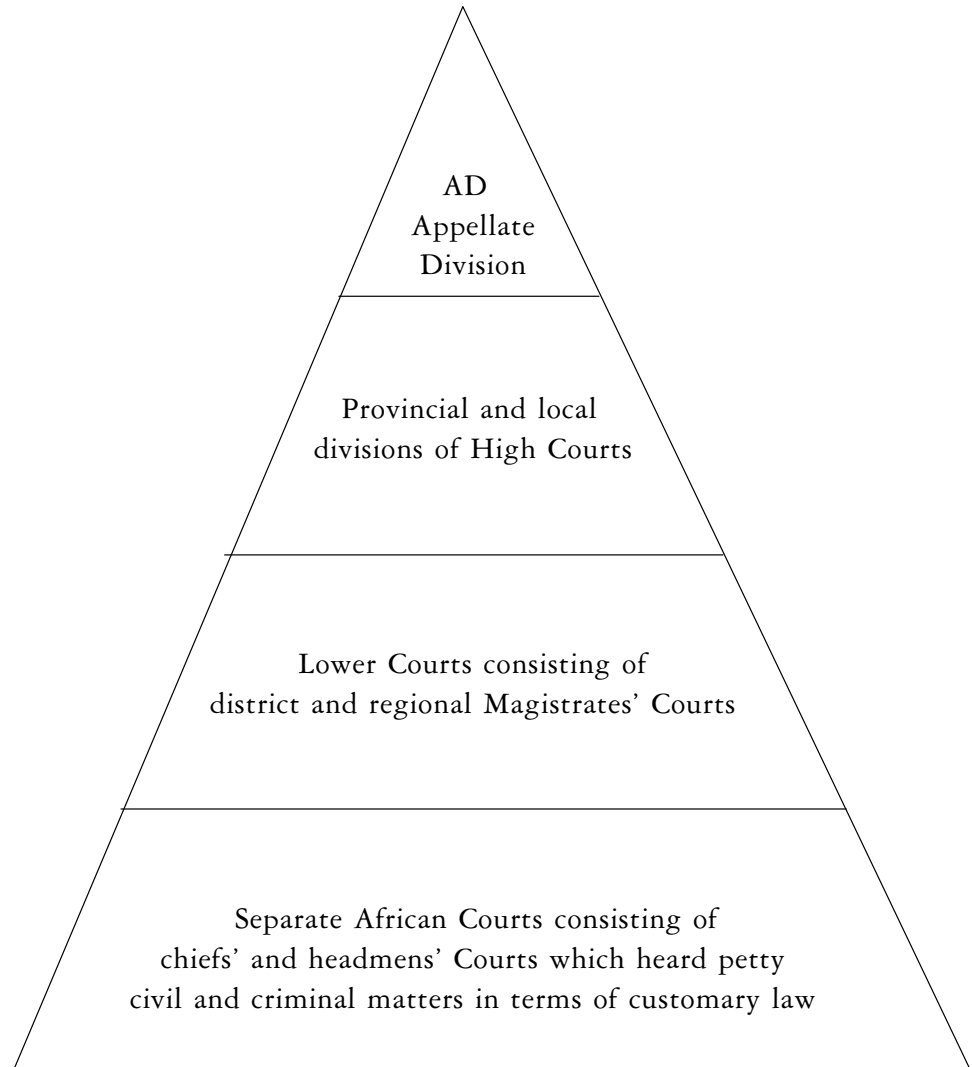
- This is a mini essay. Your answer needs to be logical and coherent.
 - Start with an introduction.
 - Determine which branch of government is responsible for applying and interpreting the law.
 - Make certain you understand the meaning of the word “metamorphosis”.
 - Determine the role of the judiciary prior to 1993.
 - Determine the status of the judiciary after 1993.
 - Refer to section 1 and section 165 of the Constitution.
 - Draw your own conclusions based on the above analysis.
-

10.4 STRUCTURE OF THE JUDICIAL SYSTEM

10.4.1 Prior to 1993

What was the structure of the Courts before 1993?

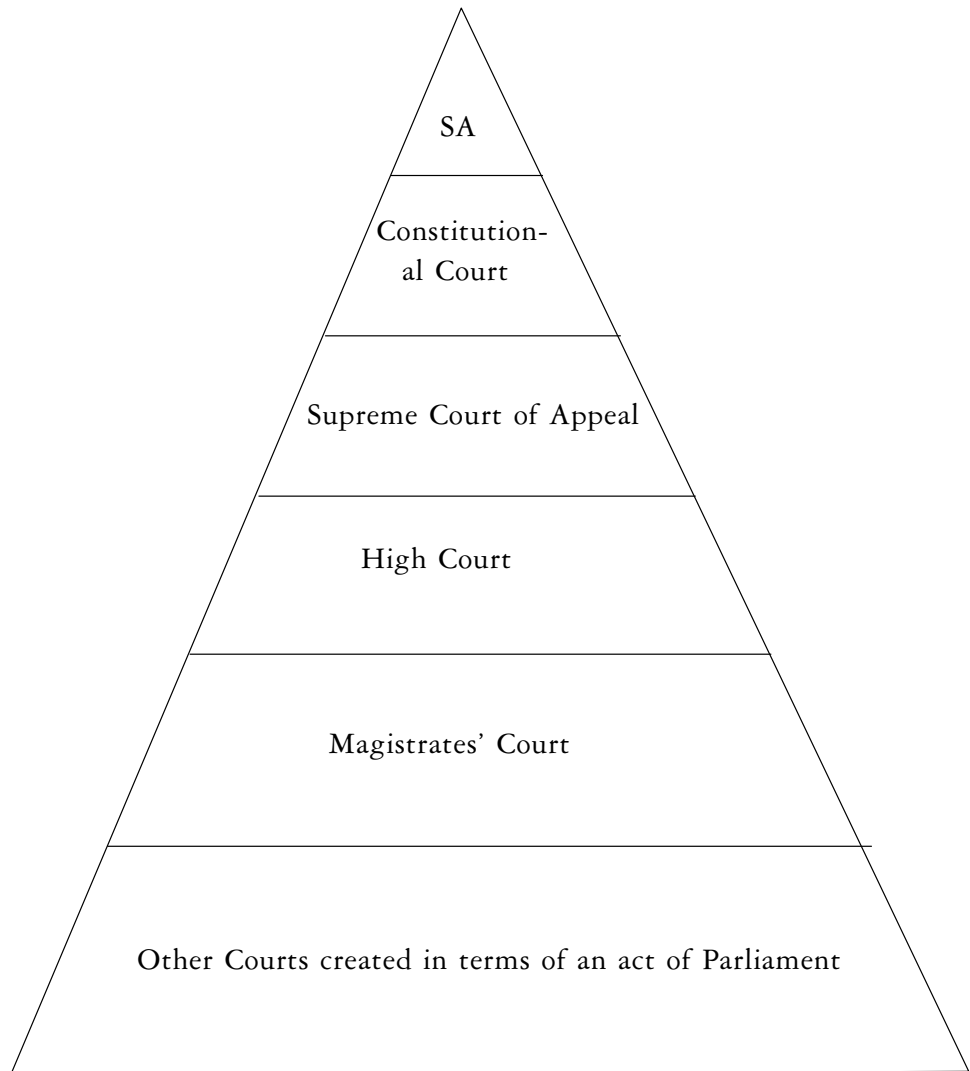
Before 1993, there existed a hierarchy of Courts in South Africa. This hierarchical structure was organised as follows:



10.4.2 After 1993

What is the current structure of South Africa's judicial system?

The 1996 Constitution made some fundamental changes to the Court structure. If you study section 166 (given in this study unit), you will notice that it creates an innovative hierarchy of Courts in South Africa. Section 166 enumerates, in order of hierarchy, the five categories of Courts, which can be diagrammatically illustrated as follows:



If you compare the pre-1993 and post-1993 Court structure, you will find that the following changes have been made:

- The 1996 Constitution creates a specialised Constitutional Court, which is the highest Court in the land. The creation of a specialist Constitutional Court is one of the salient features of our new constitutional order. However, the idea of such a Court was at first resisted by many lawyers and politicians, who felt that a new Constitution should be adjudicated by the ordinary Courts (eg the High Courts and Supreme Court of Appeal). It was argued that the creation of a specialist Constitutional Court would result in a too-rigid

distinction between constitutional and nonconstitutional matters, and would exempt “ordinary” judges from the obligation to interpret and apply the Constitution. On the other hand, proponents of a specialist Constitutional Court argued that the judiciary suffered from a severe legitimacy crisis, and that ordinary judges were generally too positivistic in their approach and too executive-minded to be entrusted with constitutional adjudication. In the end, it was decided to institute a Constitutional Court, which would have the final say in constitutional matters.

- The Supreme Court of Appeal, which, in effect, is the old Appellate Division, is now a fully fledged constitutional entity and not simply a branch of the Constitutional Court. Both the Supreme Court of Appeal and the Constitutional Court are essentially Courts of appeal.
- Section 166 creates a number of High Courts, which were created from the old provincial and local divisions of the Supreme Court and from the Supreme Courts of the former TBVC (Transkei, Bophuthatswana, Venda and Ciskei) states.
- The Magistrates’ Courts and specialist Courts, which are creatures of statute, remain unchanged.

ACTIVITY 60

- (1) Draw a pyramid which clearly illustrates the differences between the pre-1994 and post-1994 structure of the Courts in South Africa.
- (2) Tabulate the differences between the pre-1994 and post-1994 structure of the Courts in South Africa.

As a law student, it is not enough for you simply to know the order in which the Courts appear. It is also important to determine the capacity of the different Courts to hear constitutional matters.

10.5 JURISDICTION OF THE COURTS

10.5.1 Meaning of “jurisdiction”

In a constitutional state premised on constitutional supremacy, disputes may take one of two forms, namely:

- The dispute could occur between an individual and a government body because the individual feels that the government body has not acted in accordance with the principles embodied in the Constitution. An example would be that where Parliament passes a law which states that only men are allowed to perform military service, and women claim that Parliament has acted in violation of the equality clause (s 9 of the Constitution).

Or

- The dispute could occur between government bodies themselves about the distribution and exercise of government authority. An example would be that where the executive of one of the provinces claims that there has been an improper delegation of legislative authority to another body.

Refer to study unit 7 for a discussion on the issue of delegation of legislative authority.

In order to resolve such disputes, it is important to select the correct forum for the resolution of the dispute, otherwise a number of adverse consequences could arise. For example, your case could be thrown out of Court, your client's time and money could be wasted, and so on. Thus, the issue of jurisdiction is extremely important. By now, you are probably asking: what does "jurisdiction" mean?

You will learn more about these matters in the law of civil procedure.

"Jurisdiction" means the power or competence of a Court to adjudicate on, determine or dispose of a dispute. In other words, it is the ability or authority of a Court to hear a particular matter. The competence of a Court to hear a particular dispute may be determined by a number of factors, such as geographical delineation of magisterial districts, causes of action, the amount of the claim, or some other ground. In the context of constitutional law, we are primarily concerned with the authority of the various Courts to hear disputes that relate to constitutional matters. Now let us examine the jurisdiction of the individual Courts to hear constitutional matters.

10.5.2 The Constitutional Court

Study section 167 of the Constitution. Read section 167(3) of the Constitution.

In South Africa, the Constitutional Court is the highest Court in all constitutional matters. The Constitutional Court is also the final instance of appeal in all constitutional matters, even though other Courts may entertain appeals regarding constitutional matters. The question that arises is: what constitute constitutional matters? In *President of the Republic of South Africa v South African Rugby Football Union* 1999 (2) BCLR 175 (CC), at paragraph 41, the Constitutional Court held that constitutional matters could include the following:

- allegations of bias on the part of judicial officers
- all aspects of the exercise of public power
- the interpretation and application of laws that give effect to a right in the Bill of Rights
- the development, or failure to develop, the common law
- any matter concerning the nature and ambit of the powers of the High Courts

What does section 167(4) provide?

Section 167(4) sets out the matters over which the Constitutional Court exercises exclusive competence. This means that only the Constitutional Court is authorised to adjudicate on matters that fall within this section.

From the above discussion, it is clear that the Constitutional Court exercises concurrent and exclusive judicial competence.

10.5.3 The Supreme Court of Appeal

Section 168 of the Constitution provides that the Supreme Court of Appeal can hear any matter. This means that:

- the Supreme Court of Appeal is allowed to hear and decide constitutional issues, except those matters that fall within the exclusive jurisdiction of the Constitutional Court
- the Supreme Court of Appeal has the same breadth of constitutional jurisdiction as the High Courts
- the Supreme Court of Appeal will be the final Court of appeal in nonconstitutional matters

By now it should be clear to you that the Supreme Court of Appeal has both constitutional and nonconstitutional jurisdiction and can dispose of an appeal on nonconstitutional grounds without reaching the constitutional issue.

In 2005, the Fourteenth Constitutional Amendment Bill was passed. One of the provisions in the Bill advanced the idea that the Constitutional Court should be the highest Court in all matters, with the Supreme Court of Appeal acting as an intermediate Court of appeal. Clearly, this is a departure from the current system as discussed above. Conflicting views exist on this proposal. Carol Lewis supports the creation of an apex Court, but cautions that many changes would have to be effected to realise this objective: the name of the Constitutional Court would have to be changed; the composition of the Court would have to be revisited; and the Constitutional Court would have to be reconfigured owing to the increase in workload.

Wiechers, on the other hand, whilst not totally averse to the idea of the Constitutional Court as a Court apart from the existing structure, fears that such an endeavour would elevate the Constitutional Court to the status of a High Court of Parliament, would erode the status of the Supreme Court of Appeal as the highest Court of appeal in nonconstitutional matters despite the fact that it has delivered outstanding judgments on constitutional matters and would further result in the Constitutional Court becoming embroiled in nonconstitutional cases to the detriment of its role as an austere and vigilant protector and guardian of the Constitution.

10.5.4 The High Courts

Section 172 sets out the jurisdiction of the High Courts. The High Courts have wide constitutional powers and may decide any constitutional matter,

except those that fall within section 167(4) of the Constitution, or any matter that has been allocated to another Court of a similar status to that of the High Court. Apart from constitutional jurisdiction, the High Courts can decide other disputes that have been conferred on them by statute. Alternatively, the High Courts may entertain matters because of the inherent or residual powers conferred on them by virtue of section 173 of the Constitution.

10.5.5 The Magistrates' Courts

The jurisdiction of the Magistrates' Courts is governed by section 170 of the Constitution. If you read this section carefully, you will see that the Constitution does not itself confer any constitutional jurisdiction on the Magistrates' Courts. However, this does not necessarily mean that the Magistrates' Courts can never decide constitutional matters. Section 170 clearly states that Parliament may enact legislation to give the Magistrates' Courts jurisdiction to hear constitutional matters. However, these Courts will not be allowed to enquire into the validity of any legislation or any conduct of the President.

See section 172(2) of the Constitution.

In summary, the Supreme Court of Appeal, the High Courts and a Court of a status similar to a High Court may make an order concerning the constitutionality of an Act of Parliament, a provincial Act or any conduct of the President. However, such an order of invalidity has no force of law unless it is confirmed by the Constitutional Court. For example, in *Satchwell v The President of the Republic of South Africa and Another* 2002 (9) BCLR 986 (CC), the Constitutional Court confirmed the order of the Northern Gauteng High Court, which held that sections 8 and 9 of the Judges' Remuneration and Conditions of Service Act 88 of 1989 were unconstitutional, because they affected benefits to judges' same-sex partners but not judges' spouses.

ACTIVITY 61

- (1) List the matters over which the Constitutional Court has exclusive jurisdiction. (6)
- (2) Do the following Courts have jurisdiction to hear constitutional matters, and, if so, to what extent? Discuss. (12)
 - (a) the Supreme Court of Appeal (SCA)
 - (b) the High Courts (HCs)
 - (c) the Magistrates' Courts
 - (d) the Labour Appeals Court
- (3) What has to happen before an order of the Supreme Court of Appeal or High Courts concerning the constitutional validity of an Act of Parliament, provincial Act or the conduct of the President acquires the force of law? (3)

- (4) Which Court(s) has/have jurisdiction to decide the following constitutional matters? Give reasons for your answers. (12)
- (a) a dispute between the President and the Premier of Mpumalanga concerning the power of the Mpumalanga government to perform certain functions
 - (b) a dispute between the Premier of Mpumalanga and the Nelspruit Municipal Council concerning the power of the municipality to perform certain functions
 - (c) an application for an order to declare section 49 of the Criminal Procedure Act (an Act of Parliament) unconstitutional
 - (d) an application for an order to declare a provision in the Western Cape Schools Act unconstitutional
 - (e) an application for an order to declare a municipal bylaw unconstitutional
 - (f) an application to certify the Constitution of the Limpopo Province
- (5) Do you think that a separate Constitutional Court should be created with unlimited jurisdictional capacity? Discuss. (10)
-

10.6 APPOINTMENT OF JUDGES

The manner in which judges were to be appointed was another contentious issue during the negotiations and deliberations preceding the adoption of the new Constitution. Lawyers, academics and politicians were concerned that the new government might be tempted to appoint their own supporters as judges, and that this would compromise the independence and integrity of the judiciary. At the same time, however, there was clearly a need to transform the judiciary from an institution dominated by white males to one that was more representative in terms of both race and gender.

The 1993 Constitution created a new body, the Judicial Service Commission (JSC), comprising members of the judiciary and legal profession, as well as politicians. The Judicial Service Commission had to advise the government on matters relating to the judiciary. More specifically, it had to make recommendations regarding the appointment, removal from office, term of office and tenure of judges. The involvement of the Judicial Service Commission in the appointment of judges was intended to restrict the power of the executive to appoint whoever it wished, and thus bolster judicial independence.

The 1996 Constitution also provides for the role of the Judicial Service Commission in the appointment of judges and other matters relating to the judiciary. Section 178 prescribes the composition of the Judicial Service Commission, as well as other matters relating to the Judicial Service Commission.

You must study this section carefully for examination purposes.

Section 174 deals with the appointment of judicial officers. However, before we discuss the procedure for the appointment of judges, you must study section 167(1) and (2), which deals with the composition of the Constitutional Court, and section 168(1) and (2), which deals with the composition of the Supreme Court of Appeal.

Section 174(3) states that the President as head of the national executive appoints the Chief Justice and Deputy Chief Justice of the Constitutional Court “after consulting” with the Judicial Service Commission and the leaders of the parties represented in the National Assembly.

It is important to note the following:

- The President makes these appointments in his or her capacity as head of the national executive. This means that he or she must act together with the other members of the Cabinet (see study unit 9).
- The President makes these appointments after consulting with the Judicial Service Commission and the leaders of political parties. In study unit 9, we saw that the term “after consultation with” bears a different meaning from the terms “together with” or “in consultation with”. The President is not bound by the recommendations of the Judicial Service Commission. Even though he or she is obliged to consult with the Judicial Service Commission in good faith, the ultimate decision lies with him or her. The Judicial Service Commission calls for nominations whenever a vacancy occurs, candidates are then interviewed, and the Judicial Service Commission makes recommendations to the President, thereby making the appointment process more transparent and independent.

You must also study the provisions dealing with the appointment of:

- the other nine judges of the Constitutional Court [s 174(4)]
- the Chief Justice and Deputy Chief Justice [s 174(3)]
- judges of the other Courts, for example the Supreme Court of Appeal, the High Courts, and the Labour Appeals Court [s 174(6)]
- other judicial officers, for example magistrates [s 174(7)]

The promotion of a diverse judiciary is a constitutional imperative, as highlighted in section 174(1) and (2), which sets out the considerations that must be taken into account when judicial appointments are being made. These include the following:

- the candidate must be a South African citizen
- the candidate must be a fit and proper person
- the appointments must reflect the racial and gender composition of South Africa

The rationale for this is obvious. As Wiechers points out, it would have been totally incongruous in South Africa’s multiracial society to have members of only one or two racial groups occupying the judicial benches.

Wesson and Du Plessis state that recent statistics show that more progress has been made in securing the diversity mandated in section 174(1) and (2) of the Constitution. The table below illustrates the statistics for the high Courts for 1990 vis-à-vis those for 1998.

1990	1998 (of a total of 201 judges)
99% white males	89 white males
1% white females	33 females
	59 black males
	11 Indian males
	9 mixed races

Section 174(5) provides that, at all times, at least four members of the Constitutional Court must be persons who were judges at the time they were appointed to the Constitutional Court.

ACTIVITY 62

- (1) Tick the relevant box to indicate the person(s) or body/bodies that must be consulted in the process of appointment of the various judges within the Court structure. (15)

Judicial officers	President (Executive)	JSC	National Assembly	President of SCA	Acts of Parliament
Chief Justice (CJ)					
Deputy Chief Justice (DCJ)					
President of SCA					
Deputy President of SCA					
Other nine judges of the CC					
Other judges of other Courts					

- (2) Which factors must be taken into account when judicial officers are being appointed? (4)
 - (3) Discuss the role of the Judicial Service Commission in the appointment of judges. Is the President bound to follow the advice of the Judicial Service Commission, or can he or she ignore it? (6)
-

10.7 JUDICIAL INDEPENDENCE

10.7.1 Introductory remarks

In any democratic system, the judiciary is an integral component of a political system that provides for the settlement of disputes and the accommodation of interests in accordance with the rule of law. An independent judiciary that adheres to the rule of law guarantees the fabric and source of all social organisations. As already mentioned, the judiciary bears the responsibility for adjudicating disputes, whether they arise between individuals or between an individual and the government, or between different spheres of government. The role of the judiciary is fundamental in the constitutional law context, where it serves to adjudicate constitutional rights claims by individuals against their government. The judiciary can only perform these functions if its independence is secured.

Internationally, the Universal Declaration on the Independence of Justice, which was followed by the United Nations Basic Principles on the Independence of the Judiciary, comprehensively sets out the constitutional and institutional requirements for an independent judiciary that will allow judges to decide matters before them impartially, in accordance with their assessment of the facts and their understanding of the law, without any restrictions, influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason. Other national systems throughout the world have also shown a determination to create independent judiciaries and to establish conditions under which justice can be maintained. For example, article 104 of the Constitution of the Kingdom of Bahrain provides, *inter alia*, that “[n]o authority shall prevail over the judgment of a judge, and under no circumstances may the course of justice be interfered with”. Article 65 of the Egyptian Constitution provides that “[t]he independence and immunity of the judiciary are two basic guarantees to safeguard rights and liberties”. Article 97 of Jordan’s Constitution states that “[j]udges are independent, and in the exercise of their judicial functions they are subject to no authority other than that of the law”.

10.7.2 Meaning of “judicial independence”

The *trias politica* doctrine, as discussed in study unit 5, is indirectly, through a number of provisions in the 1996 Constitution, part of South

Africa's constitutional system. One of the consequences of this doctrine is the independence of the judiciary. The 1996 Constitution does not give a clear meaning to "independence" as it pertains to the Courts. However, as illustrated in the previous section, international human rights instruments and other national systems are unanimous in the belief that the independence of the judiciary requires that every judge be free to decide matters placed before him or her in accordance with the assessment of facts in relation to the relevant law without any interference whatsoever from other bodies, persons or parties. The independence of the judiciary is a vital ingredient of the constitutional state. The reason is obvious: if judges can be told what to do by politicians (or by business or other interest groups), then there is little chance that the Courts can be an effective mechanism for preventing the abuse of power.

The independence of the judiciary is firmly entrenched in the South African Constitution. The Constitution contains both a general provision which guarantees the principles of judicial independence and non-interference by other organs of state (s 165) and several other specific provisions pertaining to the appointment, salaries, removal and terms of office of judges.

Rautenbach and Malherbe distinguish between the personal and the functional independence of the Courts, which is discussed below.

10.7.3 Functional independence

Functional independence is primarily an instance of the separation-of-powers doctrine. Functional independence refers to the way in which the Courts operate within the framework of a constitutional state.

In the Canadian case of *The Queen in Right of Canada v Beauregard* (1986) 30 DLR (4th) 481 (SCC) 491, Dickson CJ spoke of the core principle central to the independence of the judiciary as the "complete liberty of individual judges to hear and determine cases before them independent of, and free from, external influences or influence of government, pressure groups, individuals or even other judges".

This means that judicial power is exercised by the judiciary, and may not be usurped by the legislature, the executive or any other institutions. Judicial officers exercise their powers subject only to the Constitution and the law, not to the whims of public opinion or of the majority in Parliament.

During the apartheid years, the functional independence of the South African judiciary was threatened on more than one occasion. The most famous (or infamous!) example occurred during the 1950s, when Parliament attempted to set up a High Court of Parliament with the power to set aside decisions of the Appellate Division of the Supreme Court, particularly the decision which declared the Separate Representa-

tion of Voters Act 46 of 1951 unconstitutional on the ground that it was not adopted in accordance with the correct procedure for constitutional amendments. (The Separate Representation of Voters Act aimed to remove “coloured voters” from the common voters roll.)

The validity of the High Court of Parliament Act was attacked in *Minister of the Interior v Harris* 1952 (4) SA 769 (A) (the “second *Harris* case”). It was argued that Parliament was endeavouring to assume the role and functions of the Court and was attempting to act as judge, jury and executioner. The Cape Provincial Division accepted this argument, and so did the Appellate Division. The Appellate Division found that the High Court of Parliament was no Court of law, but was merely Parliament in a different guise. The Act was therefore invalidated.

Section 165 of the 1996 Constitution is designed to prevent such a situation from arising again.

You must know
section 165 for ex-
amination purpo-
ses.

In recent times, there have been two events which have directly impugned the independence and integrity of the Constitutional Court and questioned the efficacy of section 165 as a protector of the independence of the Court. Wiechers (2009:4) identifies these two events as follows:

- First, there were the allegations that a Judge President of a division of the High Court had interfered with a pending judgment of the Constitutional Court by making personal representations to two of the Court’s judges.
- The second event to cloud the independence and dignity of the Constitutional Court concerned the arms deal saga of the 1990s in which a later-to-be-elected President of the Republic of South Africa and the African National Congress was implicated. The conduct concerned resulted in charges subsequently being brought on the grounds of the commission of fraud, corruption and money-laundering. Although the charges were withdrawn in 2009, the conduct of the Courts at the highest levels was cast in a shroud of darkness.

Another factor that contributes to the functional independence of the Courts is that judicial officers enjoy immunity against civil actions and the offence of contempt of Court. It was stated in *May v Udwin* 1981 (1) SA 19 (A) that “[p]ublic interest in the due administration of justice requires that a judicial officer, in the exercise of his judicial function, should be able to speak his mind freely without fear of incurring liability for damages for defamation”. The reason for this rule is obvious. Judicial officers would not be able to perform their tasks competently if they could be sued for defamation every time they expressed an unfavourable view about a litigant or the credibility of a witness during the course of giving judgment.

(1) Briefly explain what you understand by the term “judicial independence”. (5)

(2) Read the following passage:

Suppose that Parliament passes an Act in terms of which it (Parliament) has the power to test the validity of a judgment of the Constitutional Court.

Now answer the following question:

Would this Act be constitutional? Discuss. (10)

To answer this question (2), you have to do the following:

- Identify the doctrine that has been violated.
- State what this doctrine says.
- Determine what you understand by the concept of functional independence.
- Refer to section 165 of the 1996 Constitution.

(3) Study the hypothetical scenarios described below and indicate, in each case, whether or not the independence of the Courts has been compromised. Substantiate your answers.

(a) a public outburst that certain political parties are trying to take control of the Courts through judicial appointments (3)

(b) the arrest and detention of a magistrate simply because the finding of the magistrate was not favourable to one of the parties involved in the legal dispute (3)

(c) the arrest, detention and charging of a judge on allegations of corruption (3)

(d) the arrest and detention of a judge who has made a ruling against the Minister of Transport for contempt of Court (3)

(e) the making of death threats to a judicial officer, and his or her family, to the effect that an adverse judgment will result in the judge and his or her family suffering unspecified bodily harm (3)

10.7.4 Personal independence

Personal independence, which is also known as institutional independence, is secured by making sure that judicial officers are satisfied with their conditions of service and will not, therefore, derogate from performing their core functions.

The personal independence of judges is determined by the following:

- The manner in which they are appointed. Are they simply appointed by the President or the majority party in Parliament? Or are there

mechanisms in place to ensure that judges will not be seen as mere political appointees who are unlikely to act independently and impartially?

- Their terms of office. If judges are appointed for a fixed, nonrenewable period, they will not need to seek the favour of politicians in order to be reappointed.
- Their security of tenure. It would have serious consequences for judicial independence if the executive were in a position to dismiss judges more or less arbitrarily.
- Their conditions of service. Politicians should not be in a position to determine the salaries of judicial officers in an arbitrary manner.

The Constitution seeks to safeguard the personal independence of judges in the following ways:

- We have already seen that the Judicial Service Commission plays an important role in the appointment of judges. The involvement of the Judicial Service Commission makes it more difficult for the executive merely to appoint its own loyal supporters.
- Section 176 of the Constitution provides that judges of the Constitutional Court are appointed for a nonrenewable term of 12 years. (However, they must retire at the age of 70 years.) Other judges may serve until the age of 75 years or until they are discharged from active service in terms of an Act of Parliament. This means that judges enjoy security of tenure, so that there is no need for them to seek the favour of politicians to make sure that they keep their jobs.
- The Constitution makes it difficult for the executive to dismiss judges. Section 177 clearly stipulates the circumstances in which judicial officers may be compelled to vacate their positions before the termination of their terms of office. The President may remove judges from office only if the Judicial Service Commission finds that they suffer from incapacity, are grossly incompetent or are guilty of gross misconduct, and if the National Assembly has called for their removal by a resolution adopted with the support of at least two-thirds of its members.
- Section 176(3) provides that the salaries, allowances and other benefits of judicial officers may not be reduced.

ACTIVITY 64

Briefly discuss the mechanisms that are in place to ensure that the independence of the Courts is protected against laws emanating from Parliament and against unscrupulous conduct. (10)

10.7.5 Impartiality of judges

IN STUDY UNIT 5, YOU LEARNT ABOUT THE SEPARATION OF PERSONNEL AND FUNCTIONS AS A MANIFESTATION OF THE *TRIAS POLITICA* DOCTRINE.

Heureux Dube (2001.92) states that judicial independence is about the institutional relationship between the judiciary, the executive and the legislature. Furthermore, impartiality refers to the individual judge's state of mind or attitude in relation to the issues in dispute and the parties that are involved. In the Israeli case of *Efrat v Registrar of Population* 47(1) P.D.749.781.782 (1993), Justice Aharon Barak, the President of the Supreme Court of Israel, highlighted some of the challenges that judges face on a daily basis. He stated that judges:

- must reflect the long-term beliefs of society
- must avoid imposing their private creeds on society
- must distinguish between their personal views of the ideal and the present-day realities of society
- must clearly distinguish between their personal beliefs and judicial perceptions
- must not close their eyes to the realities of society, but be open-minded with regard to possibilities

On assumption of office, judicial officers undertake to administer justice to all without any distinctions being made and without any external pressures or influences being brought to bear. As a rule, judicial officers are not allowed to follow any other occupation or perform any other official function that is not compatible with the independence of the judiciary. In the *Sarfu* case, the Constitutional Court formulated the test for bias as follows:

“The question is whether a reasonable, objective, and informed person would, on the correct facts, reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is, a mind open to persuasion by the evidence and submissions of counsel.”

The general rule is that presiding officers must, on request or voluntarily, recuse themselves from proceedings if there is a reasonable apprehension [on whatever ground(s)] that the judgment that will be delivered will be tainted and not be in accordance with the law.

ACTIVITY 65

Read the following passage:

Parliament passes an Act in terms of which it is possible to establish special investigating units to investigate serious maladministration or malpractice in the administration of state institutions. Pursuant to this Act, the

President establishes an investigatory unit and appoints a judge to head the investigations into the conduct of attorneys regarding the lodgment of claims with, and payments received from, the Road Accident Fund.

Now answer the following question:

- (1) Critically evaluate whether the appointment of a judge as head of a special investigating unit is constitutional. (15)

To answer this question (1), you have to do the following:

- determine in whom judicial authority in the Republic is vested
- determine the core functions of the judiciary in any democratic society
- determine whether a judicial officer can engage in more than one occupation
- if a judicial officer cannot engage in more than one occupation, work out the rationale behind this general rule

Refer to the case of *SA Association of Personal Injury Lawyers v Heath* 2001 (1) BCLR 77 (CC), which is in your *Reader*.

10.8 ACCOUNTABILITY AND ETHICS

In 1998, the Judicial Service Commission expressed concerns about the increasing number of complaints being lodged against judges and about the absence of effective mechanisms to deal with such complaints. The complaints resulted in a draft Bill being tabled in October 1999, with the core emphasis being that judges should be accountable to the Public Protector and then the Judicial Service Commission, which is a body with a predominance of active politicians in its ranks. However, the point that should be made in this regard is that confrontation between the judiciary and the executive or the legislature is unseemly and should be avoided in the interests of the administration of justice and of good governance.

This does not mean that judges cannot be held accountable, except through stringent control measures that are likely to sacrifice the independence of the Courts.

A number of mechanisms, such as the following, already exist by means of which judges can be held accountable:

- Judicial control. The fact that their decisions may be taken on review or appeal in the higher Courts encourages judicial officers to apply their minds to the matters before them, and to furnish reasons for their decisions.

- The involvement of the Judicial Service Commission in the appointment of judges makes the judicial process more transparent (candidates are interviewed during public hearings), and may instil in judges a greater sense of their own accountability.
- Removal from office. You will remember that a judge may be removed from office if he or she suffers from incapacity, is grossly incompetent or is guilty of gross misconduct (see s 177).
- Public debate and criticism. It is hoped that the constitutional guarantees of freedom of speech and freedom of the press (s 16) will help to create an environment in which judicial decisions are subject to vigorous public debate and criticism. It is only within such an environment that judges will fully realise their responsibility towards the public. This responsibility is not restricted to the protection of the general public, but also consists in explaining and justifying their decisions and in acknowledging that their own viewpoints are not necessarily the only legitimate viewpoints.
Admittedly, the right to discuss and criticise judicial decisions is not absolute. It is, for instance, curtailed by the offence of contempt of Court. The rationale behind this offence is to protect the integrity of our Courts. However, the belief is that this offence should be constructed in a restrictive manner in order to allow for fairly robust and vigorous public debate.
- Civil liability. Judicial officers normally enjoy immunity from civil actions arising from their decisions. However, a judge who has acted mala fide will not escape civil liability.

Although judges are accountable through the mechanisms listed above, their accountability does not extend to them having to account to another institution in government for their judgments. Judicial accountability differs materially from accountability of the executive, the legislature or any public institution. Accountability thus refers to the responsibility that judges have to ensure that their conduct is beyond reproach in the view of the reasonable, fair-minded and informed person.

The Code of Conduct for Magistrates as envisaged in Magistrates Act 90 of 1993 issued under Regulation 54A of 1994 and the Guidelines for Judges seek, generally, to codify the ethical rules applicable to members of the South African judiciary.

ACTIVITY 66

Read the following passage:

On 13 October 1999, the Chairperson of the Parliamentary Portfolio Committee on Justice announced that the Committee would summon Foxcroft J to appear before it to answer questions relating to a judgment in a rape case delivered by him. This was after Foxcroft J, a judge of the Cape High Court, had sentenced a rapist to a sentence of seven years'

imprisonment. The judgment caused a public outcry, as it was felt that the sentence was too light. The judge was accused of having ignored the minimum sentences prescribed by legislation. He was also reported as saying that it was a mitigating factor that the accused had raped his own daughter, and that there was little danger that the crime would be repeated. Feminists and anti-rape groups were appalled by what they saw as a statement that it is acceptable to rape one's own daughter.

Now do the following:

Write a short essay in which you advance arguments both in favour of and against the proposition that Parliament may call a judge to account. What are your own views on the matter? Refer to the relevant sections of the Constitution in your answer. (15)

To write this short essay, you have to:

- determine whether there is a tension between the principles of judicial independence and the need to control judges
- determine whether Parliament is allowed to call the judiciary to account, since they are not the elected members
- determine whether Parliament's conduct constitutes a violation of the separation-of-powers doctrine
- determine whether there are other ways in which the judiciary may be called to account for its conduct

10.9 THE POWERS OF THE COURTS IN CONSTITUTIONAL MATTERS

In terms of section 172(1)(a), a competent Court has the power to declare any law or conduct that is inconsistent with the Constitution invalid to the extent of its inconsistency. This power may have serious ramifications for existing relationships and the administration of the country in general. This is due to a number of factors:

- Normally, a declaration of invalidity has retrospective effect. This means that legislation and any action taken under the legislation are invalidated from the moment that the rule or the Constitution came into operation, and not from the moment of the Court's order.
- It is not the task of the Courts to rewrite legislation or to tell the executive or public administration how it should exercise its discretion. Normally, a Court will invalidate a rule or conduct, and then leave it to the legislature or responsible official to rectify the unconstitutional law or conduct. However, it usually takes time to rectify unconstitutional legislation. It may sometimes give rise to serious disruptions in the running of the country or the administration of justice if a provision in a law has been invalidated with immediate effect, and nothing has yet been put in its place.

It is therefore often advisable for the Courts to avoid declarations of

invalidity and/or to limit the extent and effect of such declarations. Rautenbach and Malherbe (at 236–237) mention the following techniques that a Court can adopt to avoid and/or limit the effect and extent of a declaration of invalidity:

- A Court should decide a case on grounds other than a constitutional ground if possible. This principle was endorsed in the case of *S v Vermaas*; *S v Du Plessis* 1995 (7) BCLR 851 (CC); 1995 (3) SA 292 (CC), at paragraph 13, where Kentridge AJ stated the following:

I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course that should be followed.

- Where possible, a Court should interpret a provision in such a manner that it does not conflict with the Constitution. Thus, if a provision has more than one meaning, one of which does not conflict with the Constitution, the one that does not conflict with the Constitution should be adopted.
- A Court should declare any law or conduct that is inconsistent with the Constitution invalid only to the extent of the inconsistency [s 172(1)(a)], rather than invalidating the entire law or conduct. For instance, a Court should attempt to sever (separate) the provision(s) that are unconstitutional from the rest of the law, and should then invalidate only those provisions, while leaving the rest of the law intact.
- A Court may limit the retrospective effect of a declaration of invalidity [s 172(1)(b)(i)].
- A Court may suspend a declaration of invalidity for any period and on any conditions in order to allow the competent authority the opportunity of correcting the defect [s 172(1)(b)(ii)].

ACTIVITY 67

- (1) Discuss the ways in which a declaration of invalidity can be avoided. (6)
- (2) Discuss the ways in which the extent and effect of a declaration of invalidity can be limited. (4)

10.10 COMMON MISTAKES

Many students do not seem to know in which body judicial authority is vested. Some say that judicial authority is vested in the Judicial Service Commission, but this is not the case. The Judicial Service Commission is simply the body that assists in the appointment of judicial officers. Or students say that judicial authority vests in the executive or legislature,

which clearly indicates that they do not understand the separation-of-powers doctrine. Another common mistake is to confuse the jurisdiction of the various Courts to hear constitutional matters.

10.11 CONCLUSION

In all democratic states, judicial control is the most effective way to ensure that the executive and legislative organs of state adhere to the law, as embodied in the Constitution and the other sources of law. The executive and the legislature are constitutionally mandated to promote and preserve the independence of the Courts. But who controls the judiciary OR can the judiciary be controlled within a constitutional democracy? Think about it!

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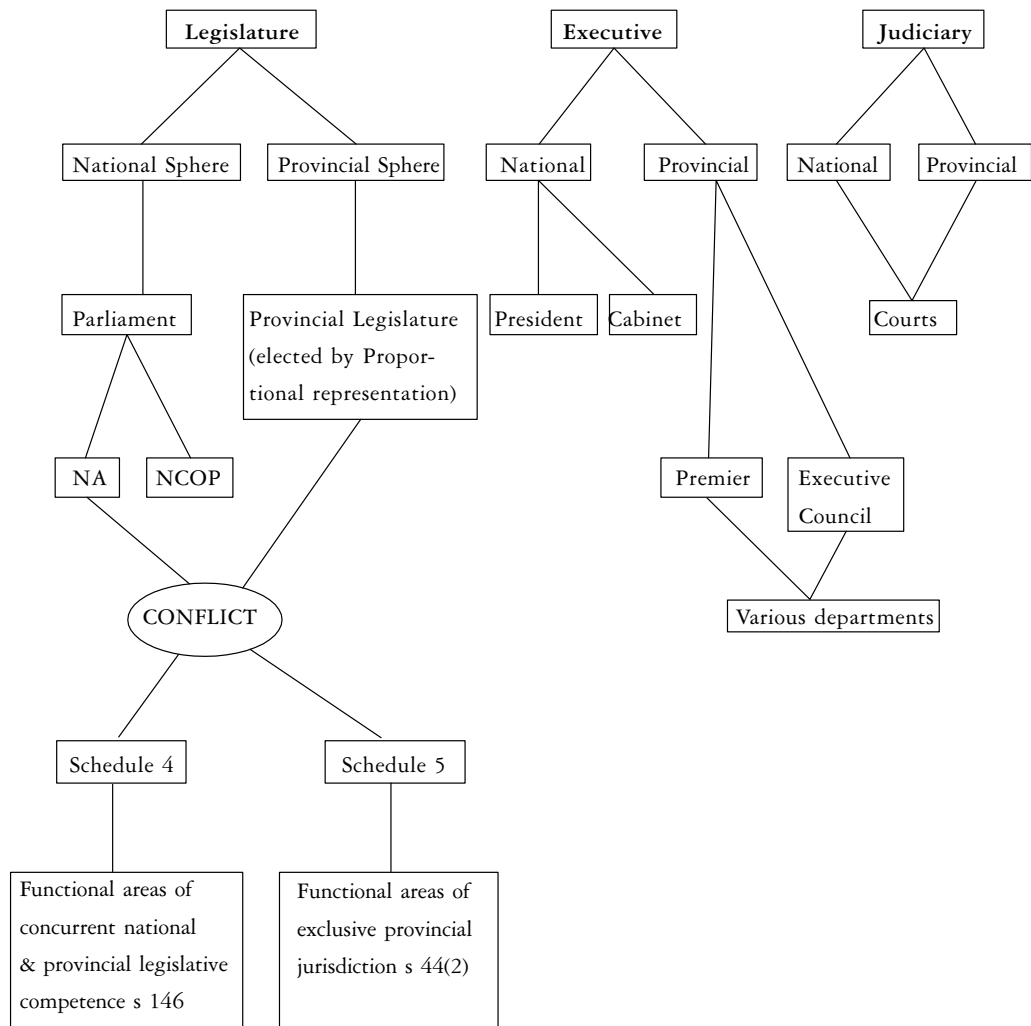
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STUDY UNIT 11

Provincial government

DIAGRAMMATIC REPRESENTATION OF PROVINCIAL GOVERNMENT



What you should know before attempting this study unit

Before attempting this study unit, you must make sure you understand and that you can define and explain (for examination purposes) the following:

- cooperative government
- unitary systems of government
- executive authority at national level
- legislative authority at national level
- branches and spheres of government
- integrated federalism

- separation of powers
- legislative authority
- adoption of bills affecting the provinces
- the executive

OVERVIEW

In study unit 6, we saw that South Africa’s system of government is described by some commentators as an example of an integrated (or cooperative) model of federalism. This does away with the unitary system of government that existed before 1994 (ie when the interim Constitution came into operation).

Before 1994, the four provinces were, in all respects, subordinate to the central government. The legislative authority of the provinces was severely limited, and power was centralised in the hands of the national government.

By contrast, both the interim and final Constitutions recognise some degree of provincial autonomy: the final Constitution displays the following federal characteristics:

Federal characteristics of the Constitution.

- The Constitution provides for certain matters over which the provinces have exclusive legislative authority [s 104(1)(b)(ii) read with s 44(1) and Schedule 5].

“Concurrent” legislative authority means that both the national and provincial legislatures may make laws dealing with certain matters.

- It contains a list of functional areas over which Parliament and the provincial legislatures have concurrent legislative authority [s 104(1)(b)(i) read with s 44(1) and Schedule 4].
- It spells out how conflicts between national and provincial legislation should be resolved (ss 146–150).

“Exclusive” legislative authority means that only the provinces have the power to make laws in relation to certain matters, and that the national legislature generally does not have any authority in relation to these matters.

- It recognises that a province has exclusive executive authority to implement provincial legislation in that province [s 125(5)].
- It sets up a Constitutional Court, which has exclusive jurisdiction to adjudicate disputes between organs of state in the national and provincial spheres concerning the constitutional status, powers or functions of any of those organs of state [s 167(4)(a)].
- It recognises the authority of provinces to adopt their own constitutions (ss 142–145).
- It institutes the National Council of Provinces (NCOP), which represents the provinces in the national sphere of government [s 42(4)].

However, we also saw that the system of cooperative government, which is determined by Chapter 3 of the Constitution, presupposes a great measure of central planning and coordination, and imposes definite limitations on the autonomy of provinces.

Below is a list of a few of these limitations:

Limitations on the autonomy of the provinces.

- The Constitution provides that national legislation dealing with a matter over which the national and provincial legislatures have concurrent legislative authority will prevail over provincial legislation in the case of a conflict, if any of a number of conditions are met (s 146).
- The national legislature may intervene even in those areas in which the provinces enjoy exclusive legislative authority, if it is necessary to do so in order to realise objectives such as the maintenance of national security or economic unity [s 44(2)].
- Government in the national sphere may intervene when a province cannot or does not fulfil an executive duty in terms of legislation or the Constitution (s 100).
- Provincial legislatures have only limited powers of taxation. Section 228(1) provides, *inter alia*, that a provincial legislature may levy taxes, levies and duties other than income tax, value-added tax, general sales tax, rates on property, and customs duties.

In the remainder of this study unit, we shall inquire into the constitutional status, functions and powers of the provinces.

UNIT OUTCOMES

After you have studied the material in this study unit, you should be able to do the following:

- discuss whether, and to what extent, the Constitution recognises provincial autonomy
- discuss the legislative authority of the provinces
- discuss the executive authority of the provinces, and ways in which the provincial executive can be held accountable
- discuss the power of the provinces to adopt provincial constitutions

- explain when Parliament can adopt legislation dealing with a Schedule 5 matter
- explain what happens in the case of a conflict between national and provincial legislation

PRESCRIBED STUDY MATERIAL

- *Ex Parte President of the RSA: In re Constitutionality of the Liquor Bill*, paragraphs 2, 21, 34–39, 41–43, 46–55, 57–58, 61–62, 64, 68–82, 87 and 89
- Sections 44, 99–100, 104, 125–127, 132–133, 136, 139–141, and 142–150, and Schedules 4 and 5 of the Constitution

You must know these sections.

RELEVANT SECTIONS OF THE CONSTITUTION

For examination purposes, you have to memorise sections 44, 99, 100, 104, 125–127, 132–133, 136, 139–141, and 142–150, and Schedules 4 and 5 of the Constitution.

Legislative authority of the provinces

You must know these sections for examination purposes.

Section 104	Legislative authority of provinces	<p>(1) The legislative authority of a province is vested in its provincial legislature, and confers on the provincial legislature the power: –</p> <p>(a) to pass a constitution for its province or to amend any constitution passed by it in terms of sections 142 and 143;</p> <p>(b) to pass legislation for its province with regard to: –</p> <p>(i) any matter within a functional area listed in Schedule 4;</p> <p>(ii) any matter within a functional area listed in Schedule 5;</p> <p>(iii) any matter outside those functional areas, and that is expressly assigned to the province by national legislation; and</p> <p>(iv) any matter for which a provision of the Constitution envisages the enactment of provincial legislation; and</p>
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Section number	Title of section	Content
		<p>(c) to assign any of its legislative powers to a Municipal Council in that province.</p> <p>(2) The legislature of a province, by a resolution adopted with a supporting vote of at least two thirds of its members, may request Parliament to change the name of that province.</p> <p>(3) A provincial legislature is bound only by the Constitution and, if it has passed a constitution for its province, also by that constitution, and must act in accordance with, and within the limits of, the Constitution and that provincial constitution.</p> <p>(4) Provincial legislation with regard to a matter that is reasonably necessary for, or incidental to, the effective exercise of a power concerning any matter listed in Schedule 4 is, for all purposes legislation with regard to a matter listed in Schedule 4.</p> <p>(5) A provincial legislature may recommend to the National Assembly legislation concerning any matter outside the authority of that legislature, or in respect of which an Act of Parliament prevails over a provincial law.</p>
Section 99	Assignment of functions	<p>A Cabinet member may assign any power or function that is to be exercised or performed in terms of an Act of Parliament to a member of a provincial Executive Council or to a Municipal Council. An assignment: –</p> <p>(a) must be in terms of an agreement between the relevant Cabinet member and the Executive Council member or Municipal Council;</p> <p>(b) must be consistent with the Act of Parliament in terms of which the relevant power or function is exercised or performed; and</p> <p>(c) takes effect upon proclamation by the President.</p>

Section number	Title of section	Content
Section 100	National intervention in provincial administration	<p>(1) When a province cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, the national executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation, including: –</p> <ul style="list-style-type: none"> (a) issuing a directive to the provincial executive, describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations; and (b) assuming responsibility for the relevant obligation in that province to the extent necessary to: – <ul style="list-style-type: none"> (i) maintain essential national standards or meet established minimum standards for the rendering of a service; (ii) maintain economic unity; (iii) maintain national security; <p style="text-align: center;">or</p> (iv) prevent that province from taking unreasonable action that is prejudicial to the interests of another province or to the country as a whole. <p>(2) If the national executive intervenes in a province in terms of subsection (1)(b): –</p> <ul style="list-style-type: none"> (a) it must submit a written notice of the intervention to the National Council of Provinces within 14 days after the intervention began; (b) the intervention must end if the Council disapproves the intervention within 180 days after the intervention began or by the end of that period has not approved the intervention; and (c) the Council must, while the intervention continues, review the intervention regularly and may make any appropriate recommendations to the national executive.

Section number	Title of section	Content
		(3) National legislation may regulate the process established by this section.
Section 125	Executive authority of provinces	<p>(1) The executive authority of a province is vested in the Premier of that province.</p> <p>(2) The Premier exercises the executive authority, together with the other members of the Executive Council, by: –</p> <ul style="list-style-type: none"> (a) implementing provincial legislation in the province; (b) implementing all national legislation within the functional areas listed in Schedule 4 or 5 except where the Constitution or an Act of Parliament provides otherwise; (c) administering in the province, national legislation outside the functional areas listed in Schedules 4 and 5, the administration of which has been assigned to the provincial executive in terms of an Act of Parliament; (d) developing and implementing provincial policy; (e) co-ordinating the functions of the provincial administration and its departments; (f) preparing and initiating provincial legislation; and (g) performing any other function assigned to the provincial executive in terms of the Constitution or an Act of Parliament. <p>(3) A province has executive authority in terms of subsection (2)(b) only to the extent that the province has the administrative capacity to assume effective responsibility. The national government, by legislative and other measures, must assist provinces to develop the administrative capacity required for the effective exercise of their powers and performance of their functions referred to in subsection (2).</p>

Section number	Title of section	Content
		<p>(4) Any dispute concerning the administrative capacity of a province in regard to any function must be referred to the National Council of Provinces for resolution within 30 days of the date of the referral to the Council.</p> <p>(5) Subject to section 100, the implementation of provincial legislation in a province is an exclusive provincial executive power.</p> <p>(6) The provincial executive must act in accordance with: –</p> <ul style="list-style-type: none"> (a) the Constitution; and (b) the provincial constitution, if a constitution has been passed for the province.
Section 126	Assignment of functions	<p>A member of the Executive Council of a province may assign any power or function that is to be exercised or performed in terms of an Act of Parliament or a provincial Act, to a Municipal Council. An assignment: –</p> <ul style="list-style-type: none"> (a) must be in terms of an agreement between the relevant Executive Council member and the Municipal Council; (b) must be consistent with the Act in terms of which the relevant power or function is exercised or performed; and (c) takes effect upon proclamation by the Premier.
Section 127	Powers and functions of Premiers	<p>(1) The Premier of a province has the powers and functions entrusted to that office by the Constitution and any legislation.</p> <p>(2) The Premier of a province is responsible for: –</p> <ul style="list-style-type: none"> (a) assenting to and signing Bills; (b) referring a Bill back to the provincial legislature for reconsideration of the Bill's constitutionality; (c) referring a Bill to the Constitutional Court for a decision on the Bill's constitutionality; (d) summoning the legislature to an extraordinary sitting to conduct special business;

Section number	Title of section	Content
		<ul style="list-style-type: none"> (e) appointing commissions of inquiry; and (f) calling a referendum in the province in accordance with national legislation.
Section 132	Executive Councils	<p>(1) The Executive Council of a province consists of the Premier, as head of the Council, and no fewer than five and no more than ten members appointed by the Premier from among the members of the provincial legislature.</p> <p>(2) The Premier of a province appoints the members of the Executive Council, assigns their powers and functions, and may dismiss them.</p>
Section 133	Accountability and responsibilities	<p>(1) The members of the Executive Council of a province are responsible for the functions of the executive assigned to them by the Premier.</p> <p>(2) Members of the Executive Council of a province are accountable collectively and individually to the legislature for the exercise of their powers and the performance of their functions.</p> <p>(3) Members of the Executive Council of a province must: –</p> <ul style="list-style-type: none"> (a) act in accordance with the Constitution and, if a provincial constitution has been passed for the province, also that constitution; and (b) provide the legislature with full and regular reports concerning matters under their control.
Section 136	Conduct of members of Executive Councils	<p>(1) Members of the Executive Council of a province must act in accordance with a code of ethics prescribed by national legislation.</p>

Section number	Title of section	Content
		<p>(2) Members of the Executive Council of a province may not: –</p> <ul style="list-style-type: none"> (a) undertake any other paid work; (b) act in any way that is inconsistent with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests; or (c) use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person.
Section 139(1–3)	Provincial intervention in local government	<p>(1) When a municipality cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, the relevant provincial executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation, including: –</p> <ul style="list-style-type: none"> (a) issuing a directive to the Municipal Council, describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations; (b) assuming responsibility for the relevant obligation in that municipality to the extent necessary to: – <ul style="list-style-type: none"> (i) maintain essential national standards or meet established minimum standards for the rendering of a service; (ii) prevent that Municipal Council from taking unreasonable action that is prejudicial to the interests of another municipality or to the province as a whole; or (iii) maintain economic unity; or

Section number	Title of section	Content
		<p>(c) dissolving the Municipal Council and appointing an administrator until a newly elected Municipal Council has been declared elected, if exceptional circumstances warrant such a step.</p> <p>(2) If a provincial executive intervenes in a municipality in terms of subsection (1)(b): –</p> <p>(a) it must submit a written notice of the intervention to: –</p> <p>(i) the Cabinet member responsible for local government affairs; and</p> <p>(ii) the relevant provincial legislature and the National Council of Provinces, within 14 days after the intervention began;</p> <p>(b) the intervention must end if: –</p> <p>(i) the Cabinet member responsible for local government affairs disapproves the intervention within 28 days after the intervention began or by the end of that period has not approved the intervention; or</p> <p>(ii) the Council disapproves the intervention within 180 days after the intervention began or by the end of that period has not approved the intervention; and</p> <p>(c) the Council must, while the intervention continues, review the intervention regularly and make any appropriate recommendations to the provincial executive.</p>

Section number	Title of section	Content
		<p>(3) If a Municipal Council is dissolved in terms of subsection (1)(c): –</p> <p>(a) the provincial executive must immediately submit a written notice of the dissolution to: –</p> <p>(i) the Cabinet member responsible for local government affairs; and</p> <p>(ii) the relevant provincial legislature and the National Council of Provinces; and</p> <p>(b) the dissolution takes effect 14 days from the date of receipt of the notice by the Council unless set aside by that Cabinet member or the Council before the expiry of those 14 days.</p>
Section 140	Executive decisions	<p>(1) A decision by the Premier of a province must be in writing if it: –</p> <p>(a) is taken in terms of legislation; or</p> <p>(b) has legal consequences.</p> <p>(2) A written decision by the Premier must be countersigned by another Executive Council member if that decision concerns a function assigned to that other member.</p> <p>(3) Proclamations, regulations and other instruments of subordinate legislation of a province must be accessible to the public.</p> <p>(4) Provincial legislation may specify the manner in which, and the extent to which, instruments mentioned in subsection (3) must be: –</p> <p>(a) tabled in the provincial legislature; and</p> <p>(b) approved by the provincial legislature.</p>

Section number	Title of section	Content
Section 141	Motions of no confidence	<p>(1) If a provincial legislature, by a vote supported by a majority of its members, passes a motion of no confidence in the province's Executive Council excluding the Premier, the Premier must reconstitute the Council.</p> <p>(2) If a provincial legislature, by a vote supported by a majority of its members, passes a motion of no confidence in the Premier, the Premier and the other members of the Executive Council must resign.</p>

Provincial constitutions

You must know these sections.

Section number	Title of section	Content
Section 142	Adoption of provincial constitutions	A provincial legislature may pass a constitution for the province or, where applicable, amend its constitution, if at least two thirds of its members vote in favour of the Bill.
Section 143	Contents of provincial constitutions	<p>(1) A provincial constitution, or constitutional amendment, must not be inconsistent with this Constitution, but may provide for: –</p> <p>(a) provincial legislative or executive structures and procedures that differ from those provided for in this Chapter; or</p> <p>(b) the institution, role, authority and status of a traditional monarch, where applicable.</p> <p>(2) Provisions included in a provincial constitution or constitutional amendment in terms of paragraph (a) or (b) of subsection (1): –</p> <p>(a) must comply with the values in section 1 and with Chapter 3; and</p>

Section number	Title of section	Content
		<p>(b) may not confer on the province any power or function that falls: –</p> <p>(i) outside the area of provincial competence in terms of Schedules 4 and 5; or</p> <p>(ii) outside the powers and functions conferred on the province by other sections of the Constitution.</p>
Section 144	Certification of provincial constitutions	<p>(1) If a provincial legislature has passed or amended a constitution, the Speaker of the legislature must submit the text of the constitution or constitutional amendment to the Constitutional Court for certification.</p> <p>(2) No text of a provincial constitution or constitutional amendment becomes law until the Constitutional Court has certified: –</p> <p>(a) that the text has been passed in accordance with section 142; and</p> <p>(b) that the whole text complies with section 143.</p>
Section 145	Signing, publication and safe-keeping of provincial constitutions	<p>(1) The Premier of a province must assent to and sign the text of a provincial constitution or constitutional amendment that has been certified by the Constitutional Court.</p> <p>(2) The text assented to and signed by the Premier must be published in the national Government Gazette and takes effect on publication or on a later date determined in terms of that constitution or amendment.</p> <p>(3) The signed text of a provincial constitution or constitutional amendment is conclusive evidence of its provisions and, after publication, must be entrusted to the Constitutional Court for safekeeping.</p>

Legislative conflicts

You must know these sections.

Section number	Title of section	Content
Section 146	Conflicts between national and provincial legislation	<p>(1) This section applies to a conflict between national legislation and provincial legislation falling within a functional area listed in Schedule 4.</p> <p>(2) National legislation that applies uniformly with regard to the country as a whole prevails over provincial legislation if any of the following conditions is met: –</p> <ul style="list-style-type: none"> (a) The national legislation deals with a matter that cannot be regulated effectively by legislation enacted by the respective provinces individually. (b) The national legislation deals with a matter that, to be dealt with effectively, requires uniformity across the nation, and the national legislation provides that uniformity by establishing: – <ul style="list-style-type: none"> (i) norms and standards; (ii) frameworks; or (iii) national policies. (c) The national legislation is necessary for: – <ul style="list-style-type: none"> (i) the maintenance of national security; (ii) the maintenance of economic unity; (iii) the protection of the common market in respect of the mobility of goods, services, capital and labour; (iv) the promotion of economic activities across provincial boundaries; (v) the promotion of equal opportunity or equal access to government services; or (vi) the protection of the environment.

Legislative conflicts

Section number	Title of section	Content
		<p>(3) National legislation prevails over provincial legislation if the national legislation is aimed at preventing unreasonable action by a province that: –</p> <p>(a) is prejudicial to the economic, health or security interests of another province or the country as a whole; or</p> <p>(b) impedes the implementation of national economic policy.</p> <p>(4) When there is a dispute concerning whether national legislation is necessary for a purpose set out in subsection (2)(c) and that dispute comes before a Court for resolution, the Court must have due regard to the approval or the rejection of the legislation by the National Council of Provinces.</p> <p>(5) Provincial legislation prevails over national legislation if subsection (2) or (3) does not apply.</p> <p>(6) A law made in terms of an Act of Parliament or a provincial Act can prevail only if that law has been approved by the National Council of Provinces.</p> <p>(7) If the National Council of Provinces does not reach a decision within 30 days of its first sitting after a law was referred to it, that law must be considered for all purposes to have been approved by the Council.</p> <p>(8) If the National Council of Provinces does not approve a law referred to in subsection (6), it must, within 30 days of its decision, forward reasons for not approving the law to the authority that referred the law to it.</p>

Legislative conflicts

Section number	Title of section	Content
Section 147	Other conflicts	<p>(1) If there is a conflict between national legislation and a provision of a provincial constitution with regard to: –</p> <ul style="list-style-type: none"> (a) a matter concerning which this Constitution specifically requires or envisages the enactment of national legislation, the national legislation prevails over the affected provision of the provincial constitution; (b) national legislative intervention in terms of section 44 (2), the national legislation prevails over the provision of the provincial constitution; or (c) a matter within a functional area listed in Schedule 4, section 146 applies as if the affected provision of the provincial constitution were provincial legislation referred to in that section. <p>(2) National legislation referred to in section 44(2) prevails over provincial legislation in respect of matters within the functional areas listed in Schedule 5.</p>
Section 148	Conflicts that cannot be resolved	If a dispute concerning a conflict cannot be resolved by a Court, the national legislation prevails over the provincial legislation or provincial constitution.
Section 149	Status of legislation that does not prevail	A decision by a Court that legislation prevails over other legislation does not invalidate that other legislation, but that other legislation becomes inoperative for as long as the conflict remains.
Section 150	Interpretation of conflicts	When considering an apparent conflict between national and provincial legislation, or between national legislation and a provincial constitution, every Court must prefer any reasonable interpretation of the legislation or constitution that avoids a conflict, over any alternative interpretation that results in a conflict.

Legislative conflicts

Section number	Title of section	Content
Section 44	National legislative authority	<p>(1) The national legislative authority as vested in Parliament: –</p> <p>(a) confers on the National Assembly the power: –</p> <p>(i) to amend the Constitution;</p> <p>(ii) to pass legislation with regard to any matter, including a matter within a functional area listed in Schedule 4, but excluding, subject to subsection (2), a matter within a functional area listed in Schedule 5; and</p> <p>(iii) to assign any of its legislative powers, except the power to amend the Constitution, to any legislative body in another sphere of government; and</p> <p>(b) confers on the National Council of Provinces the power: –</p> <p>(i) to participate in amending the Constitution in accordance with section 74;</p> <p>(ii) to pass, in accordance with section 76, legislation with regard to any matter within a functional area listed in Schedule 4 and any other matter required by the Constitution to be passed in accordance with section 76; and</p> <p>(iii) to consider, in accordance with section 75, any other legislation passed by the National Assembly.</p> <p>(2) Parliament may intervene, by passing legislation in accordance with section 76(1), with regard to a matter falling within a functional area listed in Schedule 5, when it is necessary: –</p>

Legislative conflicts

Section number	Title of section	Content
		<ul style="list-style-type: none"> (a) to maintain national security; (b) to maintain economic unity; (c) to maintain essential national standards; (d) to establish minimum standards required for the rendering of services; or (e) to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole. <p>(3) Legislation with regard to a matter that is reasonably necessary for, or incidental to, the effective exercise of a power concerning any matter listed in Schedule 4 is, for all purposes, legislation with regard to a matter listed in Schedule 4.</p> <p>(4) When exercising its legislative authority, Parliament is bound only by the Constitution, and must act in accordance with, and within the limits of, the Constitution.</p>
Schedule 4	Functional areas of concurrent national and provincial legislative competence	<p>Part A</p> <ul style="list-style-type: none"> Administration of indigenous forests Agriculture Airports other than international and national airports Animal control and diseases Casinos, racing, gambling and wagering, excluding lotteries and sports pools Consumer protection Cultural matters Disaster management Education at all levels, excluding tertiary education Environment

Section number	Title of section	Content
		<p>Health services</p> <p>Housing</p> <p>Indigenous law and customary law, subject to Chapter 12 of the Constitution</p> <p>Industrial promotion</p> <p>Language policy and the regulation of official languages to the extent that the provisions of section 6 of the Constitution expressly confer upon the provincial legislatures legislative competence</p> <p>Media services directly controlled or provided by the provincial government, subject to section 192</p> <p>Nature conservation, excluding national parks, national botanical gardens and marine resources</p> <p>Police to the extent that the provisions of Chapter 11 of the Constitution confer upon the provincial legislatures legislative competence</p> <p>Pollution control</p> <p>Population development</p> <p>Property transfer fees</p> <p>Provincial public enterprises in respect of the functional areas in this Schedule and Schedule 5</p>
Schedule 5	Functional areas of exclusive legislative competence	<p>Public transport</p> <p>Public works only in respect of the needs of provincial government departments in the discharge of their responsibilities to administer functions specifically assigned to them in terms of the Constitution or any other law</p> <p>Regional planning and development</p> <p>Road traffic regulation</p> <p>Soil conservation</p> <p>Tourism</p> <p>Trade</p> <p>Traditional leadership, subject to Chapter 12 of the Constitution</p> <p>Urban and rural development</p> <p>Vehicle licensing</p> <p>Welfare services</p>

Section number	Title of section	Content
		<p>Part B</p> <p>The following local government matters to the extent set out in section 155(6)(a) and (7):</p> <ul style="list-style-type: none"> Air pollution Building regulations Child care facilities Electricity and gas reticulation Firefighting services Local tourism Municipal airports Municipal planning Municipal health services Municipal public transport Municipal public works only in respect of the needs of municipalities in the discharge of their responsibilities to administer functions specifically assigned to them under this Constitution or any other law Pontoons, ferries, jetties, piers and harbours, excluding the regulation of international and national shipping and matters related thereto Stormwater management systems in built-up areas Trading regulations Water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems

Section number	Title of section	Content
		<p>Part A</p> <ul style="list-style-type: none"> Abattoirs Ambulance services Archives other than national archives Libraries other than national libraries Liquor licences Museums other than national museums Provincial planning Provincial cultural matters Provincial recreation and amenities

Section number	Title of section	Content
		Provincial sport Provincial roads and traffic Veterinary services, excluding regulation of the profession Part B The following local government matters to the extent set out for provinces in section 155(6)(a) and 7: Beaches and amusement facilities Billboards and the display of advertisements in public places Cemeteries, funeral parlours and crematoria Cleansing Control of public nuisances Control of undertakings that sell liquor to the public Facilities for the accommodation, care and burial of animals Fencing and fences Licensing of dogs Licensing and control of undertakings that sell food to the public Local amenities Local sport facilities Markets Municipal abattoirs Municipal parks and recreation Municipal roads Noise pollution Pounds Public places Refuse removal, refuse dumps and solid waste disposal Street trading Street lighting Traffic and parking

11.1 LEGISLATIVE AUTHORITY

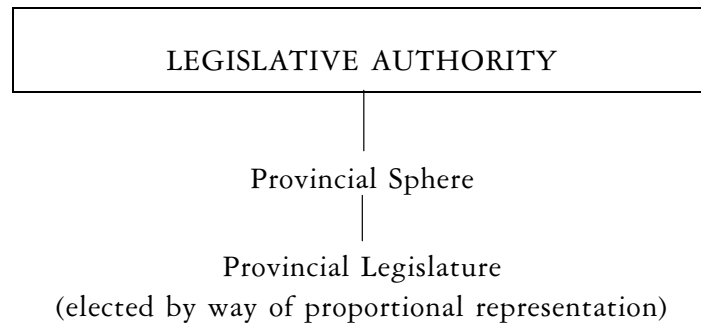
How is legislative authority in the provincial sphere exercised?

In study units 7 and 8, you studied legislative authority. Keep everything you learnt in those study units in mind as you work through this study unit. This study unit focuses more specifically on legislative authority at provincial level.

The legislative authority of the provinces is set out in section 104 of the

Constitution. The composition, election, membership and functioning of provincial legislatures, and a number of other matters relating to such legislatures, are set out in sections 105 to 124. You must study these sections for examination purposes.

Note that many of these provisions are similar to the ones relating to the National Assembly.



ACTIVITY 68

Study section 104 and then answer the following questions:

- (1) In which body is the legislative authority of a province vested? (1)
- (2) Discuss the legislative powers of the provincial legislatures. (In other words, in respect of which matters may the provincial legislatures pass legislation?) (6)
- (3) Mention two functional areas in which a provincial legislature has exclusive legislative authority, and two areas in which it shares concurrent legislative authority with Parliament. (4)

To answer question (1), you have to refer to and know section 104(1).

To answer question (2), you have to refer to and know section 104(1)(a) and (b).

To answer question (3), you have to refer to and consult Schedule 4 and Schedule 5.

The functional areas in respect of which provinces share legislative authority with Parliament are listed in Schedule 4, while the functional areas in respect of which the provinces enjoy exclusive legislative authority are listed in Schedule 5.

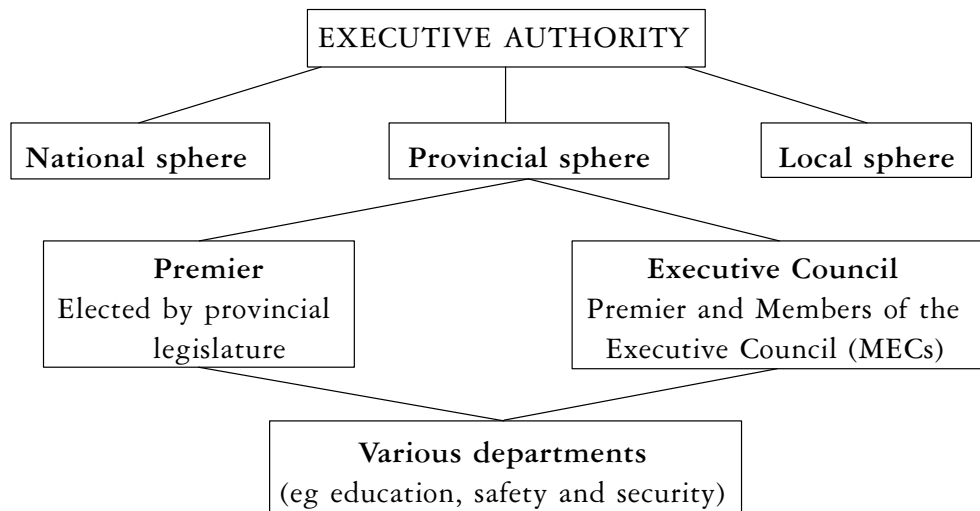
11.2 EXECUTIVE AUTHORITY

How is executive authority in the provincial sphere exercised?

You must know sections 99, 100, 125–127, 132–133, 136 and 139–141. Also read sections 128–131, 134–135 and 137–138.

In study unit 9, you studied executive authority in the national sphere. Keep everything you learnt in that study unit in mind as you work through this study unit. As we have said already, this study unit focuses more specifically on legislative authority at provincial level.

You will remember that executive authority is the power to execute and enforce legal rules.



ACTIVITY 69

Read the following paragraph:

You are a lecturer in constitutional law. You have to explain how the executive in the provincial sphere works to a student who does not understand it. To do this, you have to study the above sections.

Now answer the following questions:

- (1) In whom is the executive authority of the provinces vested? Does this person/body exercise the executive authority alone? (2)
- (2) List seven powers or functions of the executive authority of the provinces. (7)
- (3) Does a province automatically have the executive authority to implement national legislation within the functional areas listed in Schedules 4 or 5? (2)
- (4) In what circumstances may a Cabinet member assign powers or functions to a member of a provincial Executive Council? (3)
- (5) In what circumstances may the national executive intervene in provincial government affairs? (5)
- (6) Describe five similarities between the executive in the national sphere and the executive in the provincial sphere. (5)

(7) Can a provincial legislature hold the provincial executive accountable? Discuss. (5)

To answer question (1), you have to do the following:

Read and refer to section 125(1) and (2). This section states that the Premier exercises executive authority together with the other members of the Executive Council.

To answer question (2), you have to refer to and read section 125(2).

To answer question (3), you have to refer to and study section 125(3).

To answer question (4), you have to study section 99.

To answer question (5), you have to make a brief summary of section 100.

To answer question (6), you have to compare sections 125–141 with Chapter 5 of the Constitution.

You will find quite a number of similarities between the executive at national and provincial level. Below are just a few examples:

- The Premier of a province is elected by the provincial legislature [s 128(1)], just like the President is elected by the National Assembly.
- A Premier may not hold office for more than two terms [s 130(2)].
- The Premier may be impeached [s 130(3)].
- Members of the Executive Council (MECs) are accountable individually and collectively to the provincial legislature [s 133(2)], et cetera.

To answer question (7), you have to refer to the following provisions in the Constitution:

- section 114(2) (a provincial legislature must provide for mechanisms to ensure that all provincial executive organs of state are accountable to it)
- section 130(3) (removal or impeachment of Premiers)
- section 133 (accountability and responsibilities)
- section 141 (motions of no confidence)

11.3 PROVINCIAL CONSTITUTIONS

Can the provinces adopt their own constitutions?

Section 142 states that a provincial legislature may adopt a constitution for the province if at least two-thirds of its members are in favour of it. Section 143 makes it clear that a provincial constitution must not be inconsistent with the Constitution. However, a provincial constitution may provide for provincial legislative or executive structures and procedures that differ from those provided for in the Constitution. It may also provide for the institution, role, authority and status of traditional leaders. Such

provisions must, however, comply with the values in section 1 (the values upon which the Republic is based) and Chapter 3 (cooperative government), and may not confer on the province greater powers than those conferred by the Constitution.

When does the provincial constitution become law?

Section 144 states that a provincial constitution or constitutional amendment must be submitted to the Constitutional Court for certification and does not become law until the Constitutional Court has certified that it has been passed in accordance with section 142, and that the text complies with section 143.

Which provinces have adopted their own constitutions?

Only two provinces in South Africa have adopted their own constitutions: KwaZulu-Natal and the Western Cape. However, the KwaZulu-Natal constitution never came into force. That constitution was held by the Constitutional Court to usurp powers not due to the province and was therefore not certified.

The constitution of the Western Cape was initially not certified by the Constitutional Court, but, after amendments were made, the Constitutional Court certified the amended text [*In re Certification of the Amended Text of the Constitution of the Western Cape*, 1997 1998 (2) SA 655 (CC)] and the constitution came into force on 16 January 1998.

11.4 LEGISLATIVE CONFLICTS

What happens if the provincial legislature and Parliament pass legislation on the same subject matter?

By now you know that both Parliament and the provincial legislature can enact legislation.

When can the provincial legislature pass legislation?

We saw above that a provincial legislature has legislative authority to pass legislation for its province with regard to:

- Schedule 4 matters
- Schedule 5 matters
- any matter that is expressly assigned to the province by national legislation
- any matter for which a provision of the Constitution envisages the enactment of provincial legislation

Logically, the next question is: what happens if the provincial legislature AND Parliament pass legislation on the same subject matter? Which Act will supersede (override) the other?

Please note

IT IS INCORRECT TO SAY THAT AN ACT OF PARLIAMENT WILL ALWAYS PREVAIL OVER AN ACT OF THE PROVINCIAL LEGISLATURE.

11.4.1 Conflict in the event of Schedule 5 matters

When dealing with conflicting legislation in the event of Schedule 5 matters, section 44(2) is applicable.

In the normal course of events, there will not be legislative conflicts relating to Schedule 5 matters, since provincial legislatures have the exclusive power to pass legislation relating to these matters.

However, section 44(2) provides that Parliament may pass legislation on a matter falling within a functional area listed in Schedule 5 when it is necessary to:

- maintain national security, or
- maintain economic unity, or
- maintain essential national standards, or
- establish minimum standards required for the rendering of services, or
- prevent unreasonable action taken by a province which is prejudicial to the interests of other provinces or to the country as a whole

When does national legislation prevail over provincial legislation in respect of a Schedule 5 matter?

Section 147(2) provides that national legislation referred to in section 44(2) prevails over provincial legislation.

11.4.2 Legislative conflicts relating to Schedule 4 matters

When dealing with conflicting legislation in the event of Schedule 4 matters, section 146(2) applies.

Legislative conflicts relating to Schedule 4 matters are likely to arise more frequently.

When does national legislation prevail over provincial legislation in respect of Schedule 4 matters?

Section 146(2) provides that national legislation that applies uniformly with regard to the country as a whole prevails if any one of the following conditions is met:

- the national legislation deals with a matter that cannot be regulated effectively by legislation enacted by the respective provinces individually
- the national legislation deals with a matter that, to be dealt with effectively, requires uniformity across the nation, and the national legislation provides that uniformity by establishing –
 - norms and standards,
 - frameworks, or
 - national policies
- the national legislation is necessary for –
 - the maintenance of national security,
 - the maintenance of economic unity,
 - the protection of the common market in respect of the mobility of goods, services, capital and labour,
 - the promotion of economic activities across provincial boundaries,
 - the promotion of equal opportunity or equal access to government services, or
 - the protection of the environment
- national legislation prevails over provincial legislation if the national legislation is aimed at preventing unreasonable action by a province that –
 - is prejudicial to the economic, health or security interests of another province or the country as a whole, or
 - impedes the implementation of national economic policy

Section 146(3) also states that national legislation prevails over provincial legislation if the national legislation is aimed at preventing unreasonable action that is prejudicial (causes harm or injury) to another province or the country as a whole or, alternatively, if it impedes (blocks or is an obstacle to) the implementation of national policy.

When does provincial legislation prevail over national legislation in respect of a Schedule 4 matter?

Provincial legislation prevails if section 146(2) or (3) does not apply [s 146(5)]. This sounds simple enough. The problem is deciding whether something should be categorised as a Schedule 4 or Schedule 5 matter.

However, if you look at Schedules 4 and 5, you will see that some of the areas listed in the one are quite close to those listed in the other. For instance, Schedule 4 includes “road traffic regulation”, while Schedule 5 includes “provincial roads and traffic”. This may cause problems of interpretation.

In *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill*, the Constitutional Court recognised that there may be overlaps between Schedule 4 and Schedule 5 matters. It also recognised that the substance of a particular piece of legislation may not be capable of a single

characterisation only, and that a single statute may have more than one substantial character. Different parts of the legislation may thus require different assessments in regard to a disputed question of legislative competence (para 62).

In the *Liquor Bill* decision, the Court found that certain provisions of the Liquor Bill fell within the legislative competence of Parliament, since these provisions dealt with the regulation of trade and industry, which are both Schedule 4 matters.

However, other provisions fell within the narrower category of “liquor licences”, which is a Schedule 5 matter. These provisions will be valid only if the national government can show that such provisions are necessary to achieve one of the objectives set out in section 44(2).

ACTIVITY 70

Study paragraphs 2, 21, 34–43, 46–58, 61–62, 64 and 69–87 of the *Liquor Bill* decision in the *Reader*.

Now answer the following questions:

- (1) On which grounds was the constitutionality of the Liquor Bill contested?
- (2) How, in the opinion of the Court, must a Court deal with overlaps between Schedule 4 and Schedule 5 matters?
- (3) The Court talks about the “functional vision” underlying the division between exclusive and concurrent powers. What does this refer to?
- (4) What was the Court’s finding in relation to the contested provisions in the Liquor Bill?
- (5) Which of the contested provisions dealt with Schedule 4 matters?
- (6) Which of the contested provisions dealt with Schedule 5 matters?
- (7) Could the national government justify the provisions dealing with Schedule 5 matters in terms of section 44(2)?

To answer question (1), you have to refer to paragraphs 34 to 41 of the case.

To answer question (3), you have to refer to paragraph 51 of the case.

Conflicts between national legislation and a provincial constitution

Section 147(1) deals with conflicts between national legislation and a provincial constitution.

If the conflict relates to:

- a matter concerning which the national Constitution specifically

requires or envisages (visualises) national legislation, the national legislation prevails over the affected provision of the provincial constitution,

- national legislative intervention in terms of section 44(2), the national legislation prevails over the provision of the provincial constitution, or
- a matter within a functional area listed in Schedule 4, section 146 applies as if the affected provision of the provincial constitution was, in fact, provincial legislation referred to in that section

The national legislation referred to in section 44(2) prevails over provincial legislation as far as matters included within the functional areas listed in Schedule 5 are concerned.

Conflicts that cannot be resolved

What happens if conflicts cannot be resolved? Section 148 provides that, if a conflict cannot be resolved by a Court, the national legislation prevails.

Status of legislation that does not prevail

What happens to the legislation that does not prevail? Section 149 provides that legislation that does not prevail in the event of a conflict is **not invalidated**, but becomes inoperative for as long as the conflict remains.

Interpretation of conflicts

How do the Courts deal with legislative conflict? Section 150 deals with the interpretation of conflicts. When a Court considers an apparent conflict between national and provincial legislation, or between national legislation and a provincial constitution, a reasonable interpretation of the legislation or constitution that avoids a conflict must be preferred over any alternative interpretation that results in a conflict.

Legislative conflicts: a practical application

The following question is designed to test your ability to apply the Constitution to a factual situation. At the same time, it illustrates the interaction between government in the national and provincial spheres.

Answer the question, and then compare your answer with the commentary that follows.

ACTIVITY 71

Read the following paragraph:

The National Transport Act of 1990 (this is a hypothetical Act) provides that all vehicles carrying passengers for gain must have a permit to do so. The only exception is made for taxis carrying fewer than 12 passengers.

The Mpumalanga MEC for Roads and Traffic proposes an amendment in the legislation to include taxis in the permit system. The reason for this proposal is better control of taxis.

The province argues that the matter is, at best, an exclusive provincial competence, and, at worst, a concurrent one; the national Minister of Transport claims that it is a matter in respect of which national standards should be maintained, and that the province does not have the competence to pass the amendment.

The Minister and the MEC agree to ask you to advise them on the following questions:

- (1) whether the matter falls within the legislative competence of the provinces (8)
- (2) if it falls within the provincial competence, whether the provincial legislature can amend an Act of Parliament [in this case the (hypothetical) National Transport Act, 1990] (3)
- (3) whether Parliament can override the provincial amendment, and in what circumstances. (8)
- (4) if Parliament can override the provincial amendment, what procedure should be followed when adopting a new law (6)

Before you attempt to answer these questions, read the following:

This question is the sort of question you will encounter in the examination. It contains a concise set of facts, and a number of questions based on these facts. Before we give you any advice on answering the questions, let us remind you of the following:

- The general principles for answering any type of question apply: you must answer the question, write systematically, and substantiate your answers. You must also be guided by the marks allocated to the question. Check what your lecturers say in the following commentary to see whether we have succeeded in practising what we preach!
- The set of given facts is seldom exhaustive; in other words, not every little detail is provided. Sometimes, this may be frustrating, because it leaves room for a number of possible arguments. This is part of the art of answering problem- (or “application-”) type questions. One thing to remember is that you should not read more into the facts than is given.

Turning to the problem itself, we shall try to explain and apply these principles.

To answer question (1), you have to do the following:

Look again at the wording of the problem.

What do we learn about the problem?

- First, there is a reference to the (hypothetical) National Transport Act, 1990.

It is not immediately apparent whether this is an Act of Parliament (ie an Act of the national legislature). However, it probably is, since the title of the Act is the “National Transport Act”, and it was adopted in 1990 — that is, at a time when provinces did not have significant legislative power.

In fact, once we have read the whole question, we see that this belief is confirmed in question (2).

- Secondly, the facts tell us that the Mpumalanga MEC wants to change the Act.

If we are familiar with the 1996 Constitution, we will know that Mpumalanga is a province, and that provinces have legislative power [see the Constitution, ss 43(b) and 104(1)(b)].

- Thirdly, we learnt that the province (read: the Mpumalanga MEC as the representative of the province) argues that it has the power to change the Act, either as an exclusive power or as a concurrent one.

If we are familiar with the Constitution, we should be aware of the fact that provinces have exclusive legislative powers (in respect of matters listed in Schedule 5) and powers which they may exercise concurrently with the national Parliament (in respect of matters listed in Schedule 4).

- Fourthly, the national Minister of Transport denies that the province has the power to amend the Act, allegedly because she feels that national standards should be maintained.

This should tell you to look at section 44(2) and section 146 of the Constitution.

- Finally, you are asked for advice.

This means that your advice must relate to the facts provided in the question. In the end, you must show that you can apply the law to a set of facts.

Now to the questions themselves:

To answer questions (1) and (2):

Eight marks clearly require more than just “Yes”, “No” or “I’m not sure”. You should at least analyse the relevant provisions of the Constitution and come to a conclusion on the basis of the analysis.

But let us remind you: more often than not, the law is about a dispute

which, by its very nature, is based on alternative interpretations of law and fact. In other words, there might be more than one plausible conclusion in this case too.

What are the relevant provisions of the Constitution?

To begin with, we can say that, in terms of the Constitution, the provinces have legislative powers [see s 43, especially s 43(b), which refers us to s 104]. Section 104 tells us that the provinces have exclusive competences and ones which they exercise concurrently with the national legislature or Parliament.

The concurrent matters are listed in Schedule 4, the exclusive ones in Schedule 5. In order to determine whether the issue at hand, namely the imposition of a permit system for the carrying of passengers for gain, falls within provincial legislative competence, we need to look at the matters listed in Schedule 4 and Schedule 5. If the topic is covered in either of these Schedules, the provincial legislature would be competent to make a law on that matter.

Turning to Schedule 4, we see that the closest we get to carrying passengers for gain in a motor vehicle is “public transport” and possibly “road traffic regulation”. In Schedule 5, we find “provincial roads and traffic”.

Back to the question:

Does the province have legislative power in respect of carrying passengers for gain, and making this subject to a permit system?

In our opinion, the matter could be covered by Schedule 5 if one understands the item to mean “provincial roads” and “provincial traffic”.

It might also fall under “road traffic regulation” in Schedule 4. One can also use “public transport” in Schedule 4 to cover any form of transportation for the payment of a fee or tariff, which is what “for gain” means.

We would conclude, therefore, in response to the question, that the province may have an exclusive power, but that it definitely has a concurrent power to make a law on the matter covered in the problem here.

The answer to this question is thus “Yes”. The Constitution gives the provinces the power to make laws regarding certain matters (ie those listed in the schedules). As long as the provincial law deals with such a matter, it may amend an Act of Parliament. This will happen for some time to come: remember that, between 1986 and 1994, provinces did not have legislative powers.

Provinces were constrained in exercising legislative power due to the centralised system of government pre-94.

Many of the laws which now apply in the provinces and fall within their legislative powers were made by Parliament before 1994 (eg our hypothetical National Transport Act of 1990).

To answer question (3):

This is a straightforward question which requires a brief exposition of the relevant sections of the Constitution.

We find the answer in sections 146 and 147 of the Constitution. If we regard the matter at hand as an exclusive matter (Schedule 5), we need to turn to section 44(2) and the factors listed there [authority: s 147(2)].

However, we have decided that it is at least a concurrent matter, and we shall therefore turn to section 146.

Note that national legislation may override provincial legislation on a concurrent matter if any one of the conditions listed in section 146(2) and (3) is met. For instance, national legislation will prevail if this is necessary for the maintenance of economic unity [s 146(2)(c)(ii)].

We do not have to list all of the conditions here. You should study these yourself. You will note that one can easily write for eight marks in answering this question.

To answer question (4):

We have concluded that Parliament may, in certain circumstances, override the provincial law (or “prevail over” the provincial law, to use the words of the Constitution).

In order to answer the question, we need to turn to the provisions of the Constitution that deal with the national legislative process.

These are sections 73 to 79. Section 76 provides for “ordinary Bills affecting provinces”. If an Act of Parliament has to prevail over a provincial law, the Act of Parliament will influence the province; as a result, it has to comply with the provisions of section 76. All you need to do here is to give a brief exposition of the procedure found in section 76.

Again, you will see that one can easily write for six marks in answering this question.

11.5 COMMON MISTAKES AND PROBLEM AREAS

Many students confuse the process by which Bills that affect and do not affect the provinces become legislation (ss 76 and 75, dealt with in study unit 7) with legislative conflict.

Remember that sections 76 and 75 deal with the process by which a Bill becomes an Act. This process differs, depending on whether the subject matter of the Bill affects the provinces (in which case s 76 applies) or does not affect the provinces (in which case s 75 applies).

Sections 44 and 146 deal with cases where provincial legislation (ie the Bill has become legislation and is now in force) or constitutions are in conflict (clash with or are incompatible) with national legislation (ie the Bill has become legislation and is now in force).

LEGISLATIVE CONFLICT RELATES TO LEGISLATION ALREADY ENACTED, AND NOT TO BILLS THAT STILL NEED TO BE PASSED BY PARLIAMENT.

11.6 SELF-ASSESSMENT QUESTIONS

Possible examination questions:

- (1) Briefly discuss the extent to which the 1996 Constitution recognises the autonomy of the provinces. (10)

(See the relevant sections in your study guide.)

- (2) Discuss the legislative powers of the provincial legislature in terms of section 104 of the Constitution. (6)

(See s 104 of the Constitution.)

- (3) Discuss the executive authority of the provinces under section 125 of the Constitution. (8)

(See s 125 of the Constitution.)

- (4) Discuss whether the provinces have the power to adopt provincial constitutions, and, if so, how they do this. (5)

(See s 104 of the Constitution.)

- (5) Explain when Parliament can adopt legislation that deals with a Schedule 5 matter. (5)

{Study s 44(2) of the Constitution.}

- (6) Explain what will happen in the event of conflict between:

(a) national and provincial legislation dealing with a Schedule 4 matter (10)

(b) national and provincial legislation dealing with a Schedule 5 matter (5)

{Study s 146(2) and (3) and s 44(2) of the Constitution.

State which law takes precedence and the circumstances in which this will occur.}

- (7) Discuss the manner in which the Courts will deal with overlaps between a Schedule 4 and Schedule 5 matter. (5)

(See s 150 of the Constitution.)

11.7 CONCLUSION

Both the national sphere and the provincial sphere have legislative and executive branches. In this study unit, you saw how the powers of the executive should be exercised in the provincial sphere.

Where both the provincial and national sphere are capable of legislating, logic dictates that there may be a conflict between the two different pieces of legislation. This situation is dealt with in detail in the Constitution. The Constitution also explains how these conflicts should be resolved and which piece of legislation takes precedence. As you can see from the practical application, deciding when a power falls within the scope of Schedule 4 or 5 is slightly more complicated.

STUDY UNIT 12

Local government



What you should know before attempting this study unit.

Before attempting this study unit, you must make sure you understand and that you can define and explain (for examination purposes) the following:

- separation of powers
- spheres of government
- cooperative government
- national sphere (legislative and executive authority)
- provincial sphere (legislative and executive authority)
- supreme Constitution
- integrated form of federalism

OVERVIEW

In this study unit, we examine the third sphere of government, which is the local sphere of government. We discuss the pre- and post-1993 status of local government, as well as its relationship with the national and provincial spheres of government. You will also learn the rationale behind the devolution of power to the local sphere of government, and whether or

not such devolution has had a positive or negative impact on the development of society as a whole. We will also discuss the composition, functions and powers of local government.

This discussion is intertwined with the role of traditional leadership as an institution that also deals with matters affecting people at the local level of governance.

UNIT OUTCOMES

After you have studied the material in this study unit, you should be able to do the following:

- discuss the reason behind the creation of local government as an “autonomous” sphere of government
- explain the role and functioning of local government and of traditional leaders
- illustrate the effect of Chapter 7 of the 1996 Constitution on the legal status of local government
- compare the term “sphere” with the term “level” of government and explain the connotation of each term in constitutional law
- review local government in the context of intergovernmental relations
- discuss whether local government is nothing more than an administrative “handmaiden” to national government
- discuss the composition, functioning and powers of the local sphere of government

PRESCRIBED STUDY MATERIAL

- *Executive Council of the Western Cape v Minister of Provincial Affairs, Executive Council of KwaZulu-Natal v President of the Republic of South Africa* 1999 (12) BCLR 1360 (CC), 2000 ISA 661 (CC)
- *Robertson and Another v City of Cape Town and Another; Truman-Baker v City of Cape Town* 2004 (9) BCLR 950 (C), paras 17–24 (see *Revised Reader* hereafter “the *Reader*”)
- Wiechers & Budhu “Current judicial trends pertaining to devolution and assignment of powers to local government” (2002) *SAPR/L* (see the *Reader*)

RELEVANT SECTIONS OF THE CONSTITUTION

You are required to study section 151 to section 164 of the 1996 Constitution. These provisions deal with:

Section 151

Status of municipalities

- (1) The local sphere of government consists of municipalities, which must be established for the whole of the territory of the Republic.
- (2) The executive and legislative authority of a municipality is vested in its Municipal Council.
- (3) A municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution.
- (4) The national or a provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions.

Section 152

Objects of local government

- (1) The objects of local government are: –
 - (a) to provide democratic and accountable government for local communities;
 - (b) to ensure the provision of services to communities in a sustainable manner;
 - (c) to promote social and economic development;
 - (d) to promote a safe and healthy environment; and
 - (e) to encourage the involvement of communities and community organisations in the matters of local government.
- (2) A municipality must strive, within its financial and administrative capacity, to achieve the objects set out in subsection (1).

Section 153

Developmental duties of municipalities

A municipality must: –

- (a) structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community; and
- (b) participate in national and provincial development programmes.

Section 154

Municipalities in co-operative government

- (1) The national government and provincial governments, by legislative and other measures, must support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions.
- (2) Draft national or provincial legislation that affects the status, institutions, powers or functions of local government must be published for public comment before it is introduced in Parliament or a provincial legislature, in a manner that allows organised local government, municipalities and other interested persons an opportunity to make representations with regard to the draft legislation.

Section 155

Establishment of municipalities

- (1) There are the following categories of municipality:
 - (a) Category A: A municipality that has exclusive municipal executive and legislative authority in its area.
 - (b) Category B: A municipality that shares municipal executive and legislative authority in its area with a category C municipality within whose area it falls.
 - (c) Category C: A municipality that has municipal executive and legislative authority in an area that includes more than one municipality.
- (2) National legislation must define the different types of municipality that may be established within each category.
- (3) National legislation must:–
 - (a) establish the criteria for determining when an area should have a single category A municipality or when it should have municipalities of both category B and category C;
 - (b) establish criteria and procedures for the determination of municipal boundaries by an independent authority; and
 - (c) subject to section 229, make provision for an appropriate division of powers and functions between municipalities when an area has municipalities of both category B and category C. A division of powers and functions between a category B municipality and a category C municipality may differ from the division of powers and functions between another category B municipality and that category C municipality.
- (4) The legislation referred to in subsection (3) must take into account the need to provide municipal services in an equitable and sustainable manner.
- (5) Provincial legislation must determine the different types of municipality to be established in the province.

- (6) Each provincial government must establish municipalities in its province in a manner consistent with the legislation enacted in terms of subsections (2) and (3) and, by legislative or other measures, must: –
 - (a) provide for the monitoring and support of local government in the province; and
 - (b) promote the development of local government capacity to enable municipalities to perform their functions and manage their own affairs.
- (6A) Left the sub-section on purpose.

[Sub-s. (6A) inserted by s. 1 of the Constitution Third Amendment Act of 1998 and deleted by s. 2 of the Constitution Twelfth Amendment Act of 2005.]

- (7) The national government, subject to section 44, and the provincial governments have the legislative and executive authority to see to the effective performance by municipalities of their functions in respect of matters listed in Schedules 4 and 5, by regulating the exercise by municipalities of their executive authority referred to in section 156(1).

Section 156

Powers and functions of municipalities

- (1) A municipality has executive authority in respect of, and has the right to administer: –
 - (a) the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5; and
 - (b) any other matter assigned to it by national or provincial legislation.
- (2) A municipality may make and administer by-laws for the effective administration of the matters which it has the right to administer.
- (3) Subject to section 151(4), a by-law that conflicts with national or provincial legislation is invalid. If there is a conflict between a by-law and national or provincial legislation that is inoperative because of a conflict referred to in section 149, the by-law must be regarded as valid for as long as that legislation is inoperative.
- (4) The national government and provincial governments must assign to a municipality, by agreement and subject to any conditions, the administration of a matter listed in Part A of Schedule 4 or Part A of Schedule 5 which necessarily relates to local government, if: –
 - (a) that matter would most effectively be administered locally; and
 - (b) the municipality has the capacity to administer it.
- (5) A municipality has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions.

Section 157

Composition and election of Municipal Councils

- (1) A Municipal Council consists of: –
 - (a) members elected in accordance with subsections (2) and (3); or
 - (b) if provided for by national legislation: –
 - (i) members appointed by other Municipal Councils to represent those other Councils; or
 - (ii) both members elected in accordance with paragraph (a) and members appointed in accordance with subparagraph (i) of this paragraph.
- (2) The election of members to a Municipal Council as anticipated in subsection (1)(a) must be in accordance with national legislation, which must prescribe a system: –
 - (a) of proportional representation based on that municipality's segment of the national common voters roll, and which provides for the election of members from lists of party candidates drawn up in a party's order of preference; or
 - (b) of proportional representation as described in paragraph (a) combined with a system of ward representation based on that municipality's segment of the national common voters roll.
- (3) An electoral system in terms of subsection (2) must result, in general, in proportional representation.
- (4) (a) If the electoral system includes ward representation, the delimitation of wards must be done by an independent authority appointed in terms of, and operating according to, procedures and criteria prescribed by national legislation.
 - (b)
- (5) A person may vote in a municipality only if that person is registered on that municipality's segment of the national common voters roll.
- (6) The national legislation referred to in subsection (1)(b) must establish a system that allows for parties and interests reflected within the Municipal Council making the appointment, to be fairly represented in the Municipal Council to which the appointment is made.

{Para. (b) deleted by s. 3 of the Constitution Twelfth Amendment Act of 2005.}

Section 158

Membership of Municipal Councils

- (1) Every citizen who is qualified to vote for a Municipal Council is eligible to be a member of that Council, except: –
 - (a) anyone who is appointed by, or is in the service of, the municipality and receives remuneration for that appointment or service, and who has not been exempted from this disqualification in terms of national legislation;
 - (b) anyone who is appointed by, or is in the service of, the state in

- another sphere, and receives remuneration for that appointment or service, and who has been disqualified from membership of a Municipal Council in terms of national legislation;
- (c) anyone who is disqualified from voting for the National Assembly or is disqualified in terms of section 47(1)(c), (d) or (e) from being a member of the Assembly;
 - (d) a member of the National Assembly, a delegate to the National Council of Provinces or a member of a provincial legislature; but this disqualification does not apply to a member of a Municipal Council representing local government in the National Council; or
 - (e) a member of another Municipal Council; but this disqualification does not apply to a member of a Municipal Council representing that Council in another Municipal Council of a different category.
- (2) A person who is not eligible to be a member of a Municipal Council in terms of subsection (1)(a), (b), (d) or (e) may be a candidate for the Council, subject to any limits or conditions established by national legislation.
- (3) Vacancies in a Municipal Council must be filled in terms of national legislation.

Section 159

Terms of Municipal Councils

- (1) The term of a Municipal Council may be no more than five years, as determined by national legislation.
- (2) If a Municipal Council is dissolved in terms of national legislation, or when its term expires, an election must be held within 90 days of the date that Council was dissolved or its term expired.
- (3) A Municipal Council, other than a Council that has been dissolved following an intervention in terms of section 139, remains competent to function from the time it is dissolved or its term expires, until the newly elected Council has been declared elected.

Section 160

Internal procedures

- (1) A Municipal Council: –
 - (a) makes decisions concerning the exercise of all the powers and the performance of all the functions of the municipality;
 - (b) must elect its chairperson;
 - (c) may elect an executive committee and other committees, subject to national legislation; and
 - (d) may employ personnel that are necessary for the effective performance of its functions.

- (2) The following functions may not be delegated by a Municipal Council:
 - (a) The passing of by-laws;
 - (b) the approval of budgets;
 - (c) the imposition of rates and other taxes, levies and duties; and
 - (d) the raising of loans.
- (3)
 - (a) A majority of the members of a Municipal Council must be present before a vote may be taken on any matter.
 - (b) All questions concerning matters mentioned in subsection (2) are determined by a decision taken by a Municipal Council with a supporting vote of a majority of its members.
 - (c) All other questions before a Municipal Council are decided by a majority of the votes cast.
- (4) No by-law may be passed by a Municipal Council unless: –
 - (a) all the members of the Council have been given reasonable notice; and
 - (b) the proposed by-law has been published for public comment.
- (5) National legislation may provide criteria for determining: –
 - (a) the size of a Municipal Council;
 - (b) whether Municipal Councils may elect an executive committee or any other committee; or
 - (c) the size of the executive committee or any other committee of a Municipal Council.
- (6) A Municipal Council may make by-laws which prescribe rules and orders for: –
 - (a) its internal arrangements;
 - (b) its business and proceedings; and
 - (c) the establishment, composition, procedures, powers and functions of its committees.
- (7) A Municipal Council must conduct its business in an open manner, and may close its sittings, or those of its committees, only when it is reasonable to do so having regard to the nature of the business being transacted.
- (8) Members of a Municipal Council are entitled to participate in its proceedings and those of its committees in a manner that: –
 - (a) allows parties and interests reflected within the Council to be fairly represented;
 - (b) is consistent with democracy; and
 - (c) may be regulated by national legislation.

Section 161

Privilege

Provincial legislation within the framework of national legislation may provide for privileges and immunities of Municipal Councils and their members.

Section 162

Publication of municipal by-laws

- (1) A municipal by-law may be enforced only after it has been published in the official gazette of the relevant province.
- (2) A provincial Official Gazette must publish a municipal by-law upon request by the municipality.
- (3) Municipal by-laws must be accessible to the public.

Section 163

Organised local government

An Act of Parliament enacted in accordance with the procedure established by section 76 must: –

- (a) provide for the recognition of national and provincial organisations representing municipalities; and
- (b) determine procedures by which local government may: –
 - (i) consult with the national or a provincial government;
 - (ii) designate representatives to participate in the National Council of Provinces; and
 - (iii) participate in the process prescribed in the national legislation envisaged in section 221(1)(c).

Section 164

Other matters

Any matter concerning local government not dealt with in the Constitution may be prescribed by national legislation or by provincial legislation within the framework of national legislation.

These provisions must be read together with the Traditional Leadership and Governance Framework Act 41 of 2003 (Framework Act), which requires the institution of traditional leadership to promote the principles of cooperative governance in its interaction with all spheres of government and organs of state (see preamble of the Framework Act).

Recommended material

Please note that you are not required to study the following material for examination purposes:

- Dlamini RM “Towards a new legal order for a new South Africa” (1992) Volume XVI *Legal Studies Forum* 131–144
- Rautenbach & Malherbe *Constitutional Law* LexisNexis Publishers Durban, chapter 12, 295–313
- *Certification of the Constitution of the Republic of South Africa* 1996 (10) BCLR 1253 (CC), paragraphs 287–289 and paragraph 373
- *Doctors for Life International v Speaker of the National Assembly* 2006 (12) BCLR 1399 (CC), paragraph 101
- *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1998 (12) BCLR 1458 (CC)
- *Merafong Demarcation Forum v President of the Republic of South Africa*, 2008 (10) BCLR 968 (CC) paragraph 19
- Traditional Leadership and Governance Framework Act 41 of 2003 (Framework Act)

12.1 INTRODUCTION

In study units 6, 7, 8, 9 and 11, you learnt about the national and the provincial spheres of government. In this study unit, we concentrate on the third sphere of government, namely local government. As you work through this study unit, you will realise that this sphere of government has an important role to play in the democratisation process. If you study the cartoon at the beginning of this study unit, you will understand why the local sphere of government is regarded as the cornerstone of modern democracies (even though they constitute the smallest government institution in any state).

12.2 LOCAL GOVERNMENT IN THE NEW CONSTITUTIONAL DISPENSATION

Pre-1993, the implementation of apartheid policies at local level resulted in a highly fragmented, dysfunctional and illegitimate system of local government marked by a sharp separation between developed, well-serviced and representative local government in white areas, and underdeveloped, seriously underserviced and unrepresentative local government in black areas (see the background in *Walker* at paras 17–24).

The institution of traditional leadership was also not recognised as a legitimate institution that plays an important role in addressing issues of governance at local level — except as an instrument to divide and rule and to exercise control over the majority of South Africans (Dlamini at 133).

Pursuant to the dawn of democracy and the adoption of the Constitution of the Republic of South Africa, 1996 (the “Constitution”), local government has been restructured in order to fall within the ambit of the new constitutional dispensation. The Constitution forms the bedrock of this development and is supplemented by the following pieces of legislation:

- the Local Government: Municipal Systems Act 32 of 2000, which seeks to ensure the provision of mechanisms and processes that are essential for municipalities to move towards the social and economic upliftment of local communities (see the long title of the Act)
- the Local Government: Municipal Finance Management Act 56 of 2003, which seeks to secure sound and sustainable management of the financial affairs of municipalities and other institutions in the local sphere of government (see the long title of the Act)
- the Local Government: Municipal Property Rates Act 6 of 2004, which empowers municipalities to regulate rates on property (see the long title of the Act)

These pieces of legislation are supplemented by the Framework Act, which seeks to ensure the integration of the institution of traditional leadership in ensuring the:

promotion of the ideals of co-operative government, integrated development planning, sustainable development and service delivery through the allocation of roles and functions [s 20(2)(g) of the Framework Act].

The adoption of these particular pieces of legislation heralded a new development and a new legal order in the promotion of good governance at local level. They affirm the objectives of local government as set out in section 152 of the Constitution, namely to:

- provide democratic and accountable government for local communities
- ensure the provision of services to local communities in a sustainable manner
- promote social and economic development

(Rautenbach & Malherbe at 252)

These principles are in line with the role of local government in cooperative governance, as envisaged as follows in section 154 of the Constitution:

- (1) The national government and provincial governments, by legislative and other measures, must support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions.
- (2) Draft national or provincial legislation that affects the status, institution, powers or functions of local government must be published for public comment before it is introduced in Parliament or a provincial legislature, in a manner that allows organised local government, municipalities and other interested persons an opportunity to make representations with regard to the draft legislation.

According to Rautenbach and Malherbe (at 298), this means that the principles of cooperative governance also apply to the relationship between local government and other spheres of government. These principles are reinforced by the recognition of the institution of traditional leadership as

a legitimate institution in the regulation of public administration and governance at local level as envisaged in section 20(1) of the Framework Act of 2003, which lays down the framework for guiding principles for the allocation of the institution's roles and responsibilities in public governance.

12.3 IMPORTANCE OF PARTICIPATORY GOVERNMENT

Numerous countries, such as Sri Lanka, Belgium, Germany, Australia, Ghana and Nigeria, are still experimenting, or have experimented, with new ways of improving democratic decision-making mechanisms at grassroots level. Brynard (2009:2) identifies a number of reasons why public participation in matters that directly affect members of the public is considered important:

- Participation facilitates access to information about local conditions, needs, desires and attitudes, which may be important in terms of adopting informed and implementable decisions in the policy management cycle.
- Participation, even if it is through lowest-level representation, provides people whose lives will be affected by proposed policies with the opportunity to express their views and to at least attempt to influence public officials about the desirability (or otherwise) of proposed policies.
- Participation is a means of involving and educating the public. The benefit of involvement is that people are more likely to be committed to a project, programme or policy if they are involved in its planning and preparation. This is because they identify with it and even see it as “their” plan.
- Participation provides a mechanism for ensuring the democratisation of the planning process in particular and the public management process in general. In most countries, participation in local government is considered a basic democratic right of the people. This is linked to the notion of popular sovereignty, in that local government should be the creation of the citizenry rather than a separate entity standing above it.
- Participation is a means of balancing the demands of central control against the demand for concern for the unique requirements of local government and administration. The more distant and less publicly accessible any form of government, the more likely it is that government projects, programmes and policies will be unpopular.
- Participation also plays a watchdog role. This is because openness and participation tend to reduce the possibility of corruption and may help maintain high standards of behaviour. Participation in the policy management cycle may empower citizens to directly influence public officials, which, in turn, may help to overcome bureaucratic dysfunctionality caused by citizen involvement.

These factors are deeply entrenched in section 59, which guarantees the

role of the National Assembly in the facilitation of public participation. This provision is mirrored by section 72(1)(a) relating to the role of the National Council of Provinces and by section 118(1)(a), which equally entrenches the role of provincial legislatures in the facilitation of public involvement (*Merafong Demarcation Forum v President of the Republic of South Africa* at para 19).

The significance of these provisions was emphasised, and intertwined with the African value system, by Ngcobo J in *Doctors for Life International v Speaker of the National Assembly* 2006 (12) BCLR 1399 (CC), where it was pointed out that

... 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 the *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 [at para 101].

Despite the advantages of participatory democracy highlighted above, it is a truism that the success of participatory democracy depends on the active involvement of people at the lowest level. In order to make the process of participation easier, it is important to address the numerous practical problems involved in participation. Examples of such problems are: language problems, difference in attitudes and expectations, and mutual feelings of distrust, suspicion and resentment. It is also necessary to educate citizens on the range of options — for example, regarding the forums that are available to them in which they can express their views and wishes, and in which they are free to comment on proposed policies. What is important here is to disseminate information so that people at least know about initiatives undertaken by local government officials, and so that they are aware of those policies that emanate from the national or provincial spheres of government.

ACTIVITY 72

- (1) You are a member of a task team created to advise Parliament on whether the recognition of local government is a necessary precondition to the achievement of democratic objectives. Write down the key points that you will refer to in your address to Parliament. (10)

- (2) Brynard lists a number of reasons why public participation at grassroots level is fundamental to fulfilling democratic aspirations. Can you think of at least five reasons why such participation may defeat the desired result? List them. (10)
- (3) List some of the factors that may hamper effective participation at grassroots level. (10)

(This question is an open question and requires you to think beyond the information that we have provided.)

12.4 BRIDGING THE GAP: CHAPTER 7 OF THE FINAL CONSTITUTION

12.4.1 Local government in transformation

Chapter 7 has had a profound effect on the status of local government. Indeed, the constitutional recognition of local government and the vesting of a range of original powers in local authorities have transformed the legal status of local government. For the first time in South African history, provision is made for autonomous local government with its own constitutionally guaranteed and independent existence, powers and functions. This means that the functions of government are not only exercised at national or provincial level, but are also decentralised to local government to take it closer to the people (s 154 of the Constitution).

In *Fedsure v Greater Johannesburg Metropolitan Council* 1999 (1) SA 374 (CC), the Constitutional Court stated:

Under the interim Constitution (and the 1996 Constitution) a local government is no longer a public body exercising delegated powers. Its council is a deliberative legislative assembly with legislative and executive powers recognised in the Constitution itself [at para 26].

The constitutional status of a local government is thus materially different to what it was when Parliament was supreme, when not only the powers but the very existence of local government depended entirely on superior legislatures. The institution of elected local government could then have been terminated at any time and its functions entrusted to administrators appointed by the central or provincial governments. That is no longer the position. Local governments have a place in the constitutional order, have to be established by the competent authority, and are entitled to certain powers, including the power to make bylaws and impose rates.

Chapter 7 is an extension of the principle of cooperative government discussed in study unit 5 of this study guide. The provisions contained in Chapter 7 are designed to promote intergovernmental relations between local and provincial government. Chapter 7 also functions as the

framework for the implementation and application of the new local government legislation (eg the Local Government Municipal Demarcation Act 27 of 1998 and the Local Government: Municipal Structures Act 117 of 1998).

12.4.2 Local government as a “sphere” of government

Section 151 of the 1996 Constitution reads as follows:

- (1) The local sphere of government consists of municipalities, which must be established for the whole of the territory of the Republic.
- (2) The executive and legislative authority of a municipality is vested in its Municipal Council.
- (3) A municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution.

In study unit 5, we discussed section 40 and section 41 of the Constitution. You will remember that these sections state that the Republic is made up of the national, the provincial and the local spheres of government, spheres that are interdependent, interrelated and distinctive. Section 151(1) to (3) reaffirms the status of local government as a structure on its own. The use of the word “sphere” in section 151(1) has two important consequences:

- First, the recognition of local government as a sphere of government means that it cannot be abolished by either the national or provincial governments.
- Secondly, the use of the word “sphere” signifies a shift away from the hierarchical divisions of government authority towards a vision of government in which each sphere has equivalent status, is self-reliant and possesses constitutional latitude to define and express its unique character.

De Villiers states that, in theory, the organisation of government is therefore more of a cooperative, matrix model than a rigid, top-down model as found in classical unitary states, where provincial and local powers are based on decentralisation of powers by the central government. This means that central government no longer has the power to grant, revoke or limit the powers of the lower sphere of government and unilaterally override local government decisions.

12.5 LOCAL GOVERNMENT IN THE CONTEXT OF INTERGOVERNMENTAL RELATIONS

Section 154 of the 1996 Constitution reads as follows:

- (1) The national government and provincial governments, by legislative and other measures, must support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions.
- (2) Draft national or provincial legislation that affects the status, institutions, powers or functions of local government must be published for public comment before it is introduced in Parliament or a provincial legislature, in a manner that allows organised local government, municipalities and other interested persons an opportunity to make representations with regard to the draft legislation.

Section 151(4) of the 1996 Constitution reads as follows:

The national or a provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions.

The principles of cooperative government and intergovernmental relations (ss 40 and 41 of the 1996 Constitution), which, to a large extent, are the constitutional embodiment of the philosophy of *Bundestreue* and federal partnership found in Germany and America, are expressly reiterated in sections 151(4) and 154 of the 1996 Constitution. It is clear that these principles recognise the relational spectrum into which local government is placed. These provisions recognise the interdependence of the three spheres of government and place a duty on them to respect one another's powers, functions and institutions, to cooperate and to coordinate their activities in good faith and mutual trust, to inform one another of new policy measures, to assist one another, and to avoid legal proceedings against one another.

De Villiers states that the principles of cooperative government may seem vague and general, but that, if one takes into account the impact that a nonconstitutional principle such as *Bundestreue* has had on German constitutional law, they may have an even greater direct and substantial impact in the whole system of intergovernmental relations in South Africa and the way in which the Constitutional Court interprets intergovernmental disputes. Section 154(1) reflects the principles referred to above. Study section 154 together with section 155(6), which states that provincial governments have the responsibility to monitor and support local government in their provinces and to promote the development of

local government capacity to enable municipalities to perform their functions and manage their affairs. The legislative and executive setting for the support function is provided in section 155(7), which states that national and provincial governments have the legislative and executive authority to ensure that municipalities are performing their functions effectively. From a legislative perspective, this can be achieved by creating intergovernmental mechanisms in enactments emanating from Parliament or the provincial legislatures.

Parliament has already undertaken to do this by effectively incorporating cooperative features in a number of its enactments: sections 9 and 10 of the Housing Act 107 of 1997; section 13 of the Water Services Act 108 of 1997 (duty to prepare water services development plans as part of integrated planning development); and section 39(5) (all spheres of government must define and make known the required functions and responsibilities of all sectors in relation to land development).

Pimstone states that the monitoring power is conceptually elusive, because it does not bestow additional or residual powers on the provinces to intrude, beyond making sure that local government is complying with the legislative directives or the Constitution itself. Study section 154 together with section 139 of the Constitution, which set out the steps that the provincial government can take where a municipality cannot or does not fulfil an executive obligation stipulated in the legislation.

The inform-and-consult obligation in section 154(2) emerges as a duty on national and provincial spheres. The recognition and participation of organised local government, which is facilitated by section 163 of the 1996 Constitution, play an important role in bolstering the status and integrity of local government. Organised local government plays a consultative role in the following forums:

- Organised local government, in the form of ten part-time representatives chosen to represent the different municipal categories, is entitled to participate in the proceedings of the National Council of Provinces (although such representatives do not have voting rights). This allows local government to have a small say in the national legislative process that relates to concurrent provincial and local matters. Study section 163 together with section 67 of the 1996 Constitution.
- Organised local government, through two nominees, is entitled to serve on the Financial and Fiscal Commission. This is another area where local government is given the opportunity to address issues relating to the equitable division of nationally raised revenue among the provinces and local government, to the regulation of provincial and local fiscal powers, and to the regulation of provincial and municipal loans and loan guarantees. Study section 163 together with section 221 of the 1996 Constitution.

- A national Act must provide for the establishment of national and provincial organisations to represent the interests of municipalities.

Section 163 must be read together with a number of other provisions in the Constitution, which set out the various levels at which local government is involved with a view to finding sustainable ways to meet the social, economic and material needs of the people and improve the quality of their lives. This provision affirms the importance of cooperative governance in the regulation of intergovernmental relations. The essence of intergovernmental relations is given effect to by the adoption of the Intergovernmental Relations Framework Act 13 of 2005. This Act seeks to:

establish a framework for the national government, provincial governments and local governments to promote and facilitate intergovernmental relations; to provide for mechanisms and procedures to facilitate the settlement of intergovernmental disputes; and to provide for matters connected therewith [see the long title of the Act].

The significance of intergovernmental relations was endorsed by the Constitutional Court in *In re the Certification of the Constitution of the Republic of South Africa 1996* (10) BCLR 1253 (CC). The Court held that:

the constitutional system chosen by the [Constitutional Assembly] (CA) is one of cooperative government in which powers in a number of important functional areas are allocated concurrently to the national and the provincial levels of government. This choice, instead of one of “competitive federalism” which some political parties may have favoured, was a choice which the CA was entitled to make in terms of the [Constitutional Principles] ... all spheres of government and all organs of state within each sphere must adhere to the principles of cooperative government and inter-governmental relations set out in that section ... these principles, which are appropriate to cooperative government, include an express provision that all spheres of government must exercise their powers and functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere [at paras 287–289].

Intergovernmental relations play an invaluable role in representing local government interests at national and provincial levels. Section 4 of the Organised Local Government Act 52 of 1997 allows for consultation with the South African Local Government Association, which was established in November 1996 to represent, promote and protect the interests of local government. Study section 163 together with section 154(2) of the 1996 Constitution.

A constitutional and legal framework for cooperative government has been created by the 1996 Constitution in order to provide local government

with the basis for interacting with the national and the provincial government, but the political culture supporting such interaction will take time to develop. The capacity of any sphere of government to function in such an interactive manner depends on the following: the legal allocation of power, financial and managerial capacity, the interpretation of the powers of the other spheres of government, and the extent to which local government actions are controlled and regulated.

ACTIVITY 73

Read the following passage:

Two ratepayers, Daniel and Pumi, live in the Sandton area. They approach you with the following problem: Parliament has enacted section 21 of the Local Government Amendment Act, which has a direct impact on the general valuation of property in the Sandton area, and the rates based on those valuations. Daniel and Pumi indicate that they had no knowledge that such an enactment had been proposed, nor were they given an opportunity to express their views on the said Act prior to it coming into operation.

Now attempt the following task:

- Advise Daniel and Pumi on whether they can challenge the constitutionality of the said Act, and, if so, on what basis such a challenge can be brought. (10)

To answer this question, you have to do the following:

- Determine whether Parliament is sovereign under the new dispensation. If Parliament is not sovereign, then you must determine the status of the local sphere of government under the 1996 Constitution.
- Determine the mechanisms that are in place to assist the local sphere of government in achieving its full potential.

Refer to the *Robertson* case in your answer.

12.6 "AUTONOMOUS LOCAL GOVERNMENT" VERSUS "ADMINISTRATIVE HANDMAIDEN"

So far, we have discussed some of the provisions in the Constitution which confirm that local government is an autonomous sphere of government which has a seminal role to play in the democratisation process. We shall now highlight those provisions which are linked to the objects, powers and duties of local government and which tend to suggest that local government is, in fact, nothing more than an administrative "handmai-

den” of the other spheres of government. Your task is to determine whether you agree or disagree with this submission after you have studied the following sections of the Constitution:

- section 156(3), which states that local government cannot legislate in conflict with national and provincial legislation
- section 156(4), which states that national and provincial government must assign to local government (Schedules 4 and 5, part A) those local government matters that would be most effectively administered locally, and where the local government structure has the capacity to administer it
- section 156(5), which gives municipalities any power reasonably necessary for, or incidental to, the effective performance of their functions

Pimstone states that this is an unfortunate definition, that suggest that local government is nothing more than the administrative arm of the other spheres of governments, because it gives the impression that local government plays a predominantly administrative role, which is at odds with the description of local government as a sphere that is relatively autonomous, and one that enjoys expansive or original powers.

ACTIVITY 74

- (1) Study the article by Wiechers and Budhu, which appears in your *Reader*, and then answer the questions that follow:
 - (a) Critically evaluate whether you agree with the authors’ submission that local government is an important vehicle designed to bring development to the people. (10)
 - (b) Briefly discuss the approach that the Courts have adopted in dealing with local government matters. Refer to relevant case law to substantiate your answer. (10)
 - (c) Briefly explain the practical consequences that have resulted since the establishment of local government autonomy. (10)
 - (d) Critically analyse whether local government is indeed autonomous or simply the “handmaiden” of the other spheres of government. (10)
 - (2) Summarise, in your own words, what the Constitutional Court stated in the *Fedsure* case. (5)
 - (3) Compare the effect of the term “sphere” with the term “level” of government and explain the implications of each concept for the institutional status of local government. (6)
 - (4) Name at least two institutions in which local government plays a consultative role. (4)
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12.7 ESTABLISHMENT OF MUNICIPALITIES

Read section 155 of the 1996 Constitution.

Local government is characterised by municipalities. Section 151(1) of the 1996 Constitution states that municipalities must be created for the entire Republic. The Constitution expressly states that different categories of municipalities must be set up in the different regions. The Local Government: Municipal Structures Act of 1998 defines the different types of municipalities that may be established in each category. Examples of the different types of municipalities are as follows:

- local councils or city councils
- metropolitan councils
- district councils
- rural councils

There are about 300 local government institutions in South Africa.

12.8 COMPOSITION AND ELECTION OF MUNICIPAL COUNCILS

See study unit 7 for a discussion of electoral systems.

Section 157 governs the composition and election of Municipal Councils. It is important to note that proportionality is the overriding principle in terms of which municipal councillors must be elected. The Local Government: Municipal Structures Act of 1998 gives effect to this principle by providing that municipal elections may be held either in terms of a list system or a proportional electoral system combined with ward representation.

Read section 158, which states who may be elected as municipal councillors.

12.9 POWERS VESTED IN LOCAL GOVERNMENT

Constitutional law commentators agree that the local sphere of government no longer plays a predominantly administrative role in government. This is confirmed in section 151(2), which provides that legislative and executive authority of a municipality is vested in its Municipal Council.

This view was also confirmed in *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1998 (12) BCLR 1458 (CC), where the Court pointed out that a local government is no longer a public body exercising delegated powers. Instead, local government is a deliberative assembly with legislative and executive powers recognised in the Constitution itself.

You may read this section.

Section 156 sets out the powers and functions of a Municipal Council.

The institution of traditional leadership is also not left out in the regulation of public issues at local level. This role can be traced back to the Constitution, as entrenched in section 212(1), which requires the adoption of national legislation to deal with matters affecting traditional leadership; hence the adoption of the Framework Act of 2003, which sets out the specific role of the institution in the new dispensation.

12.10 SELF-ASSESSMENT QUESTIONS

- (1) Discuss the reason behind the creation of local government as an “autonomous” sphere of government. (5)
- (2) Explain the importance of involving people at grassroots level in the functioning of government. (10)
- (3) Describe, giving an example, the effect of Chapter 7 of the 1996 Constitution on the legal status of local government. (5)
- (4) Compare the term “sphere” with the term “level” of government and explain the connotation of each term in constitutional law.
- (5) Review local government in the context of intergovernmental relations. (5)
- (6) Discuss whether local government is nothing more than an administrative “handmaiden”. (10)
- (7) Briefly discuss the composition, functioning and powers of the local sphere of government. (8)
- (8) Explain why the institution of traditional leadership is also essential for the regulation of public affairs at local level. (10)

12.11 CONCLUSION

From the above discussion, it is clear that the recognition of local government as an autonomous sphere of government is necessary to improve the quality of life experienced by members of the community and to give community members a sense of involvement in the political processes that govern their daily lives. If they are to live up to their promises, the national and provincial spheres of government must do all that they can to develop the capacity and integrity of municipalities. In the *Certification* judgment, the Constitutional Court held that:

what the NT [New Text] seeks hereby to realise is a structure for LG [local government] that, on the one hand, reveals a concern for the autonomy and integrity of LG and prescribes a hands-off relationship between LG and other levels of government and, on the other, acknowledges the requirement that higher levels of government monitor LG functioning and intervene where such functioning is deficient or defective in a manner that compromises this autonomy. This is the necessary hands-on component of the relationship [at para 373].

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