

Peter was born out of wedlock, outside the Republic, on 5 June 1998, and his mother, at the time of his birth, was not in the service of the government of the Republic. Does Peter qualify for citizenship by birth? Advise him.

A person born outside the Republic qualifies for citizenship by birth on or after the date of commencement of the Citizenship Act (1995) if, among other things, his or her parents or his or her mother (if he or she was born out of wedlock) was in the service of the Government of the Republic. Since Peter's mother was not in the service of the South African government at the time of Peter's birth, Peter does not qualify for citizenship by birth in South Africa

Themba was born in the Republic on 5 June 1998. His father was a career representative of the government of Zambia. Does Themba qualify for citizenship by birth in South Africa? Give a reason or reasons for your answer.

South African citizenship by birth is not extended to a person born in the Republic on or after the date of commencement of the Citizenship Act if, at the time of his or her birth, one of his parents was a career representative of the government of another country. Therefore, since Themba's father was a career representative of Zambia, Themba does not qualify for citizenship by birth in South Africa.

Explain the instances that could enable Themba to qualify for citizenship by birth in South Africa.

Themba will only qualify for citizenship by birth if :

- (a) he is legally adopted by a South African citizen, or
- (b) he does not have the citizenship or nationality of any other country, or has no right to such citizenship or nationality, and
- (c) his birth is registered in the Republic in accordance with the Births and Deaths Registration Act 51 of 1992

Briefly explain the legislative history of South African citizenship law.

1. The South African Citizenship Act 49 of 1949
2. The Commonwealth Relations Act 69 of 1962
3. The Black Homelands Citizenship Act 26 of 1970
4. The Restoration of South African Citizenship Act 73 of 1986
5. The Restoration and Extension of South African Citizenship Act 196 of 1993
6. The 1993 Interim Constitution
7. The 1996 Constitution

Sipho, a foreigner, was convicted of rape and sentenced to nine years' imprisonment in 2001. He served his nine years' sentence in the Pretoria prison. He comes to you for advice and he tells you that he wants to apply for a certificate of naturalisation after having been in South Africa for 10 years. Will he be issued with a certificate of naturalisation? Advise him.

You need to determine whether a period a foreigner served in prison is deemed to be a period of residence or ordinary residence for the purposes of issuing a certificate of naturalisation. Your answer should be no because Siphos spent nine years in prison. The Minister, in this case, would not be willing to make use of his discretion to grant Siphos a certificate of naturalisation under exceptional circumstances. Therefore, Siphos does not qualify for a certificate of naturalisation.

Siphos holds both South African citizenship and Canadian citizenship. He has just learnt that he has been deprived of his South African citizenship. He comes to you for advice – he tells you that the reason why he is being deprived of his citizenship is that he was convicted and sentenced to five years' imprisonment for bank robbery in Canada. He wants to know whether his deprivation of citizenship is in accordance with the law. Advise him.

Your answer should be yes. Siphos has been deprived of his citizenship in a lawful manner. The reason is that the Citizenship Act allows one to be deprived of one's citizenship if one holds dual citizenship and has been convicted in another country for a period of not less than 12 months for an offence which is also regarded as an offence in South Africa.

Explain the consequences of loss of citizenship by children deprived of their citizenship because their parents have ceased to be South African citizens through voluntarily obtaining citizenship of another country without requesting the retention of South African citizenship or as a result of deprivation.

Children born outside the Republic and who have been deprived of their citizenship, because their parents have ceased to be South African citizens by voluntarily obtaining citizenship of another country without requesting the retention of South African citizenship or as a result of deprivation, shall be regarded as having the citizenship or nationality they had before becoming South African citizens. If such children had no other citizenship or nationality before becoming South African citizens, they are regarded as having the citizenship or nationality of their responsible parents.

What are the consequences of loss of South African citizenship by a person who acquired citizenship through naturalisation and has ceased to be a South African citizen because he or she has renounced his or her citizenship?

If a person who acquired citizenship through naturalisation has ceased to be a South African citizen because he or she has renounced his or her citizenship, he or she shall be deemed to be a foreigner who is not :

- (i) in possession or is not deemed to be in possession of a permit referred to in section 25 or 26 of the Aliens Control Act 96 of 1991, as replaced by section 10(2) or 25(2) of the Immigration Act 13 of 2002; or
- (ii) in terms of section 28(2) of the Aliens Control Act (substituted by s 31(2)(a) of the Immigration Act 13 of 2002) exempted or deemed to be exempted from the prohibition in section 23(a) of the Aliens Control Act (substituted by s 10(1) of the Immigration Act 13 of 2002) which prohibits aliens from entering or sojourning in the Republic with the intention of remaining there permanently if they do not have

permanent residence permits (s 11(3) of the Citizenship Act as substituted by s 6 of the Citizenship Amendment Act 69 of 1997).

Themba is 19 years old and is Kanyi's child. He was born in Senegal and is now residing in South Africa. He lost his South African citizenship in 2009 when he was 17 years old. The reason he lost his citizenship is that Kanyi (his mother) ceased to be a South African citizen in 2009 when she voluntarily obtained citizenship of Senegal without requesting the retention of her South African citizenship. Themba comes to you for advice in November 2011. He wants to know whether it is possible for him to resume his South African citizenship. For argument's sake let's say this is 2011. Advise him.

**Remember that the resumption of South African citizenship** is regulated by section 13(2) of the Citizenship Act 1995. Your answer should look like this: Children born outside the Republic who have been deprived of their citizenship because their parents have ceased to be South African citizens by voluntarily obtaining citizenship of another country without requesting the retention of South African citizenship can resume their citizenship if

(1) they are resident in the Republic or have returned to the Republic for permanent residence; and

(2) they have attained the age of 18 years. It is therefore possible for Themba to resume his South African citizenship because he is resident in South Africa and has attained the age of 18.

Thami is a Zambian citizen who is residing in South Africa. Does he qualify for a right to vote in South Africa?

Your answer should be no: Thami does not qualify for a right to vote. The reason is to be found in section 19 of the Constitution, as discussed above.

Thami, a Zambian citizen residing in South Africa, feels that the South African government is unlawfully violating his rights. Can he ask the Zambian government for protection? If so, on what basis?

Yes, Thami can ask his Zambian government to interfere by preventing the unlawful violation of his rights by the South African government. This process is referred to as diplomatic protection.

Describe a "law of general application" for the purposes of the limitation of rights.

The law of general application entails that the law must be sufficiently clear, accessible and precise for those who are affected by it to ascertain the extent of their rights and obligations.

Explain the limitation factors listed in section 36 of the Constitution.

The limitation factors listed in section 36 are as follows:

**(a) Nature of the right**

This refers to the importance of a right that is limited.

**(b) The importance of the purpose of the limitation**

This entails an important purpose that all citizens would deem to be compellingly important.

**(c) The nature and extent of the limitation**

The emphasis on the nature and extent of the limitation is on whether the limitation is a serious or relatively minor infringement of the right. In other words, the infringement of a right should not be more extensive than is warranted by the purpose that the limitation seeks to achieve.

**(d) The relation between the limitation and its purpose**

This essentially determines whether the law serves the purpose that it is designed to serve.

**(e) Less restrictive means to achieve the purpose**

This obliges those who limit a right to

Ms P has a 14-year-old child that she wants to take along to visit the UK. What requirements must she comply with to ensure that her child complies with the law pertaining to departure from South Africa?

This question requires you to apply immigration law in respect of entry into or departure from South Africa. You need to concentrate on the law pertaining to the departure of a parent who is accompanying a child under the age of 16. Your conclusion should be that Ms P must enter her child's name in her passport.

Mr T applies for refugee status and the reason for his application is that he doesn't like his country anymore. Do you think he qualifies for refugee status in terms of the Refugees Act 1998? Substantiate your answer.

Mr T will not qualify for refugee status on the basis that he doesn't like his country anymore. A person qualifies for a refugee status if (a) he or she is unable or unwilling to avail himself or herself of the protection of his or her country owing to a well-founded fear of persecution by reason of his or her race, gender, tribe, religion, nationality, political opinion or membership of a particular social group; or (b) he or she is compelled to leave his or her place of habitual residence to seek refuge in another country because of external aggression or other events that seriously disturb public order in his or her country; or

(c) he or she is a dependant of a person contemplated in preceding points (a) or (b). Therefore, Mr T's reason is not good enough to qualify him for refugee status.

Mr X, a qualified engineer, is granted refugee status in South Africa. Two months later he is hired as a manager by the Department of Trade and Industry. Three months later he receives a letter notifying him that his refugee status has been withdrawn on the basis that he is employed by a South African government department. He comes to you for advice on whether the letter withdrawing his refugee status complies with the law on refugees. Advise him.

The letter withdrawing his refugee status does not comply with the law on refugees. That is the case because the Refugees Act 1998 allows refugees to seek employment. In other words, refugees have a right to seek employment in terms of the Refugees Act. The circumstances in which the withdrawal of refugee status is

justified in terms of the Refugees Act 1998 are (a) if a refugee has been recognised as a refugee as a result of fraud, forgery or false or misleading information; (b) if he or she has been recognised as a refugee as a result of an error, omission or oversight committed by the Refugee Status Determination Officer in good faith; or if he ceases to qualify for refugee status in terms of section 5 of the Refugees Act 1998.

Therefore Mr X's refugee status should be reinstated.

### Direct democracy

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.

### Representative democracy

Representative democracy demands that all the inhabitants of the state (ie all those above a certain age, for example 18 years, and 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.

### Participatory democracy

This is the form of representative democracy where individuals or institutions representing the people should participate in politics or in decisions that affect them.

### Define democracy.

Democracy is a system of government, by the people, through elected representatives.

It ensures political, social and legal equality. The government is based on the will of the people.

### Would you say a country like South Africa is democratic or autocratic? Give reasons for your answer.

South Africa has been an example of a democracy since 1994. A democracy is a form of government in which the will of the people is paramount. We vote for our government in elections. A dictatorship is the opposite of a democracy. It is a form of government in which the ruler has complete authority or power, often acquired by force. Examples of dictatorships are Cuba and North Korea. There is a relationship between democracy and power. What you need to realise is that under a democracy and constitutional order, which exists today, the government and its citizens have legitimate (legal) power, as the government has a mandate to rule. But this is always subject to the Constitution. During apartheid, in South Africa, no one actually had

legitimate power. Both the government and its citizens possessed illegitimate (illegal) power, as they had no mandate from the people to govern.

The **legislature** is empowered to create, amend and repeal legal rules. These powers are vested in **Parliament**.

The **executive** is empowered to execute and enforce legal rules. These **powers** are vested in the **President**.

The **judiciary** is empowered to interpret legal rules, and to apply such rules to concrete situations. These **powers** are vested in the **courts**.

**THE SEPARATION OF POWERS, OR TRIAS POLITICA DOCTRINE, IS A TECHNICAL TERM AND REFERS ONLY TO THE DIVISION OF STATE AUTHORITY BETWEEN THE LEGISLATURE, EXECUTIVE AND JUDICIARY.**

Discuss briefly y the doctrine of separation of powers, trias politica, in South Africa.

**Trias politica** or **separation of powers** refers to the division of state authority between the legislative, executive and judicial branches of government. The separation of powers is very necessary in order for a democracy to function effectively. It prevents abuse of power by any single branch of government. For political freedom in a country, there must be separation of powers.

Explain in your own words what you think public participation means in a democracy.

Public participation in a democracy firstly means that people at all levels take part in the running of the country. In your answer you should mention representative and participatory democracy. Representative democracy means government by a group of people elected by us, the electorate, in properly run elections. These representatives are elected by us and make decisions on our behalf. Representative democracy is provided for in the South African Constitution. South Africa considers public participation in a democracy important. Participatory democracy is a form of representative democracy in which we (citizens) are actively involved in the decision making of the government. Participatory democracy strengthens representative democracy, by including more participation by society. Public participation takes place by investing in a general election and in many other ways.

**Cooperative government is concerned primarily with the interaction between the national, provincial and local spheres of government.**

What are the three spheres of government?

The spheres of government refer to the principle of cooperative government, namely that there should be cooperation between the local, national and provincial spheres. Cooperative government is another way in which state authority is distributed among the three spheres of government, namely the national, provincial and local spheres (see ss 40 and 41 of the Constitution). This ensures that all three spheres of government work with each other and assist each other in certain matters. They must be able to depend on each other and coordinate their functions and activities.

### What is the difference between provincial and local government?

Provincial government regulates matters in a specific province, such as Gauteng or KwaZulu-Natal. Can you name the nine provinces?

Local government is autonomous and regulates matters relating to local affairs. A local government must make provision for access by all persons residing within its area of jurisdiction to water, sanitation, transport facilities, electricity, primary health services and so on within a safe and healthy environment. Local government is the branch of government that is closest to the people. One example of local government is the Ekurhuleni Municipality, which consists of different suburbs on the East Rand such as Boksburg and Germiston.

### Why are municipalities established? List their powers and functions.

Municipalities (s 155 of the Constitution) are established to provide local governance, to which the public can make a continuous input. A municipal council must report back all the time to its electorate and to its community. Municipalities ensure that certain services such as water and garbage removal are rendered to the community. They also promote social and economic development in areas such as child welfare services. Municipalities also promote a safe and healthy environment; for example they provide primary health care services. They encourage communities to get involved in local government matters. Many of you confuse the branches of government with the spheres of government. The branches refer to the judicial, legislative and executive authorities (trias politica). The spheres of government refer to the principle of cooperative government: the local, national and provincial spheres, as discussed above

### Here's a quick reminder of the functions of each branch of government:

- Legislative authority** is the power to create, amend and repeal legal rules.
- Executive authority** is the power to execute and enforce legal rules.
- Judicial authority**, which is the third branch of government and applies to all three spheres of government, is the power to interpret legal rules, and to apply such rules to concrete situations.

### What is the function of the provincial legislature?

The provincial legislature is vested with legislative authority and makes the laws for a specific province. Each province has its own provincial legislature (s 104) with its own rules.

### What is the executive at the national level made up of?

#### List some functions of the executive.

The executive is made up of the cabinet, which consists of the President, the Deputy President and various ministers. The President is the head of the executive at the national level.

The executive is responsible for the daily running of the country. Some of its functions are

- to assent to, sign and promulgate bills passed by Parliament
- to refer bills back to Parliament to confirm the constitutionality of the Bill
- to confer honours
- to convene cabinet meetings
- to appoint commissions of inquiry
- to pardon offenders, etc

What is the role of the provincial executive authority?

The provincial executive authority (s 125) is vested in the Premier of each province, who is appointed by the legislature. Premiers enforce the laws for their own provinces, together with the MECs.

What is cooperative government?

**The spheres of government** refer to the principle of cooperative government, in terms of which the local, national and provincial spheres must cooperate with one another. Cooperative government refers to a form of government that supports political flexibility, negotiation, compromise and less reliance on the rigid distribution of powers between the three spheres of government. It requires coordination of the functions of the spheres to work together for the common good of the nation as a whole.

Is the following statement true or false? Give reasons for your answer:

The principles of cooperative government and the trias politica doctrine are one and the same thing.

**FALSE, for the following reasons:**

- The trias politica doctrine deals with the division of state power between the three branches of government, namely the legislature, the executive and the judiciary. The legislature makes, amends and repeals laws. The executive implements and enforces the law. The judiciary interprets and applies the law to concrete situations.
- This doctrine is important because it prevents a concentration of power in the hands of one body; the principles of cooperative government are embodied in sections 40 and 41 of the Constitution.
- According to this principle, the three spheres of government, that is the national, provincial and local spheres of government, must assist and respect each other.
- Section 40 provides that the three spheres of government are interdependent, interrelated and distinctive and section 41 sets out the guidelines in terms of which these spheres must interact with each other.
- Cooperation between the three spheres of government is important in order to develop the capacity and infrastructure of the weaker provinces and municipalities.

Discuss the role of the People's Assembly.

In order to comply with its obligation to ensure public participation during the legislative



process, Parliament has developed the notion of a People's Assembly. The purpose of the People's Assembly is to enable the public to impact on decision making with regard to laws affecting them and give meaning to the notion of a People's Parliament that strives to improve the quality of life of all South Africans and to strengthen democracy. Some of the objectives of the People's Assembly are

- to create an opportunity for the public, particularly the most marginalised communities, to engage with Parliament and the provincial legislatures
- to provide a vehicle for people's voices to be heard on issues affecting them

<p><b>Law</b> sets out standards, procedures and principles which must be followed. Those who fail to adhere to the law can be taken to court.</p>
<p>A <b>policy</b> sets out the goals and planned activities of the government but laws are needed for policy to be implemented.</p>

Differentiate between a law and a policy.

A law sets out standards, procedures and principles which must be followed. Those who fail to adhere to the law can be taken to court. A policy sets out the goals and planned activities of the government but laws are needed to implement the policy. Please note that a policy document is not law. It often identifies a need for new laws in order to be able to achieve its goals.

Discuss the process of a policy becoming law.

Initially a policy regarding specific issues is drawn up by a party. The members of the party will then propose this policy and the relevant issues will be debated with opposition parties and the public. Because Parliament has to approve policies and pass new laws to give legal effect to the policies, the executive will draft discussion documents called "green papers" and "white papers" on the policy/law to allow for comments. A "green paper" will be drawn up (to identify key issues and suggest alternatives). It is made public and comment from the public is invited. The policy is finalised by the relevant department and ministry. A final policy is drawn up and published as a "white paper" (this is the basis for the actual legislation). It is debated and adopted by Parliament. Before a new law has been tabled in Parliament, it is called a draft Bill, but once tabled in Parliament it is a Bill. The cabinet must approve the Bill and release it for public comment. If the public want any changes made, the department and relevant ministry will make these changes. The draft Bill is then tabled in Parliament by the Minister. Once a Bill has been tabled, it will be given a number, for example B6 of 2007, and will go through the processes of becoming a law. If Parliament assents to the Bill, it is sent to the President, who signs it and it becomes an Act and passes into South African law.

What is the aim of public participation and are all people in the country able to use its processes?

The aim of public participation in legislative and policymaking activities is to offer poor people the opportunity to make their circumstances known and to express their

needs and grievances. However, it is mainly those who have access to resources and who are better organised who have used these processes. The poor and marginalised are unable to do so, owing to a lack of capacity and resources. Hence, while public participation is frequently viewed as a form of empowerment, the danger is that only the already empowered may be able to enjoy its benefits.

Under what circumstances is the provincial legislature entitled to exclude the public from their sittings?

They can only exclude the public from the sittings of their committees if it is reasonable and justifiable to do so in an open and democratic society in terms of section 36 of the Constitution. The conduct of meetings **in camera**, behind closed doors, would occur if matters deemed sub judice (still pending in a court of law) are presented before committees, or if the business concerns the provincial budget, before the responsible member announces the actual budget publicly or if the business concerns matters connected with public safety that would need to be withheld from the public for a time.

**A by-law is a rule or law made by a local authority.**

Explain how the public participates in the making of by-laws.

We participate in the making of by-laws by a municipality (s 156 (2)). No by-law may be passed unless all the members of the municipal council have been given reasonable notice of an envisaged by-law. When a by-law is published for public comment, such comment must be considered by the council and, after consideration, passed by the council. In terms of section 162, a municipal by-law may only be enforced after it has been published in the official **gazette** of the relevant province. These municipal by-laws must be accessible to the public, as required by section 32 of the Constitution, which guarantees people's right of access to any information held by the state.

How does the public participate in local government?

The public participates at the local level through ward councillors and ward committees which serve as the direct link between the local council and the public. The councillor is responsible for ensuring that people are informed about council decisions, developments, budget plans and any council programme that will affect them.

Name some of the institutions supporting democracy in terms of Chapter 9 of the Constitution.

Chapter 9 of the Constitution provides for a number of independent "state institutions supporting constitutional democracy", namely the Public Protector, the Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Commission for Gender Equality, the Auditor-General and the Electoral Commission.