

CONSTITUTIONAL LAW NOTES:

CHAPTER 1

Sources of constitutional law

Binding sources

1. The constitution: is a body of rules, which govern the exercise of state authority, as well as the relationships between citizens of the state and organs of state.
2. Legislation
3. Common law: is the unwritten law of SA, in the sense that it isn't contained in legislation.
4. Case law: is the practical application of constitutional principles.
5. International law: S39 (1) states that courts MUST consider international law.

Non-binding sources:

1. Academic writings
2. Policy documents
3. Foreign law

The Birth of the constitution

BEFORE 1994: SA law was characterized by a culture of authority. Parliament commanded law and there wasn't room for individuals to challenge government action.

People were expected to obey what the government dictated.

Parliament was sovereign, so laws could be adopted even if they were unfair or discriminatory and these laws couldn't be challenged in court.

The only judicial review was to ensure that parliament followed the correct procedure when adopting the law.

This apartheid regime led to the fact that SA became isolated internationally.

So multi party negotiations were held – these looked at what should be included in the constitution and the way that it should be adopted.

2 contradictory positions:

1. Former liberation movements insisted that the new constitution would only be legitimate if it was adopted by a democratically elected body (**majority**)
2. Other groups were afraid that a constitution adopted by a democratically elected representative wouldn't address the fears of **minority** groups and might result in tyranny of the majority.

2-stage process:

1. An interim government would govern the country while the final constitution was being drafted
2. The text would comply with guidelines (CP) determined beforehand by the negotiating parties.

To solve this, a **democratic election** was held to adopt a **constitutional assembly**, who would adopt the final constitution in accordance with the **constitutional principles**. They made a solemn pact that the new text of the constitution would comply with the CP. The constitution then needed to be certified by the **constitutional court**

5 respects in which the 93 and 96 constitutions represent a radical break from the previous constitutional dispensation:

1. A constitutional democracy based on the supremacy of the constitution protected by an independent judiciary
2. A democratic system of government founded on openness, accountability and equality, with universal adult suffrage and regular elections
3. A separation of powers between the legislature, executive and judiciary
4. The need for appropriate checks on governments power
5. The enjoyment of all universally accepted fundamental rights.

Concepts of constitutional law

CONSTITUTIONAL LAW: is the sum total of binding rules relating to the distribution and exercise of state authority. The rules of constitutional law define the relationship between organs of state and between organs of state and individuals

Constitutional law is part of **public law**:

Public law: that branch of law, which regulates the exercise of state authority in relationships of inequality

Private law: is said to govern the relationships between people who are on equal footing

The dividing line between public and private law has become blurred:

1. The state has become involved in private relationships – employer and employee, landlord and tenant and husband and wife.
2. The constitution states that private relationships are often unequal – bill of rights apply to private relationships
3. Public functions have become increasingly privatized – Telkom and Transnet

FLEXIBLE AND INFLEXIBLE CONSTITUTIONS

Flexible constitution: enjoys the same status as the other laws of the country and requires no special procedure for amendment e.g. SA constitution of 1961

Inflexible constitution: enjoys superior status to the ordinary laws of the land and require a special amendment procedure.

E.g. SA 1996 constitution

S74:

1. S1 may be amended by a bill passed by:
 - a) 75% of the NA
 - b) 6 provinces in the NCOP
2. Chapter 2 may be amended by a bill passed by:
 - a) 2/3 of the NA, and
 - b) 6 provinces from the NCOP
3. Any other provision of the constitution can be amended by a bill passed:
 - a) By 2/3 of the NA and
 - b) 6 of the provinces of the NCOP, if the amendment:
 - (i) Relates to a matter that affects the council
 - (ii) Alters provincial boundaries, powers or functions
 - (iii) Amends with a provision which deals with a provincial matter

SUPREME CONSTITUTION AND ONE THAT ISNT SUPREME

Supreme constitution:

- a) Ranks above all other laws in a state
 - b) Any law which is inconsistent with it will be declared invalid
 - c) Its usually also inflexible (not always)
- E.g. SA 1996 constitution

Constitution, which isn't supreme:

- a) Doesn't enjoy any special status when compared to other laws
 - b) The legislature can pass laws, which are inconsistent with the constitution. The courts cant question the validity of such laws, provided the correct procedure has been complied with
 - c) Its usually flexible
- E.g. Britain

When a constitution isn't supreme, parliament is supreme.

AUTOCHTHONOUS AND ALLOCHTHONOUS CONSTITUTIONS

Autochthonous: are said to be indigenous and allochthonous are borrowed constitutions.

Van der Vyver said there are 3 kinds of constitutions:

1. Reactive constitution: which was the result of specific problems in the past and which seeks to resolve those problems = indigenous
2. There are constitutions which are intended to maintain the continuity with established norms in legal tradition of the society concerned – indigenous
3. Superimposed constitutions: the contents of the constitution are unrelated to the history of the country concerned

SA constitution is generally described as indigenous in the sense that it was a product of negotiations between representatives of political parties. BUT the drafters of the constitution drew upon the constitutional experience of a number of countries and were also influenced by international law.

STATE

features:

1. Geographically defines territory
2. Community of people who live on the territory
3. A legal order
4. An organized system of government to uphold legal order
5. Separate political identity

GOVERNMENT

The state is the permanent legal entity, while the government is the temporary bearer of state authority – the government represents the state at a certain time.

SOVERIGNTY

sovereign state in international law refers to states, which are independent – the state isn't subject to the authority of another state.

IDEAS IN CONSTITUTIONAL LAW

CONSTITUTIONALISM: refers to a government in accordance with the constitution. The government derives its powers from and is bound by the constitution. The government's powers are limited by the constitution.

THE RULE OF LAW

According to Dicey the rule of law rests on the following 3 premises:

1. The absence of arbitrary power: no one is above the law and no one is punishable except for a distinct breach of the law
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

RECHSTAAT

Refers to a government by law and not by force.

Formal rechstaat: requires compliance with:

1. Due process
2. Separation of powers
3. Legal certainty

Material Rechstaat: the state authority is bound by higher legal values, which are embodied in the constitution.

With the adoption of the 96 constitutions SA in addition to being a formal rechstaat also became a material one.

Constitutional mechanisms to curb the powers of the government:

1. Bill of rights
2. The constitution is subject to judicial review
3. Democratic elections of representatives to parliament
4. Collective and individual responsibility of cabinet to parliament
5. Separation of powers between the legislature, executive and judiciary
6. An independent judiciary
7. The demarcation between the national and provincial spheres of government
8. Civil control of the military

DEMOCRACY:

S1 of the constitution proclaims that SA is a democratic state.

Democracy is derived from ancient Greek words *demos* (the people) and *Kratos* (strength) – this implies that a democracy is a government by the people.

In a democracy the right to govern doesn't vest in a single person but in the people as a whole.

Democracy includes free political discussion, the toleration of differences between people and the right of all citizens to participate in political decision-making.

Forms of democracy:

Direct democracy: means that all the major political decisions are made by the people themselves – may work in a small community where the people can meet on a regular basis and decide matters.

Representative democracy: the citizens of the state elect a representative of their choice and then the representative exercises the wishes of the people. It demands all the inhabitants of the state should via direct representation, have a say in which the state is governed – usually by being represented in the legislature. It's created by elections, which need to be held at regular intervals.

Criticisms:

The people can't be said to govern in any real sense if they go to the polls once every 4 or 5 years to elect representatives who are free to govern as they see fit and aren't obliged to consult the public on NB issues.

It's also weakened by certain groups and individuals – they finance election campaigns.

On the other hand it's stated that it's the only workable form of democracy in modern times – elections are still powerful mechanisms to keep a government accountable to the people – if a government loses sight of the concerns of the population they are unlikely to be re-elected.

Plus separation of powers, freedom of the press and freedom of information may prevent any single group from becoming too strong and promote democratic debate and competition.

Features:

1. Free and regular elections (4 or 5 years)
2. Multi party system
3. Universal adult suffrage
4. The protection of minorities
5. Mechanisms to ensure the accountability of government to the electorate.

Constitutional democracy:

In addition to being a representative democracy SA is also a constitutional democracy. This means that the people's representatives in parliament, in the provincial legislatures and in municipal councils aren't free to make whatever laws they wish, but are bound to observe the values in the constitution. Laws that are inconsistent with the constitution will be declared invalid.

Parliamentary and presidential systems of government:

Presidential system	Parliamentary system
<ol style="list-style-type: none">1. The head of government is also head of state (SA)2. The head of government isn't a member of the legislature and isn't responsible to it3. The head of government is elected directly by the people	<ol style="list-style-type: none">1. The head of state and head of government are 2 different people2. The head of government and his cabinet are members of the legislature and are responsible to it3. The head of government is the leader of the party with a clear majority in parliament (SA)

CHAPTER 2 **SEPERATION OF POWERS**

The separation of powers and checks and balances

Legislature: is the power to create, amend and repeal legal rules

Executive: is the power to execute and enforce legal rules

Judiciary: is the power to interpret legal rules and apply such rules to concrete situations.

Separation of powers:

Montesquieu is regarded as the father of the doctrine of separation of powers (Trias politica), according to the traditional view, the doctrine separated executive, legislature and judiciary. According to him there can be no political freedom in a country where one person makes the law, enforces the law and provides sanctions when the law is contravened.

Carpenter states that the doctrine implies the following:

1. The formal division of state authority into the legislature, executive and judiciary
2. Separation of personnel so that one person shouldn't simultaneously perform in more than one branch of government
3. Separation of function: so that one branch cant usurp on the powers and functions of the other branches
4. Checks and balances: with each branch of government given specific powers to restrain other branches and therefore achieves equilibrium among the 3 components of government authority.

Certification Case: it was argued that the new constitutional text didn't comply with one of the constitutional principles, which requires the separation of powers with checks and balances – cabinet members remain members of parliament.

The court found that there was no universal model for the separation of powers.

The overlap between the legislative and executive in the new constitution serves an NB check and balance = it ensures accountability of the executive towards the voters.

The CC has shown that it won't accept the unconstitutional usurpation of function of one branch of government by another.

Executive council of Western Cape: the court invalidated a provision in an Act, which authorized the president to amend or repeal the provisions of certain legislation.

SA constitution provides for **checks and balances**. The most NB is judicial review, which allows legislative or administrative action to be

tested for validity in court. The judiciary must ensure government acts comply with procedural and substantive requirements of the constitution.

Minister of Health and Others v TAC and Others 2002 (5) SA 721 (CC)

The High court held that the executive didn't address the need to reduce the transmission from mother to child of HIV in pregnant woman.

There was a violation of rights in the BOR in terms of S27 the right to health care and S28, which involves the rights of children

It was argued that they didn't make provision to make the drugs available and they didn't make time for the national programme.

The executive argued that this would amount to the infringement of separation of powers, as the making of policy is a prerogative of the executive and not the judiciary.

The judiciary must apply the law impartially and respect the BOR and any action/ policy, which is inconsistent with the constitution, must be declared invalid to the extent of the inconsistency.

There is also a requirement on the executive to respect and include socio economic rights.

Where there is a breach of socio economic rights the court can give appropriate relief

Representative democracy and the separation of powers

The 93 constitution established a representative democracy in SA. The 96 constitution guarantees the right of all citizens over 18 to vote in democratic elections and provides for direct election of representatives in the national, provincial and local sphere of government.

SA is also a constitutional democracy – the people's representatives in parliament, municipal councils and provincial legislatures aren't allowed to make any law they wish, they were bound to observe the values in the constitution.

Laws inconsistent with the constitution will be invalid. It may be argued that this is undemocratic.

Arguments to defend judicial review:

1. SA constitution was made by the representatives of the people in the constitutional assembly. It had to be adopted by 2/3 majority of the CA and it came from lengthily negotiations and democratic deliberation.
2. Democracy presupposed political debate, in which citizen's feel they can state their views and challenge-accepted beliefs.
Judicial review may contribute to this

3. Judges may enquire into the constitutionality of legislation, but they don't substitute their view for those of the legislature. If a judge strikes down a law as unconstitutional she doesn't make a new law. The legislature may amend the law – the only condition being that it must be constitutional.

	<u>Legislature</u>	<u>Executive</u>
<i>National</i>	Parliament: a) NA and b) NCOP	President And Cabinet (ministers)
<i>Provincial</i>	Provincial legislature	Premiers of the provinces and MEC's
<i>Local</i>	Municipal Council	Municipalities

CHAPTER 3

NATIONAL LEGISLATURE

Legislative authority is the power to enact and repeal rules of law – this power is vested in parliament (the NA and the NCOP)

Parliament consists of 2 houses: the NA and NCOP

Reasons for having 2 houses:

1. Better representation in heterogeneous societies – if the constitution of the 2nd house differs from that of the 1st it could be that interests which aren't represented adequately in the one house are in the other
2. Parliaments workload is reduced
3. More thorough consideration of matters is promoted

Functions of the NA:

S42 (3):

1. Representation of the electorate
2. Election of the president
3. Public consideration of issues
4. Passing legislation
5. Scrutinizing and overseeing executive action

Functions of the NCOP:

S42 (4):

1. Representation of provinces in the national sphere of government
2. Participation in the national legislative process
3. Public consideration of issues effecting the provinces

ELECTIONS:

Explain with reference to case law: the circumstances under which adult citizens may be deprived of their right to vote:

S19 (3) (a) of the constitution guarantees the right of every adult citizen to vote. In the August case the issue of the voting of prisoners came before the court. It was held that the electoral commission wasn't obliged to ensure that awaiting trial and sentenced prisoners may vote in general elections.

The constitution provides that one of the values of a sovereign democratic state of the RSA was based on universal adult suffrage. Unlike the interim constitution, the above sections don't contain provision-allowing disqualification from voting to be prescribed by law. If parliament wants to limit the right of adult suffrage it will have to do so in terms of S36 – it must be reasonable and justifiable in an open and democratic society based on human dignity equality and freedom.

In the 1st democratic elections, parliament determined all prisoners could vote with some exceptions, the interim constitution didn't expressly disqualify prisoners from voting, but stated that disqualifications could be prescribed by law.

The 1993 Electoral Act: declared that no person will be entitled to vote who was convicted of murder, rape, robbery with aggravating circumstances or an attempt to commit these crimes, therefore all other prisoners were allowed to vote.

The 1998 electoral act: any citizen in possession of an ID may apply for registration as a voter – the following are disqualified:

1. Persons who applied for registration fraudulently or in a way other than the prescribed manner
2. Persons who aren't SA citizens
3. Persons declared mentally ill by the high court
4. Persons detained under the Mental Health Act
5. Persons not normally resident in the district where registration was applied for

Prisoners weren't disqualified.

The right of every adult SA citizen to vote is given in unqualified terms – prisoners therefore have the right to vote as [parliament hasn't passed any law limiting such a right.

The basic arguments of the respondents was that although prisoners right to vote remained intact, they had lost their rights through their own misconduct – the judge accepted this argument.

No provision was made in the 98 Electoral Act or the Commission Act to enable prisoners to exercise their right to vote.

The commission didn't make any arrangements to enable prisoners to vote. There was no disqualifying legislative provision; therefore the respondents couldn't justify infringements of prisoner's rights to vote.

Enfranchisement of prisoners could be achieved by setting up polling stations in prisons or by giving special votes to prisoners

It was contended that the commission's resources were strained by making arrangements for prisoners, as the same would have to be done, i.e. for persons who are poor and live in remote areas.

Parliament can't deprive prisoners of their right to vote by silence and can't empower the commission or its court to disqualify certain prisoners by its silence.

The task of the court is to ensure that fundamental rights and democratic processes are protected.

In the New National Party of SA: the issue was that only people with bar coded ID's were allowed to vote, the majority of the court found he requirement wasn't unconstitutional.

In August: the constitutionality of the conduct of the Electoral Commission was at issue and in the NNP case: the constitutionality of an act of parliament was at issue.

Minister of Home Affairs v NICRO and Others

The CC upheld an order declaring provisions of the Electoral Act to be inconsistent with the Constitution and invalid = deprive prisoners serving a sentence of imprisonment without the option of a fine of the right to register and vote in the upcoming elections.

The right to vote is entrenched in the constitution and is NB for democracy - Any limitation of this right must be supported by clear and convincing reasons.

Arrangements for registering voters have been made at all prisons in order to accommodate awaiting trial prisoners and those serving sentences because they have not paid the fines imposed on them

HELD: that there was nothing to suggest that expanding these arrangements to include prisoners sentenced to imprisonment without the option of a fine would in fact place an undue burden on the resources of the Electoral Commission.

Minister argued that by allowing them to vote it would send a bad message to the public – i.e. that the government didn't punish a convicted person adequately.

COURT: looked at the fact that a number of prisoners would lose the right to vote for minor transgressions and others may have the right to appeal.

It was ordered that the Electoral Commission ensures that all prisoners, who are entitled to vote, following the declaration of invalidity of the various sections of the Electoral Act, are afforded a reasonable opportunity to register as voters for, and to vote in, the forthcoming general election in April 2004.

PROPORTIONAL AND TERRITORIAL REPRESENTATION

Territorial representation: a person is elected by people in a particular geographical area (constituency) to represent them in parliament.

Proportional representation: all parties participating in the election get representation corresponding with the votes obtained with those parties in the election.

Advantages and disadvantages of territorial representation:

advantages

1. Simple
2. Conducive to a strong and stable government
3. Results in a closer bond between the representative and the voter, as the representative represents a particular geographical constituency. Voters in the area can complain to their representative in parliament

Disadvantages

1. Incorrectly reflects the strength of the parties
2. Favors the stronger parties to the detriment of the weaker parties
3. Artificial delineation of constituencies can give rise to an imbalance between constituencies

Advantages and disadvantages of proportional representation

Advantages

1. Provides for reflection of the voters opinion
2. Eliminates problems in respect of delimitation of electoral districts
3. All votes carry the same weight
4. Accommodates wider representation of parties than territorial representation
5. Minorities can form coalitions against the majority parties and therefore avoid dominance by the majority

Disadvantages

1. May lead to a weak unstable government as it may be impossible for one party to obtain absolute majority
2. No contact between the voter and the representative
3. Often complicated
4. Often fails to produce a clear majority
5. By-elections don't operate as indicators of political trends

SA adopted proportional representation – the “96” constitution leaves it to an Act of Parliament to spell out the electoral system and specifies that the system must result in proportional representation.

FREE AND IMPERATIVE MANDATE: FLOOR CROSSING

Free mandate theory: a member of parliament isn't bound by the mandate given to him by the electorate but he must act in accordance with his own conscience and the interests of the country as a whole.

Imperative mandate theory: a member of parliament is bound by the mandate given to him by his principal (the electorate) – if he disagrees with his party he must vacate his seat.

Does SA follow a free or imperative mandate theory?

The interim constitution provided for an imperative mandate – a member of parliament wishing to cross over to another party had to vacate his seat in parliament – this gave rise to criticism.

The '96' constitution doesn't provide that a member of parliament who crosses to another political party has to vacate his seat, therefore the constitution restores the concept of free mandate. BUT imperative mandate is still in force, it applies to members elected in the 1st election in terms of the '96' constitution.

UDM case:

4 acts of parliament

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 in which they could change party allegiance without losing their seats
2. The amendments make provision for a 15 day period in September of the 2nd and 4th year after a general election when the members are allowed to cross the floor without losing their seats
3. Parties that are represented in parliament are entitled to merge or separate during those periods
4. Permission to cross the floor and for parties to divide is only required if at least 10% of the members of the party defect or break away

PARLIAMENTARY PRIVILEGES

These are to protect parliament from outside interference – they include:

- Privilege of parliament to punish people for contempt and determine their own procedures
- The freedom of members to say anything in parliament without fear that they will be held liable in court

Privileges under the '96' constitution

- The NA can determine and control its own internal arrangements, proceedings and procedures and to make rules and orders concerning its business
- Parliament can summon people to give evidence and submit documents
- They can enforce their own internal disciplinary measures for contempt of parliament – examples of contemptuous behavior are disorderliness, failure to comply with an order of parliament, perjury etc
- Members of parliament may not vote on any matter in which they have a financial interest

The privileges of SA parliament are regulated by the Powers and Privileges of Parliament Act.

In the **De Lille case**: which dealt with the question whether the exercise of parliamentary privileges is subject to the constitutional review power of the courts – YES.

De Lille was suspended from the NA after making allegations that certain ANC officials had been spies for the apartheid regime. Counsel for the NA argued that the assembly had exercised a parliamentary privilege to control its own affairs and that the exercise of the privilege wasn't subject to the review power of the courts. The judge said that parliament could not confer on itself any powers not given to them by the constitution expressly or by necessary implication.

He concluded that the exercises of parliamentary privileges must be consistent with the constitution. It's a constitutional power and isn't immune from judicial review. It was found that De Lille's suspension amounted to an unjustified infringement of her constitutional rights to freedom of speech, just administrative action and access to the courts.

A suspension of a member of parliament for contempt isn't consistent with the requirements of a representative democracy – that would be a punishment which was calculated to penalize not only the member but also his party and members of the electorate who voted for that party and who are entitled to be represented in the assembly.

Role of committees:

it's unrealistic to expect the houses of parliament to attend to all parliamentary matters. Therefore committees can be charged to perform functions on behalf of parliament.

Examples of the role of committees:

1. Portfolio committees in the NA – health, safety, security, etc
2. Select committees in the NCOP
3. Committees on public accounts in the NA – consider financial statements of all executive organs of state

MAKING OF BILLS BY PARLIAMENT

S74: BILLS AMENDING THE CONSTITUTION

SA constitution is inflexible so it requires special procedures and majorities for amendment. The reason for this is to make sure the constitution isn't amended without careful consideration of the issues involved

S74 prescribes the requirements for amendment:

1. S1 – may be amended by a bill passed by:
 - a) The NA with a 75% majority of the members
 - b) The NCOP – 6/9 provinces supporting the vote
2. Chapter 2 may be amended by:
 - a) Na with a 2/3 majority vote of members
 - b) NCOP – 6/9 provinces supporting vote
3. Any other provision in the constitution may be amended by a bill passed by:
 - a) NA with a 2/3 majority
 - b) NCOP – 6/0 provinces supporting vote if the amendment:
 - i. Relates to a matter affecting the council
 - ii. Alters provincial boundaries, powers, functions
 - iii. Amends a provision dealing with a provincial matter

S76: ORDINARY BILLS AFFECTING THE PROVINCES

It's important for parliament to identify an ordinary bill as affecting or not affecting the provinces. If a bill affecting the provinces is passed as a bill not affecting the provinces or visa versa the bill isn't properly enacted and doesn't become law.

I

in the Liquor Bill Case: the court stated that any Bill whose provisions fall within schedule 4 must be dealt with under S76

S76 (1) deals with the adoption of bills that have been passed by the NA. Such bills must then be referred to the NCOP.

S76 (2) deals with bills passed by the NCOP; such bills must then be referred to the NA.

If both houses pass a bill it is sent to the president for assent.

S76 (1) (d): if the COP rejects the bill or the NA won't pass the amended bill, the bill is referred to the **mediation committee** which may agree on:

- The bill as passed by the NA
- The amended bill by the NCOP
- Another version of the bill

If the NCOP still doesn't pass the bill the NA has the power to override them with a 2/3 majority. In which case the bill is then sent to the president for assent.

If the president has reservations regarding the constitutionality of such a bill, he may refer it to the constitutional court.

If it's found to be constitutional, president must assent to it, he has no discretion.

When the NCOP votes each province has a single vote and the bill must be passed by 6 of the 9 provinces.

S75 ORDINARY BILLS NOT AFFECTING THE PROVINCES

Bills not affecting the provinces may be introduced in the NA and NCOP.

If the bill is passed by both houses it's sent to the president for assent.

There is no mediation committee.

The NA may still pass a bill, which has been rejected by the NCOP without co-operation from the NCOP.

When the NCOP votes in S75 each delegate in a provincial delegation has one vote and the question is decided on the majority of votes passed.

PRESIDENTS POWERS IN TERMS OF S79:

When the president may refer a bill to the constitutional court for a decision on its constitutionality: Liquor Bill case: The liquor bill was in the NA. It passed through the various legislative stages in terms of S76 before parliament approved it.

When the bill was sent to the president for assent he declined to approve it, as he had reservations about its constitutionality, so it was referred back to the NA.

The NA then returned it to the president but they had made no amendments to it.

The president referred the bill to the constitutional court in terms of the powers given to him in S84.

The court dealt with 2 issues

1. Circumstances under which the president may refer the bill to the constitutional court
2. The scope of the courts power to consider the constitutionality of the bill
3. Referral by the president before a bill becomes a statute

The constitution embodies 3 routes to judicial consideration of the constitutionality of legislation passed by parliament:

- a) A challenge by an interested party in a competent court under the provisions of the constitution
- b) An application by at least 1/3 of the members of the NA to the constitutional court for an order declaring all or part of an Act of parliament unconstitutional
- c) Referral by the president before a bill becomes a statute

If the president refers a bill to the constitutional court 3 questions must be answered:

1. Must the court only consider the presidents reservations or can it direct wider attention – the court considers only the president reservations
2. Should the court examine every provision to certify that every part accords with the constitution – NO the court must 1st consider the reservations of the president
3. Does the courts finding in respect of the constitutionality of the bill mean that its provisions cant be adjudicated after its enactment – even if the court does decide that the bill is constitutional, supervening constitutional challenges after its enactment aren't excluded.

LIMITS ON PARLIAMENT TO MAKE LAW

1. Fundamental rights limitations: parliament is bound by the bill of rights and may not limit the rights unless it's in accordance with S36.
2. Federalism limitations: S40 divided into the national, provincial and local, which are distinctive, interdependent and interrelated
3. Separation of powers limitations: parliament can't usurp powers of the executive or judiciary or aloe them to usurp its own powers.
4. Delegation limitations
5. Limitation on the power to amend the constitution
6. Procedural limitations
7. Extra parliamentary consultation: the constitution provides that certain categories of bills may be passed by parliament unless certain bodies have been consulted or have had an opportunity to make representations before.

DELEGATION: FEDERALISM LIMITATIONS

It's accepted in modern democracies that parliament can't attend every task it's enjoined to perform – it normally drafts in skeletal form. Discuss delegation of legislative authority and discuss whether parliament may delegate its functions to the executive and provincial legislature.

Parliaments often leave it to their provincial legislatures or members of the national executive to fill in gaps in preliminary legislation by means of proclamations or regulations.

Delegation is necessary, as the legislative process is such a time consuming process.

DELEGATION TO THE EXECUTIVE

Power to MAKE law:

Executive Council of Western Cape: the issue of delegation of legislative authority arose. The authority of parliament to delegate its law making functions is subject to the constitution.

Here the power was delegated to the executive to make: **subordinate legislation** may be exercised within the framework of the statute under which authority is delegated

The competence of parliament to delegate was recognized by the court in this case. The court held that there is nothing in the constitution-prohibiting parliament from delegating subordinate regulatory authority to another – it's necessary for effective law making

Power to AMEND law:

Chaskelson: said there was a difference between delegating authority to make subordinate legislation and assigning plenary powers. Subordinate legislation: power to make and implement laws for the republic.

Plenary power is the power to amend or repeal legislation.

Legislature may delegate subordinate legislation to the executive but not plenary power.

DELEGATION TO THE PROVINCIAL LEGISLATURE

In respect of delegation of legislative power to **provincial legislatures** S44 authorizes the NA to assign any of its powers, except the power to amend the constitution to any legislative body in another sphere of government.

BASIC STRUCTURE DOCTRINE

Does the basic structure doctrine apply in SA?

This doctrine originated in India, where the Supreme Court held that there are certain implied limitations on the power of parliament to amend the constitution.

The substance of the doctrine is that parliament is limited in its power, in that it can't amend the basic structure of the constitution. SA hasn't adopted the basic structure doctrine. A reason why this doctrine can't be adopted is that S74 contemplates an amendment of S1 – which sets out the founding values of SA.

If the founding values are amendable by a 75% majority in the NA and support of 6 provinces in the NCOP.

CHAPTER 4

EXECUTIVE AUTHORITY

Executive authority: this involves the power to execute and enforce legal rules

- In the national sphere this power is vested in the president and his cabinet
- In the provincial sphere it's vested in the premier of the province with other members of the executive council
- In the Local sphere it's vested in the municipal council.

POWERS OF THE PRESIDENT

S84 (1): the president has powers entrusted in him by the constitution and legislation including those necessary to perform the functions as head of state and head of the national executive

S84 (2): the president is responsible for:

- a) Assenting to and signing bills
- b) Referring a bill to the NA for reconsideration of constitutionality
- c) Referring a bill to the constitutional court for a decision on its constitutionality
- d) Summoning the NA, NCOP or parliament to an extraordinary sitting to conduct special business.

S85 (2): president exercises executive authority together with other members of cabinet. The exercise of executive authority isn't the sole responsibility of the president – members of cabinet are individually and collectively responsible for executive decisions.

S84: the president has only powers conferred on cabinet ministers.

PRESIDENTS PEROGATIVES:

A prerogative is a discretionary power exercised at will – they are common law discretionary powers possessed by the leader of a state by virtue of his pre-eminence over other citizens.

Common law prerogatives previously enjoyed by the president

- Conclude treaties
- Declare war
- Make peace
- Confer honorary titles
- Pardon offenders
- Appoint a commission of enquiry

It's argued that the president retains prerogative powers to issue passports and perform acts of state. -BUT the power to issue passports is now regulated by the SA Passports and Travel Documents Act, which provides that the powers and duties in respect of passports which is vested in the president before the '93' constitution, now vest in government = it's a statutory power and not a prerogative.

Therefore acts of state are the only prerogative power which haven't been written in to the constitution or legislation.

Q: are the powers of the president in terms of S84 subject to constitutional review?

In President of RSA v Hugo: the constitutional court considered the question whether the president's power to pardon offenders is subject to constitutional review. This power, which was a prerogative power of the crown, is recognized in the '93' and '96' constitutions. The court was of the opinion that the only prerogative, which was still in force, are those in the constitution. The exercise of these powers is subject to constitutional review. This follows from the fact that the constitution is supreme and all branches of the government are bound by the constitution.

WHEN HE ACTS AS HEAD OF THE NATIONAL EXECUTIVE

Explain how the president must conduct himself when:

1. He acts together with other members of cabinet:

The functionary who had to be consulted had to concur – in accordance with its decision-making procedures.

E.g. appointment of judges

Here the president is BOUND

2. He acts after consulting other functionaries:

after consultation: means that the president must consult the relevant functionary but he isn't bound by their recommendation. E.g. by appointing judges of the constitutional court = NOT BOUND

3. He acts on recommendation of or advice of other functionaries:

The constitution stipulates that the president must exercise certain powers "on recommendation of" other functionaries. I.e. the president may remove a judge from office if the Judicial Service Commission has made a finding in respect of this and the NA calls for the judge to be removed – president is BOUND to act as advised

PRESIDENT GIVING EVIDENCE IN OPEN COURT:

SARFU case:

Why it isn't desirable in the opinion of the court to compel the president to testify in open court:

The decision to require the president himself to give evidence was flawed. The courts should be aware that the president isn't in the same position as other witnesses. The doctrine of separation of powers requires the court to protect the status, dignity and efficiency of the office of the president and the president should only be required to give evidence orally in open court in civil matters relating to performance of official duties in exceptional circumstances. The appellants submitted that the order requiring the president to testify was wrong in law.

Circumstances where the president can be compelled to testify:

No case can be found in foreign law where the head of state had been compelled to give oral evidence in respect of performance of official duties. Even where a head of state may be called as a witness special arrangements are made for the way in which evidence is given. Even though the courts must protect the status, dignity and efficiency of the office of the president, administration of justice shouldn't be impeded in order to safeguard the president's dignity.

2 conflicting considerations:

- a) Public interest in ensuring protection of dignity, status and efficiency of the office of president
- b) Need to ensure the administration of justice isn't impeded

Therefore careful consideration must be given to a decision compelling the president to give evidence and such order should be made unless administration of justice demands it.

ACCOUNTABILITY OF MINISTERS:

Collective responsibility: signifies that members of cabinet act in unison with the outside world and carry joint responsibility before parliament for the way in which each member exercises and performs powers and functions.

Individual responsibility confers 3 duties on the minister concerned:

1. To explain to parliament what happens in his department
2. To acknowledge that something has gone wrong in the department and rectify the mistake
3. To resign if the situation is serious enough.

HOW PARLIAMENT HOLDS THE EXECUTIVE ACCOUNTABLE:

S55 (2) instructs the NA to provide for mechanisms to ensure that all executive organs of state in the national sphere of government are accountable to it. The following types of parliamentary control over the executive exist:

1. Individual and collective ministerial accountability as well as the duty of cabinet members to provide parliament with regular reports in respect of matters under their control
2. 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
3. Interpellations are used to enter into short debates with ministers on particular aspects of their responsibilities
4. Parliamentary committees often report on aspects of the activities of the executive
5. S101 refers to tabling in parliament and the approval by parliament of subordinate legislation
6. Parliament has to authorize the raising of taxes and spending of funds by the executive
7. S89 – removal of the president from office by the NA. Resolution must be adopted by 2/3 majority of members in the NA and it may only occur on grounds of serious violation of the law or the constitution
8. S102 – motions of no confidence in the president, or conduct excluding the president. If the motion is adopted, he must resign with other members of cabinet. If a motion of no confidence in the cabinet, excluding the president is adopted the president must reconstitute cabinet.

Factors the courts have at their disposal to test whether the executive is acting in accordance with the constitution

1. Bill of rights: the executive and state administration may limit the rights in the bill only to the extent that they are acting in terms of the 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
2. Ouster clauses: these applied during apartheid – they ousted the jurisdiction of the court to question the validity of government conduct. S34 now guaranteed the right to have any dispute, which can be resolved by application of law, decided in a fair public hearing before a court
3. Access to information and administrative justice: this is meant to ensure openness and accountability of executive organs of state
4. Procedural requirements: constitution lays down procedural requirements for the validity of the presidents actions
5. Separation of powers: executive organs must respect the doctrine of separation of powers and not usurp the functions of the legislature to do anything to compromise the independence of the courts
6. Co-operative government: executive organs in the national sphere must respect the constitutional status, institutions, powers and functions of government in the provincial and local spheres.

WHEN IS THE PRESIDENT BOUND BY S33??

S33 guarantees the right to just administrative action- it was argued in the SARFU case that the president, in appointing a commission of enquiry into the administration of rugby, didn't act in the manner that was procedurally fair. Because the president didn't give SARFU the chance to make representations to him before deciding to appoint the commission, the judge in the high court agreed with this contention. But the constitutional court found that the appointment of the commission in terms of S84 doesn't constitute administrative action in terms of S33.

In SARFU it was concluded that 2 legal decisions were under challenge:

- a) Decision to appoint a commission of enquiry in terms of the constitution
- b) The decision to make powers of subpoena afforded by the Commissions Act applicable to that commission

To determine whether these decisions constitute administrative action in respect of S33 it's necessary to consider the function being performed. It was concluded that the president's power to appoint a commission of enquiry isn't administrative action.

The test for determining whether conduct is administrative action isn't the question whether the action is performed by a member of the executive branch of government, but whether the task itself is an administrative act.

Not all acts of members of the executive will amount to administrative action in terms of S33 – in this case it wasn't administrative action as the president was exercising an original constitutional power vested in him alone.

Institutions other than legislature and courts, which exercise control over the executive:

1. The public prosecutor: power to investigate any conduct of the government or administration alleged or suspected to be improper
2. Auditor general: must audit and report on the accounts, financial statements and financial management of state departments
3. Commissions of enquiry: president has the power to appoint commissions in terms of any matter in respect of the executive
4. Special investigating units: president has the power to appoint these units to investigate allegations of unlawful or improper conduct by employees of the state and allegations of corruption
5. The media: reporting on and criticism of the performance of politicians and public officials
6. General public: by public debate and criticism and through a variety of interest and pressure groups the public can exercise control over the executive i.e. trade unions.

CHAPTER 5

JUDICIAL AUTHORITY

Jurisdiction – is the competence of the court to hear a particular dispute.

Judicial authority constitutes the 3rd branch of government that is the power to interpret legal rules and to apply such rules to legal disputes – this power is vested in the courts.

Categories of courts, which make up our legal system:

1. Constitutional court
2. Supreme court of appeal
3. High court
4. Magistrate court
5. Courts created by acts of parliament – Labour court

Functions of the constitutional court

S167 (3): the constitutional court is the highest court in constitutional matters – they may decide only constitutional matters and issues connected with decisions on constitutional matters.

They make the final decision on whether a matter is a constitutional matter.

Jurisdiction of the constitutional court:

constitutional court exercises exclusive jurisdiction over the following matters: S167 (4):

1. Decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, power or functions of any of those organs
2. Decide on the constitutionality of any parliamentary or provincial bill, but may only do this in terms of S79 or S122
3. Decide applications envisaged in terms of S80 or S122
4. Decide on the constitutionality of any amendment to the constitution
5. Decide that parliament or the president failed to fulfill a constitutional obligation
6. Certify a provincial constitution

Discuss whether the SCA, High court and other courts have jurisdiction to hear constitutional matters

SCA: S168 (3): may decide appeals in any matter. It's the highest court of appeal, except in constitutional matters and may only decide:

- a) Appeals
- b) Issues connected to appeals
- c) Any matter which may be referred to it by an act of parliament

S169: High court: may decide:

- a) Any constitutional matter except a matter that:
 - i. Only the constitutional court may decide
 - ii. Is assigned by an act of parliament to another court of a similar status to the High court
- b) And any other matter not assigned to another court by an act of parliament

S170: Magistrate court: and all other courts may decide any matter determined by an act of parliament, but a court of status lower than the High court may not inquire into or rule on the constitutionality of any legislation or conduct of the president.

Therefore the SCA and High courts do have jurisdiction in certain constitutional matters. But magistrate and other courts don't.

INDEPENDENCE OF THE JUDICIARY:

The '93' constitution created the judicial service commission, which consisted of members of the judiciary and legal profession as well as politicians.

The JSC advised the government on matters in respect of the judiciary, by making recommendations in respect of appointment, removal from office, term of office and tenure of judges.

The '96' constitution also provides of the role of the JSC. The involvement of the JSC in the appointment of judges was believed to restrict the power of the executive to appoint whomever they wished and thus boost judicial independence.

- **S167 (1):** constitutional court consists of a chief justice, deputy chief justice and 9 other judges
- **S167 (2):** a matter before the constitutional court must be heard by at least 8 judges
- **S168 (1):** SCA consists of the chief justice, deputy and a number of judges as determined by an act of parliament
- **S174 (3):** the president as head of the national executive appoints the chief justice and deputy chief justice of the constitutional court after consulting with the JSC and leaders of the parties represented in the NA.

The other 9 judges of the constitutional court are appointed by the president as head of the national executive after consulting with the chief justice and party leaders in the NA.

JUDICIAL INDEPENDENCE

Independence of the judiciary is NB for the constitutional state- because if judges could be told what to do by politicians there is little chance that the courts will be an effective mechanism for the prevention of abuse of power.

Judicial independence is related to the separation of powers – courts are subject only to the law and no person may interfere with the functioning of the court.

FUNCTIONAL INDEPENDENCE:

Beauegard case: independence of the judiciary = complete liberty of individual judges to hear and determine cases free from external influences or the influence of government.

Judicial power is exercised by the judiciary and may not be usurped by the legislature, executive or anyone else

Judicial officers exercise their power subject only to the law and the constitution and not to public opinion.

Functional independence of the courts in SA have been threatened – most famous occurred in the 1950's when parliament tried to set up a high court of parliament which would have the power to set aside decisions of the appellate division of the supreme court. The creation of the high court of parliament was parliament's response to an earlier decision of the AD in Harris case – in which it declared the Separate Representation of Voters Act unconstitutional which aimed to remove colored voters from the voters role – the High court of parliament reversed the decision in Harris and upheld the validity of the act.

In the 2nd Harris case it was argued that parliament was assuming the role and functions of the court and was trying to act as judge, jury and executioner.

The AD found that the court of parliament was no court of law, but merely parliament in a difference guise – the act was therefore invalidated.

S165 tries to prevent this from happening again, it states that judicial authority is vested in the courts, it recognizes the independence of the courts, it states that no one may interfere with the functioning of the courts and it enjoins organs of state to assist and protect the courts in order to ensure their independence, impartiality, dignity, accessibility and effectiveness.

Another factor, which contributed to the functional independence of the courts, is the fact that judicial officers enjoy immunity against civil actions and the offence of contempt of court.

May v Udwin: public interest in the due administration of justice requires that a judicial officer, in exercising his functions, should be able to speak his mind freely without fear of incurring liability.

Judges aren't allowed to perform any other job, which would be inconsistent with the independence of the judiciary.
In SARFU: judges must give judgment in an impartial way relying on the law and constitution.

Separation of powers states that the judges can't perform functions in any other department as there must be a separation of personnel

South African Association of Personal Injury Lawyers v Heath and Others

In this case the court looked at the validity of the provisions of a Special Investigating Unit) headed by a judge, which was set up to investigate malpractices in state institutions and in connection with state assets and public money.

1. Looks at the validity of the appointment of a judge to head the Unit.
2. It deals with the validity of the President's referral to the Unit for investigation of an allegation concerning a failure by attorneys acting for road accident victims claiming from the Road Accident Fund to pay over to such persons the full amount due in settlement of their claims after deduction of reasonable costs. The appellant had unsuccessfully challenged the provisions in the Transvaal High Court.

The validity of the appointment of a judge to head the Special Investigating Unit = held that the appointment of a judge to head the SIU violated the separation of powers required by the Constitution.

Courts must be independent of the legislature and the executive so that they can discharge their duty - this prevents the legislature and the executive from requiring judges to perform non-judicial functions that are incompatible with judicial office and which are not appropriate to the central mission of the judiciary, and prohibits judges from undertaking such functions.

The matters to be investigated are determined by the President and not by the unit itself, and involve questioning persons, searching premises, gathering evidence and instituting court actions for the recovery of losses alleged to have been suffered by the state. These are executive and not judicial functions, which under our constitutional scheme are ordinarily performed by the police

The functions that a judge is required to perform under the Act are of a nature incompatible with the independence of the judiciary and judicial office. The provision of the Act that requires a judge or acting judge to be appointed as head of the Unit, and the appointment by the

President of a judge to this position were accordingly held to be unconstitutional and invalid.

PERSONAL INDEPENDENCE OF JUDGES

Personal independence is protected in the following ways:

- a) JSC plays an NB role in the appointment of judges
- b) S176 provides that judges of the constitutional court are appointed for a non-renewable term of 12 years – but they must retire at the age of 70. Other judges may serve office until the age of 75 or until they are discharged from active service in terms of an act of parliament = judges enjoy security of tenure so there is no need for them to seek favour from politicians to make sure that they keep their jobs
- c) The constitution makes it difficult for the executive to dismiss judges – S177: states circumstances where a judicial officer may be compelled to vacate his position before the termination of his term of office – the president may remove a judge from office only if the JSC finds that he suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct and if the NA calls for his removal by a resolution adopted with the support of 2/3 of its members
- d) S176 provides that the salaries, allowances and other benefits of judicial officers may not be reduced.

CONTROL OVER THE JUDICIARY

1. Judicial control: their decisions may be taken on review – this makes them apply their minds to the matter and give reasons for their decisions
2. Appointment: JSC's involvement in the appointment of judges makes the judicial process more transparent and may instill in judges a greater sense of their accountability
3. Removal from office: judge may be removed from office if he suffers an incapacity or is grossly incompetent or guilty of gross misconduct
4. Public debate and criticism: its hopes that the constitutional guarantees of freedom of speech and freedom of the press will help to create an environment in which judicial decisions are subject to public debate and criticism

5. Civil liability: judicial officers normally enjoy immunity from civil actions arising from their decisions, but a judge who acted mala fide can't escape civil liability

DIRECT ACCESS TO THE CC:

Bruce v Feecytex: rule 17(1) provides – the court shall allow direct access in terms of S100 of the interim constitution in exceptional circumstances only, which will normally only exist where the matter is so urgent or of such public importance that delay by use of normal proceedings would prejudice public interest or the ends of justice and good government.

S167 (6) of the '96' constitution – national legislation or the rules of the constitutional court must allow a person when it's in the interests of justice and with the leave of the constitutional court:

- a) To bring the matter directly to the constitutional court or
- b) To appeal directly to the constitutional court from any other court.

INTERPRETATION

5 techniques the courts use to avoid or limit the effects of a declaration of invalidity:

S172 a competent court has the power to declare any law or conduct that's inconsistent with the constitution invalid to the extent of its inconsistency.

Normally a declaration of invalidity has retrospective effect – any actions taken under the legislation are invalidated from the moment the rule came into operation.

Normally a court will invalidate a rule and then leave it to the legislature to rectify the unconstitutional law – but this takes time and it may give rise to serious disruptions in the running of the country or the administration of justice – so it's advisable for the courts to avoid or limit the extent of declarations of invalidity.

Avoid:

1. If possible a court should decide a case on grounds other than a constitutional ground – this was endorsed in S v Vermaas where it's possible to decide any case without reaching a constitutional issue that's the course that should be followed
2. Where possible courts should interpret a provision in such a way that it doesn't conflict with the constitution – therefore if the provision has more than one meaning, one of which isn't in conflict with the constitution, the one which isn't in conflict should be adopted.

To limit:

3. A court should declare any law or conduct inconsistent with the constitution invalid only to the extent of the inconsistency, rather than invalidating the entire law or conduct. The courts should separate the invalid sections of the law from those which are valid and leave the valid portions intact
4. A court may limit the retrospective effect of a declaration of invalidity
5. A court may suspend a declaration of invalidity for any period and on any conditions in order to allow the competent authority the chance to correct the defect.

CHAPTER 6 **CO-OPERATIVE GOVERNMENT**

S40: the government of the Republic is constituted as the national, provincial and local spheres which are distinctive, interdependent and interrelated.

UNITARY FORM OF GOVERNMENT:

It has a unified center of authority – all government bodies are subject to the authority exercised by the national government

Characteristics:

1. Power is concentrated in the hands of the national sphere of the government
2. Greater emphasis is placed on centralization than decentralization.
3. The provinces are subordinate to the national government

SA Before 1993:

Before the new constitutional dispensation, parliament was sovereign and political dispensation was increasingly centralized in both law and in practice. There was a 3-tier system with the national government at the top. The national government was regarded as the determinant power.

FEDERAL FORM OF GOVERNMENT

Characteristics:

1. State power and sources of income are divided between the national and provincial government
2. The provinces are given wider powers
3. NB issues like defence, taxation and custom exercise are normally regulated by the national sphere of government
4. Disputes between the spheres are usually regulated by an arbiter

<u>Divided model of federalism</u>	<u>Integrated model of federalism</u>
1. Powers and responsibilities of the national and provincial levels of government are clearly divided	1. Few area in which the national government enjoys exclusive power and many areas in which the national and provinces have shared responsibility
2. Provinces are given independent taxing powers	2. Revenues and taxing powers are shared between the national and provincial governments
3. Even though mechanisms exist for the co-operation between the national and provincial governments they have no status or constitutional recognition	3. A number of intergovernmental institutions have the responsibility of promoting co-operation between the various levels of government
4. Provincial interests aren't represented within the national government E.g. Canada	4. Provinces are able to put their interests directly into the national legislative process – NCOP

Simeon says that SA follows a more integrated form of federalism than a divided one. This is evident from the following:

1. Chapter 3 of the constitution is entitled “Co-operative Government” – S40 states that the government is constituted as the national, provincial and local sphere which are distinctive, interdependent and interrelated.
2. The fact that the constitution refers to spheres and not level creates the impression that the aim is to move away from the hierarchy
3. The constitution has a list of functional areas in which the national, provincial and local areas share legislative functions
4. Provinces have limited powers to raise revenues for themselves and are barred from imposing income, sales or VAT
5. S41 (2): requires an Act of parliament to establish or provide for structures or institutions to promote or facilitate intergovernmental relations and provide for appropriate mechanisms to settle intergovernmental disputes
6. S41 (3): an organ of state involved in an intergovernmental dispute must make every reasonable effort to resolve the dispute by means of mechanisms provided and must exhaust all internal remedies before they approach a court to resolve it.
7. Provincial interests are represented in parliament in the NCOP – which ensures that provincial interests are taken into account on a national sphere.

Discuss the principles of co-operative government set out in chapter 3 of the constitution:

the concept of co-operative government requires all spheres of government to work together.

S125 (3) orders the national government to assist the provinces to develop the administrative capacity for the effective exercise of their powers.

S154 (1): requires that the national and provincial governments support and strengthen the capacity of municipalities to manage their own affairs and exercise their own functions.

S40:

National, provincial and local, which is distinctive, interdependent and interrelated.

- Distinctive: they are separate and have their own powers
- Interdependent: they depend on and help each other
- Interrelated: sometimes they have concurrent powers

Discuss the issue of co-operative government in respect of the Premier of the Western Cape v President of the RSA:

a co-op government involves all spheres of government working together. This is NB in respect of the new text as S40 and S41 provide for distinctive, interdependent and interrelated spheres and for the settlement of disputes among them.

The government of the Western Cape challenged the constitutionality of an amendment to the public service act.

In terms of this amendment, provincial heads of department are given the same functions and responsibilities as national departments and no longer fall under the administrative control of the provincial Director General (DG).

The DG is responsible for the administration of the office of premier, intergovernmental relationships and co-operation between the departments of the provincial administration.

The Western Cape government objected that its part of the executive power of a province to structure its own administration and the national legislature, which wants to impose such structure on the provinces, infringes the provincial power.

The court rejected this argument:

It said that the sanctioning of national legislature is a feature of the constitution and a system of co-operative government that it prescribes.

This legislation is required for the raising and division of revenue. In the 1st certification judgment the constitutional court held that such requirements are inconsistent with the constitution.

The courts interpretation of S40:

The Western Cape government argued that the provision of the amended legislation encroached on the geographical and functional integrity of the provincial government contrary to S41.

The principle of co-operative government in S40 where the spheres of government are described as being distinctive, interdependent and interrelated.

This is consistent with the way powers have been divided between the spheres of government.

Distinctiveness: lies in the provision made for elected government at the national, provincial and local levels.

Interdependent and interrelatedness: flow from the founding provisions that SA is a sovereign, democratic state and a constitutional structure which makes provision for framework provisions to be set by the national sphere of government.

These provisions vest concurrent legislative powers in respect of important matters in the national and provincial spheres of government and contemplate that the provincial executive will have responsibility for implementing national laws as well as provincial laws.

Courts interpretation of S41:

The constitution makes provisions to make sure that with common effort the spheres of government co-operate with each other to secure the implementation of legislation in which they all have a common interest.

This co-operation requires that every reasonable effort be made to settle disputes before a court is approached to do so.

Its desirable wherever possible to avoid conflicting legislative provisions, to determine the administration, which will implement laws that are made, and to ensure that adequate provision is made and to ensure provisions are made for it in the budget of different governments.

S41 (1)(g) requires that: all spheres of government and all organs of state within each sphere must exercise their powers and perform their functions in a manner that doesn't encroach on the geographical, functional or institutional integrity of government in another sphere. This reflects a requirement in the constitutional principles that the national government won't exercise its powers so to encroach on the provinces.

In this case:

What is relevant is that the constitutions power to structure public service, vests in the national sphere of government.

The purpose of S41 is to prevent one sphere of government from using its powers in such a way, which would undermine the other sphere and prevent them from functioning effectively.

The constitution provides that provinces shall have the exclusive functions shared with the national legislature.

Constitution also requires the establishment of a single public service and gives the power to structure that public service to the national legislature.

This power of the national legislature is one, which has to be exercised carefully, in the context of S41, to ensure that in exercising its power the national legislature doesn't encroach on the ability of provinces to carry out the functions entrusted to them by the constitution.

3 objections:

1. It assigns functions to the provincial Director General's and heads of departments in a manner that's unacceptable to it.
2. It constrains the premiers executive powers to establish and abolish departments of government
3. It empowers the minister to give directions concerning the transfer of certain functions to and from the provincial administration.

The courts findings:

On if it's constitutional for parliament to assign functions to the provincial DG: S41 (2) of the constitution enjoins parliament to enact legislation to facilitate intergovernmental relations.

The establishment of a post within the public services for the discharge of such functions doesn't infringe any provincial powers. The functionary isn't a representative of the national government but is appointed by the premier.

The province has the competence to appoint a functionary who is to occupy this post and that is all that the constitution requires.

It can't be said that there aren't valid reasons for having included such functions within the duties of the DG or that to do so would prevent the provincial government from carrying out its constitutional duties effectively.

The provisions of the amendment dealing with the powers and functions of the DG aren't inconsistent with the executive power if the province. It's also not been established that the provision infringes S41.

The power of the president at the request of the premier to establish or abolish any provincial department is constitutional:

S3A (a) - premier of a province may subject to S7 establish or abolish any department of the provincial administration concerned

S7 (5) - president can at the request of the premier.

President is required to amend the schedule by proclamation to give effect to such a requirement if he's satisfied it's consistent with the provisions of the constitution.

The premier has the power to establish and abolish provincial departments – this power is limited only by the extent that it must be exercised by way of a request directed to the president.

Proceedings require the president and the premier to seek agreement about the legality of a proposed re-structuring of the public service within a provincial administration, is entirely consistent with the system of co-operative government prescribed by the constitution and it can't be said to invade either the executive power vested in the premier or the functional integrity of the provincial government.

If the power of the minister to transfer certain functions to the provincial government to the national government is constitutional: S3 makes provisions for the allocation and transfer of functions to and from departments of government, which by definition includes provincial departments.

The court found the S3 wasn't reasonably capable of such an interpretation and was therefore unconstitutional.

CONFLICTS REGARDING LEGISLATION:

What happens if the provincial legislature and parliament pass legislation on the same subject matter?

SCHEDULE 5 MATTER:

normally there won't be conflicts since provinces have the EXCLUSIVE POWER to pass legislation relating to these matters.

BUT S44 (2): states that parliament may pass legislation on a matter falling within a functional area listed in schedule 5 when it's necessary to:

- Maintain national security
- Maintain economic unity
- Maintain essential national standards
- Establish minimum standards required for the rendering of services
- Prevent unreasonable action taken by a province which is prejudicial to the interests of other provinces or to the country as a whole

SCHEDULE 4 MATTER:

S146 (2) national legislation that applies uniformly with regard to the whole country prevails if one of the following conditions is met:

- 1) The national legislation deals with a matter that can't be regulated effectively by legislation enacted by the provinces individually
- 2) The national legislation deals with a matter that requires uniformity across the nation and the national legislation provides that uniformity by establishing –
 - Standards
 - Frameworks or
 - National policies
- 3) The national legislation is necessary for:
 - Maintaining national security
 - Maintaining economic unity
 - Protection of the common market in respect of 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
 - The protection of the environment
- 4) 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
 - Impedes the implementation of national economic policy

See Ex Parte President of RSA: In Re Constitutionality of the Liquor Bill.

Conflicts which can't be resolved: if it can't be resolved by the court then the national legislation prevails.

CHAPTER 7 **PROVINCIAL GOVERNMENT**

Provincial government

PROVINCIAL LEGISLATURE:

legislative authority of a province is vested in its provincial legislature.

Powers of the provincial legislature – S104 (1):

1. Pass a constitution for the province
2. Pass legislation for its province with regard to:
 - a) Any matter in schedule 4
 - b) Any matter listed in schedule 5
 - c) Any matter outside those functional areas and that is assigned to the province by national legislation
 - d) Any matter for which provision of the constitution envisages
3. To assign any of its legislative powers to the municipal council in the province.

PREMIERS AND MEC:

Executive authority of a province is vested in the Premier of that province, who exercises authority with other members of the executive council.

Powers of the executive authority of a province:

1. Implement provincial legislation in the province
2. Implement national legislation within the functional areas of schedule 4 and 5, except where the constitution or act of parliament prescribes otherwise
3. Develop and implement provincial policy
4. Coordinate the functions of the provincial administration
5. Prepare and initiate provincial legislation
6. Perform any function assigned in terms of the constitution or an act of parliament.

A province has executive authority only to the extent that the province has the administrative capacity to assume effective responsibility – the national government must assist provinces to develop the administrative capacity required for effective exercise of their powers.

When cabinet assigns powers to a member of the provincial executive council:

S99: an assignment:

- a) Must be in terms of an agreement between the relevant cabinet members and the executive council member
- b) Must be consistent with an act of parliament
- c) Takes effect upon proclamation by the president

Circumstances where the national government can intervene in provincial government affairs:

S100: national government can take steps to fulfill the obligation including:

- 1) Issuing a directive to the provincial executive, describing the extent of the failure to fulfill its obligations and stating any steps required to meet its obligations
- 2) Assuming responsibility for the relevant obligation in that province to the extent that its necessary to:
 - a) Maintain essential national standards, or mere minimum standards for the rendering of service
 - b) Maintain economic unity
 - c) Maintain national security
 - d) Prevent that province from taking unreasonable action that is prejudicial to the interests of another province or the country as a whole

When the provincial legislature holds the provincial executive accountable:

-removal or impeachment of premiers

Member of the executive council are accountable collectively and individually to the legislature for the exercise of their powers and the performance of their functions.

The provincial legislature may by a vote supported by a majority of their members pass a motion of no confidence in the provinces executive council excluding the premier and the premier must reconstitute the council.

They can also pass a motion of no confidence in the premier – premier and all members of the executive council must resign.

PROVINCIAL CONSTITUTIONS

S142: a provincial legislature may adopt a constitution for the province if it has the agreement of at least 2/3 of its members in favour of it.

This provincial constitution cant be inconsistent with the constitution – it may however provide provincial legislative or executive structures and procedures that differ from those provided in the constitution – it may also provide the institution and authority of traditional leaders – such provisions must be in accordance with S1 and Chapter 3 of the constitution and may not confer greater powers than those given by the constitution.

A provincial constitution must be submitted to the constitutional court for certification.

Only 2 provinces have adopted their own constitutions in SA – 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 wasn't certified.

The Western Cape constitution had to be amended but was certified in 1998.

CHAPTER 8 **LOCAL GOVERNMENT**

Importance of participatory government

Reasons why public participation in matters that directly affects members of the public is NB:

1. It facilitates access to information about local conditions, needs and attitudes, which are NB in terms of adopting informed decisions in the policy management
2. Participation provides people whose lives will be affected by the proposed policies with the opportunity to express their views and to attempt to influence public officials about the desirability of the proposed policies
3. It means involving and educating the public
4. Provides mechanisms for ensuring democratization of the planning process
5. Participation is a means of balancing the demands of central control against the demands for concern for the unique requirements of local government
6. Participation plays a watchdog role – this openness and participation tends to reduce the possibility of corruption and may help maintain high standards of behaviour.

Chapter 7 of the final constitution:

the constitutional recognition of local government and the vesting of powers in local authorities have transformed the legal status of the local government.

For the 1st time in SA history provision is made for autonomous local government with its own constitutionally guaranteed and independent existence, powers and functions.

Fedsure: constitution – a local government is no longer a public body exercising delegated powers – it's a legislative assembly with legislative and executive powers recognized by the constitution itself.

Local governments have a place in the constitutional order, have to be established by a competent authority and are entitled to certain powers, including the power to make by laws and impose rates.

Chapter 7 is an extension of the principle of co-operative government – it's designed to promote intergovernmental relations between the local and provincial government.

Local government as a sphere of government:

S151:

- 1) The local government consists of municipalities, which must be established for the whole 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, the local government affairs of its community, subject to national and provincial legislation.

S151 has 2 NB implications:

- a) The recognition of the local government as a sphere means that it can't be abolished by the national or provincial governments
- b) Sphere illustrates a shift away from the hierarchical division of government authority

This means that the central government no longer has the power to grant, revoke or limit the powers of the lower spheres and unilaterally overrides local government decisions.

Local government in the context of intergovernmental relations

S154:

- 1) The national and provincial governments, by legislative and other means 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's introduced into parliament or the provincial legislature, in a way that allows an organized local government, municipality or other interested party an opportunity to make representation.

Organized local government plays a consultive role in the following forums:

- Organized local government in the form of 10 part time representatives chosen to represent the different municipal categories are entitled to participate in the proceedings of the NCOP – but have no voting rights
- 2 nominees are entitled to serve on the Financial and Fiscal Commission – address issues relating to the equitable division of nationally raised revenue to the provinces and local government
- A national Act must provide for the establishment of national and provincial organizations to represent the interests of municipalities.

Autonomous local government versus administrative handmaiden
S156 states that the local government can't legislate in conflict
with national and provincial legislation

The national and provincial government must assign to local government those local government matters that would be most effectively administered locally and where the local government structure has the capacity to administer it.

Municipalities have powers reasonably necessary or incidental to the effective performance of their functions.

Pimstone – says that this definition gives the impression that the local government plays a administrative role, which is at odds with the description of local government as a sphere that is autonomous and one that enjoys original powers.

Establishment of municipalities
S151 – municipalities must be created for the entire Republic -
constitution expresses that different categories of municipalities
must be set up in the different regions.

Examples of these different types of municipalities are:

- Local or city councils
- Metropolitan districts
- District councils
- Rural councils

Robertson:

This is an appeal which concerns the validity of a provisional valuation roll of property in the area of jurisdiction of the City of Cape Town. The appellants in this Court are the City of Cape Town and the Minister of Provincial and Local Government.

In June 2002, Anita Marie Robertson and Guy Trevor Robertson, a couple living in Camps Bay, Cape Town approached the Cape High Court for an order restraining the City from charging property rates based on the provisional property valuations roll which the City opened for inspection and objection on 21 May 2002.

As part of the process aimed at transforming racially determined local government into one democratically determined, the Cape Metropolitan Area embarked on a process which eventually integrated sixty local authorities into a single municipality, now known as the City of Cape Town. Before then, local municipalities had each conducted their property valuations for rates based on different valuation rolls, some more than twenty years old. However, this produced discrepancies between rates values and the actual values of

properties. Moreover, uniform property rates increases led to a perception in some quarters of an unfair and discriminatory distribution of the property rates burden. Shortly after its establishment in December 2000, the City compiled a metropolitan wide provisional valuation roll of properties for the 2002/2003 municipal financial year in terms of the Property Valuation Ordinance (Cape) of 1993 (the Ordinance). The property valuations reflected on the roll were used to calculate rates levied against the affected properties. This decision was opposed by some individual rate payers, such as the Robertsons, and associations of ratepayers as it had far reaching financial implications for many property owners.

Before the High Court, the validity of the provisional valuation roll was challenged on three grounds. First, that the Ordinance is not a law in force and therefore the City could not rely on it for levying rates. Second, that in any case, the City could not impose rates because it was not a local authority as described by the Ordinance. And third, that there was no other law empowering the City to charge property rates based on a provisional valuation roll.

After the start of the High Court application, the City and the Minister sought and parliament passed an amendment to the law governing local governments. The relevant amendments are contained in section 21 of the Amendment Act. In response, the Robertsons amended their application to include a challenge to its constitutional validity on the grounds that before their passage by parliament, the consultative procedures required by sections 154(2) and 229(5) of the Constitution had not been complied with.

The High Court, upheld the claim of the Robertsons. It further declared section 21 of the Amendment Act invalid on the grounds that its terms should have been published for public comment in draft form before it was tabled in parliament in accordance with section 154(2) of the Constitution; and that there had been no formal request from parliament to the Financial and Fiscal Commission to consider the draft of section 21 of the Amendment Act in accordance with section 229(5) of the Constitution.

This Court unanimously holds that the appeal should succeed and that the orders of the High Court should be set aside.

Moseneke J writing for a unanimous Court finds that the Local Government: Municipal Structures Act 117 of 1998 (Structures Act) taken together with the Ordinance authorise the City to value property and to recover property rates within its area of jurisdiction. He holds that despite the powers of municipalities being subject to definition and regulation by a “competent authority”, this does not mean that the powers exercised by local government are “delegated” powers.

Rather, local government exercises “original” powers entrenched in the Constitution.

The approach that a municipality has no power to act if not authorised by a statute, is a relic of our pre-1994 past and is no longer permissible under our constitutional supremacy. In the past, parliament was sovereign and municipalities were creatures of statute, enjoying only delegated or subordinate legislative powers derived exclusively from ordinances or Acts of Parliament. The Constitution has moved away from a hierarchical division of governmental power. A municipality under the Constitution is no longer a mere creature of statute. The Constitution has ushered in a new vision of government in which the sphere of local government is interdependent, inviolable and possesses the constitutional latitude with which to define and express its unique character subject to constraints permissible under our Constitution.

The Constitution itself, and in particular sections 229(1) and (2) thereof authorise municipalities to impose property rates.

Moseneke J declined to consider the constitutionality of section 21 of the Amendment Act as the decision would not have any practical value. Moreover, the facts are obscure and the issues are complex and far-reaching. They relate to the procedural validity of legislation. In any event, even if the challenge is decided in favour of the respondents, the decision would not alter the outcome of this case, vindicate the right of any party or resolve a matter of wider public importance.

The order of constitutional invalidity made by the High Court is not confirmed.