

## Basic concepts of constitutional law

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## 2.1 Introduction

To obtain a sound command of South Africa's constitutional law, it is important that we consider certain fundamental concepts at the outset. This is necessary to establish some level of common understanding of the principles, doctrines and concepts that lie at the heart of how our Constitution operates, the context that gave rise to it as well as the context in which it operates. These concepts lie at the heart of the South African Constitution and find expression in many of the provisions of the Constitution. When studying specific aspects of the Constitution, this needs to be done against the background of the concepts discussed below.

The principle aim of this chapter is therefore to introduce some of the more important overarching ideas that are pivotal in both explaining and contextualising the development of South African constitutional law. Although we focus on constitutional developments that have taken place in the period after South Africa's transition to democracy, we also briefly consider some important constitutional moments from bygone colonial and apartheid periods for purposes of context. We will also attempt to locate these constitutional developments within a broader historical and political context that recognises the influence of the constitutional law and practices of other countries.

## 2.2 Constitutionalism

### 2.2.1 Understanding the nature of constitutionalism

Constitutionalism as an idea or a term is not easy to define. The term 'constitutionalism' is sometimes used to convey the idea of a government that is limited by a written constitution: it describes a society in which elected politicians, judicial officers and government officials must all act in accordance with the law which derives its legitimacy and power from the constitution itself.<sup>1</sup> Constitutionalism, in this sense, is thus concerned with the problem of how to establish a government with sufficient power to realise a community's shared purposes and to implement the programmes for which a specific government has been elected by voters. At the same time, an issue is how to structure that government and control the exercise of power by the various branches of that government (and other powerful role players in society) in such a way that oppression and abuse of power is prevented.<sup>2</sup> As such, constitutionalism is closely related to the notions of democracy and theories of governance.

As a starting point, we can identify some characteristics of constitutionalism that will assist us to understand its nature:

- First, constitutionalism is concerned with the formal and legal distribution of power within a given political community in which a government is ordinarily established in terms of a written constitution.<sup>3</sup>
- Second, constitutionalism provides for the establishment of the institutions of governance, such as the legislature, the executive and the judiciary.
- Third, constitutionalism brings about the creation of binding rules or laws for the regulation of the political community, its institutions of governance and the governed.
- Fourth, constitutionalism plays an important role in determining the nature and basis of relations that exist between institutions of governance and those they govern.
- Last, and implicit in the previous points, constitutionalism prescribes limits on the exercise of state power and provides mechanisms to ensure that the exercise of power does not exceed the limits set by the constitution.

While this is by no means an attempt at a definition, in identifying these characteristics, we attempt to expose the types of matters with which constitutionalism would ordinarily be concerned. In the section that follows immediately below we elaborate further on what constitutionalism is.

Accepting the characteristics of constitutionalism described above, we can conclude that, in essence, constitutionalism is about the notion that a constitution must both structure and constrain state power. On the one hand, a constitution must allocate power to various

branches of government to allow for the effective governing of a state. On the other hand, it must limit and/or disperse that power to ensure that it will not be abused.

While constitutionalism seeks to achieve what are clearly important, if not sometimes conflicting, goals, we must acknowledge that constitutions are not self-executing documents nor do they contain identical provisions. The development of a particular system of constitutionalism and its relationship with other important constitutional law concepts, such as the rule of law, the protection of human rights and democracy, therefore, will depend on which constitution is under consideration, the relevant political and social history of the society in which it is being established and the particular rules, principles and institutions it establishes. Consequently, over the centuries during which the concept has evolved, different understandings as well as different models of constitutionalism have developed. The development of these models depended on how a particular constitution structured and allocated power and which norms were emphasised as foundational to the system by the text of the constitution and/or by the interpretation and application of that text by judges. We consider some of these understandings and models below.

### PAUSE FOR REFLECTION

The unique nature of South African constitutionalism

In *S v Makwanyane and Another*, Mahommed J made the following statement which, arguably, captures the unique nature of South African constitutionalism:

All Constitutions seek to articulate, with differing degrees of intensity and detail, the shared aspirations of a nation; the values which bind its people, and which discipline its government and its national institutions; the basic premises upon which judicial, legislative and executive power is to be wielded; the constitutional limits and the conditions upon which that power is to be exercised; the national ethos which defines and regulates that exercise; and the moral and ethical direction which that nation has identified for its future. In some countries, the Constitution only formalizes, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic.<sup>4</sup>

This passage highlights the fact that South African constitutionalism must be understood as relating to more than the mere technical legal regulation of the exercise of state power (and the limits placed on the exercise of that power) by the various branches of government. South African constitutionalism is thus not only a descriptive doctrine, factually describing what institutions should exercise power in what particular manner. It is also a prescriptive doctrine as it prescribes how state power should be exercised in a legitimate manner, which is related to the democratic legitimacy of the exercise of that power, and it prohibits the exercise of state power in certain ways. It is also normative as it sets out the values that must be adhered to in the governing process. This limits the kinds of actions that any state institutions, and

sometimes also private institutions, are permitted to perform. We explore these aspects further below.

### 2.2.2 Constitutionalism as a descriptive doctrine

We can view constitutionalism as a descriptive doctrine or, put slightly differently, we can understand it in a descriptive sense. Understood in this way, constitutionalism seeks to provide a factual description of the institutions, procedures and structures that make up the constitutional system of a particular state.<sup>5</sup> This understanding of constitutionalism is formalistic in nature: it focuses on explaining the distribution of power, the relations between the branches of government and the limitations on power as provided for in a given constitution. It does not concern itself with whether state power is being used in contravention of democratic or human rights norms. In other words, it does not seek to make value judgments as to whether the state in question adheres to or upholds its own constitutional limits or rules or whether it provides for an essentially democratic system of government.

Constitutionalism as a descriptive doctrine tends to represent a practice that has largely fallen out of favour as it reduces constitutionalism to a mere explanation of a constitution's structure and operational design. It was in this descriptive sense only that we could, prior to the advent of democracy in South Africa, speak of South African constitutionalism. This was similar to other colonial territories where there was a constitution but the constitution failed to establish a truly democratic system of government, and concepts of equal rights or even equal citizenship for both black and white inhabitants were absent. This form of constitutionalism could at best be described as an empty form of constitutionalism as it focused on form rather than on substance.

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### Constitutionalism as a descriptive doctrine in practice

The purely descriptive form of constitutionalism discussed above can be illustrated with reference to the facts and reasoning of the Appellate Division's decision in *Harris and Others v Minister of the Interior and Another*,<sup>6</sup> in which amendments to the Union Constitution then in place were challenged on procedural grounds.<sup>7</sup> The Union Constitution required that constitutional amendments be passed by the two Houses of Parliament sitting together (unicamerally) with a two-thirds majority. However, a constitutional amendment, removing coloured people from the common voters roll, was passed bicamerally (both Houses of Parliament sitting separately) with a simple majority.

The Court held that the failure on the part of Parliament to pass the constitutional amendment in accordance with the procedure set out in the Union Constitution resulted in such legislation not being recognised as an Act of Parliament and was therefore invalid. The Court could not enquire into whether the removal of coloured people from the common voters role would diminish the democratic aspects of the Union Constitution or whether the right to vote would be infringed. It was empowered merely to determine, on procedural grounds, whether the amendment was valid or not.

### 2.2.3 Constitutionalism as a prescriptive doctrine

More recently, the understanding of constitutionalism has evolved. This evolution has seen constitutionalism become a prescriptive doctrine that seeks to define in general terms the manner in which state power is allocated and exercised. In terms of this understanding, constitutionalism assumes some prescriptive force that establishes the norms and principles that define what may be termed to be a constitutional government.<sup>8</sup> Constitutionalism, thus understood, demands that a particular constitutional system adhere to the following norms and principles: separation of powers; the rule of law; democratic self-government; the protection of human rights; and the existence of an independent judiciary.<sup>9</sup>

We discuss certain of these norms and principles in more detail below. However, before doing so, we briefly discuss three different models of constitutionalism that have influenced South Africa's constitutional development.

#### 2.2.4 Models of constitutionalism

Constitutions, while broadly serving the same purpose, can vary widely in terms of their structure and content. One factor that influences the form and substance of a constitution is the peculiar history of the country in which it was drafted. The issues addressed by a constitution usually reflect the specific period and place of the drafting, as well as the prevailing power relations between political and economic actors in that society. Also influencing the content of the constitution are the social, political, legal and cultural traditions of that society <sup>10</sup> and the shared norms of that society (or at least the norms embraced by the elite who drafted the constitution).

However, as the nation-state has become the most dominant form of government in the world, so too has there been some level of coalescence around the general framework and content of constitutions<sup>11</sup> as well as around models of constitutionalism. This has led to two major constitutional models that have greatly influenced the development of constitutionalism over the past 50 years. We refer here to the Westminster constitutional model and the United States (US) constitutional model which we consider in turn below. Both these models have had a great influence on South African constitutional history. We also consider a third model, namely the German model, which has also been influential in the South African context, more especially in the post-apartheid era.

##### 2.2.4.1 The Westminster constitutional model

The Westminster constitutional model has its origins in Britain.<sup>12</sup> The Westminster model evolved over an extensive period during which it came to be characterised by certain distinctive features.<sup>13</sup> One particularly interesting fact about the Westminster constitutional model is that, as a model, it is premised on Britain's Constitution which to date remains unwritten. In fact, what is commonly known as the British Constitution is actually a series of conventions and ordinary laws in the form of statutes, common law and case law that broadly regulate state power as well as the relations between the state and its citizens.<sup>14</sup> These laws taken collectively comprise the British Constitution. However, where the Westminster model has been adopted, particularly in former British colonies such as pre-democratic South Africa, Botswana and Zimbabwe, the practice has been to reduce the constitution to writing.

At the heart of the Westminster model is the legislative branch, namely Parliament. In Britain, Parliament comprises the House of Commons (the directly elected lower House) and the House of Lords (the unelected upper House). Parliament is of central importance as it

exercises sovereign or supreme law-making powers. This means that any law made by Parliament cannot be undone by anybody or any organ except by Parliament itself.<sup>15</sup> This characteristic feature of a Westminster-style constitution is also known as parliamentary supremacy or parliamentary sovereignty. This means that in Britain there is, in principle, no fundamental law which cannot be altered by ordinary parliamentary action and there is no bill of rights which denies Parliament the power to destroy or curtail liberties. Parliament is said to have the power to make any law on any subject.

The contemporary position is, however, not so clear cut. First, the United Kingdom's accession to the European Union has subjected Parliament, to some degree, to the laws of the European Community.<sup>16</sup> Second, it has long been recognised that there are certain measures that it would be politically impossible to adopt and whose enactment would never be attempted.<sup>17</sup> Parliamentary sovereignty in Britain, properly understood, thus 'denotes only the absence of legal limitations, not the absence of all limitations or ... inhibitions, on Parliament's actions'.<sup>18</sup> Such exceptions notwithstanding, the fact that Parliament is the ultimate law-making authority does not excuse or exempt it from being bound to respect the rule of law. We discuss the rule of law later in this chapter.

Another notable feature of this constitutional model is the formal separation between the head of state and the head of government. In practice, the head of state in Britain is the monarch (currently Queen Elizabeth II) while the head of government is the Prime Minister. After an election, the monarch calls on the leader of the majority political party in Parliament (or the person chosen by a coalition of parties where no party has achieved an overall majority and a coalition has been formed) to form a new government. The Prime Minister is the head of this new government and is usually the leader of the majority party in Parliament. The government is formed and governs in the monarch's name as long as it retains the support of a majority of Members of Parliament.<sup>19</sup> Therefore, with this model, political parties play an important role in forming a government and retaining it in power.

A closely related feature of the Westminster constitutional model is that of parliamentary government. Parliamentary government means that the executive branch of government, namely the Prime Minister and the Cabinet, are all drawn from and continue to be Members of Parliament. The Prime Minister and his or her Cabinet thus serve both as members of the legislature and as members of the executive at the same time.<sup>20</sup> There is therefore no strict separation of powers between the legislature and the executive as is the case in the US system discussed below. The Prime Minister engages in regular question-and-answer sessions in Parliament during the Prime Minister's questions time where he or she verbally spars with the leader of the opposition and other members of opposition parties. The effect of this practice is that Parliament continues to exercise an oversight role over the executive. Members of the executive are required to account to Parliament as to how they exercise their powers in conducting government business, including the development of policy and the implementation of the law, on a continuous basis.

We now turn our attention to the courts. The courts' function in this model must be viewed in light of the doctrine of parliamentary supremacy discussed above. As an incidence of parliamentary supremacy, the courts under this model enjoy no powers to decide on the constitutionality of legislation although they may review administrative decisions of the administration.<sup>21</sup> The effect of this limitation on the courts' powers is that it makes them institutionally less powerful than the legislature. However, this does not mean that the courts do not enjoy significant powers nor that they are any less important than the legislature

within the entire scheme of governance under this constitutional model. While the courts may not have constitutional review powers, they do, when adjudicating matters, have a significant opportunity to influence how the law is applied as well as its impact in a given situation.

In 1998, the British Parliament adopted the Human Rights Act [22](#) which gives effect in British law to many of the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950). However, in theory, Parliament retains its sovereignty although the courts must now interpret legislation consistently with the provisions of the European Convention whenever possible. Some of the national courts are empowered to issue declarations of incompatibility if they find legislation to be in conflict with the norms embodied in the European Convention. This triggers the possibility of fast-track amendments by means of administrative legislation. If this is not sufficient, the provisions of the Act can be challenged before the European Court of Human Rights. Although Parliament can, in theory, depart from orders of this court, it seems politically ever less feasible that it will do so.[23](#)

Because of the important role played by the courts, the Westminster constitutional model demands as one of its defining features that the judiciary be independent. It thus requires that the judiciary function independently of Parliament and the executive. Remaining judicially independent means that judges must not be subjected to any undue influence either by Parliament or by the executive while they discharge their duties. This has necessitated the inclusion of mechanisms that seek to guarantee judicial independence, including the following:

- First, judicial independence is guaranteed by way of security of tenure that requires that judges are appointed for life.
- Second, judges cannot be removed from their judicial office except where they are found to have contravened the law or otherwise engaged in serious misconduct.
- Third, judges' salaries are guaranteed and cannot be reduced while their tenure continues.[24](#)

Figure 2.1 The overlap between the legislature and the executive indicates that the members of the executive are drawn from Parliament

#### 2.2.4.2 The United States constitutional model

The United States (US) constitutional model [25](#) originates, as its name indicates, in the United States of America. The US constitutional model can immediately be distinguished from the Westminster model by way of the history of its making. While the Westminster model evolved organically over centuries, the US model was the product of 'a deliberate process of constitution-making' in the late 1780s involving 13 former British colonies that had been established in the territory.[26](#) In coming together to form a federation under the banner of the United States of America, these former colonies established a Constitution and a constitutional system that today endures as the longest-surviving system based on essentially the same written Constitution.[27](#) In the following section we discuss some of the characteristic features of US constitutionalism.

As a constitutional model that arose out of ‘a deliberate process’, a process which aimed to unify 13 independent colonies, one of the main issues of concern was that of the exercise of political power; more precisely, how to limit the exercise of political power by the federal government. To achieve an effective balance between regulating the former colonies’ collective interests on coming together and ensuring that power was not overconcentrated in one source, the drafters of the US Constitution divided power along two lines. In the first instance, the drafters created a two-tier federal state with a central federal government on one level and state governments on another level. This federal division of power resulted in certain specified powers and functions being allocated to the national federal government. The remainder or residue of powers and functions was left to the states which came together to form a ‘more perfect union’.<sup>28</sup> The result of this division of power is that it ascribes exclusive functions and competencies to each level of government. Ultimately, as a constitutional principle, federalism serves as an important limitation on an overly powerful central government. At the same time, it promotes diversity and local autonomy by allowing each state to deal with many of the day-to-day issues affecting its citizens.<sup>29</sup>

The second line along which the US Constitution limits power is in terms of the concept of separation of powers adopted by the drafters of the Constitution. The doctrine of separation of powers dictates that governmental power be divided according to function (and, in the most rigid cases, of personnel too) between three primary branches of government, namely the legislature, the executive and the judiciary. The US constitutional model provides for the most stringent separation in respect of the branches, their functions and personnel. While a similar separation of branches exists under the Westminster model, the US’s model is radically different in that the separation between the three branches is far more absolute. For example, the US model of separation of powers provides for a complete separation of personnel between the three branches of government – no one may be a member of more than one branch at any given time.<sup>30</sup> Contrast this with the Westminster system of parliamentary government where members of the executive (the Prime Minister and his or her Cabinet) are also necessarily Members of Parliament.

The US model does not, however, demand a complete separation of powers in all respects. Instead, the US model introduced an important innovation from a constitutional law point of view, namely a system of checks and balances. This system of checks and balances allows the three branches to enjoy a limited amount of power to check the exercise of power by the other branches in prescribed circumstances in order to maintain a balance of power among them. The US model ensures that no one branch can function completely independently of the other while ensuring that no one branch accumulates excessive powers.<sup>31</sup> It is based on the assumption that the concentration of power in one body would lead to a possible abuse of power. For example, while the legislative branch enjoys the power to legislate, this power is subject to the presidential veto in terms of which the President can block legislation from coming into force despite the legislature having passed it. Equally, another example of a check is where a court declares a statute to be unconstitutional in spite of the fact that such legislation was properly passed by a legislative majority.

Figure 2.2 Checks and balances in the US model of constitutionalism



Another defining feature of the US constitutional model is that of constitutional supremacy. Contrasted with parliamentary supremacy under the Westminster model, constitutional supremacy is premised on the notion that the constitution is the highest law and requires all other law and conduct to comply with its provisions. Put differently, constitutional supremacy means that the constitution is the ultimate source of all law and lawful exercise of authority. Subject to the constitution being amended, the appropriate court must declare invalid any law passed by the legislature or conduct by a governmental body or organ that is in conflict with or is otherwise inconsistent with the constitution.

The inclusion of a Bill of Rights by the drafters [32](#) is another important contribution made by the US constitutional model. The importance of a bill of rights is that it also serves as a limit on the power of government by setting out those individual freedoms and liberties on which the government may not encroach. Constitutionally protected rights, in other words, serve as a protective mechanism for safeguarding rights-holders' interests against governmental trespass. Of course, remember that although the language of the US Bill of Rights was couched in universal terms and would later serve to inspire many other countries in their quest for independence, the US Bill of Rights was a product of its times. So while the Bill of Rights proclaimed that 'all men [sic] are created equal' and that their rights are 'inviolable' in 1789, it did not protect native Americans and Africans (many of whom were brought to the US and held in slavery). Women also did not originally enjoy equal rights with men.

The final feature of the US model that we consider here is the institution of judicial review. The US Supreme Court asserted its power of judicial review for the first time in *Marbury v Madison*.[33](#) This power is an important check on the legislature and the executive as it empowers the courts to declare unconstitutional any law or conduct found to contravene the constitution. However, the US Constitution does not expressly provide for this checking power exercised by the courts on the other branches of government. This fact, alongside the fact that the power of judicial review essentially permits courts to overrule a majority decision taken by the legislature on behalf of millions of citizens, also known as the counter-majoritarian dilemma,[34](#) has ensured that to this day the power remains controversial in the US.

We deal with counter-majoritarianism in more detail below. For present purposes, it is imperative that we point out that the overriding importance of judicial review is that for a constitutional system premised on the doctrine of constitutional supremacy and providing for a bill of rights to have excluded powers of judicial review would have weakened the system immensely.[35](#) The reason for this is that there would otherwise be no politically non-partisan organ of state charged with upholding and enforcing the constitution.[36](#)

#### PAUSE FOR REFLECTION

Justification for the courts' power of review

In *Marbury v Madison*, then US Chief Justice Marshall established the principle that the courts have the right to review and set aside legislation that contravened the Constitution. He made the following argument to justify his decision:

This theory is essentially attached to a written constitution, and is consequently to be considered by this court as one of the fundamental principles of our society. It is not therefore to be lost sight of in the further consideration of this subject. If an act of the legislature,

repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration. It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the constitution: if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law: the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply. Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law. This doctrine would subvert the very foundation of all written constitutions. It would declare that an act, which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure. That it thus reduces to nothing what we have deemed the greatest improvement on political institutions – a written constitution, would of itself be sufficient, in America where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the constitution of the United States furnish additional arguments in favour of its rejection. The judicial power of the United States is extended to all cases arising under the constitution. Could it be the intention of those who gave this power, to say that, in using it, the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises? This is too extravagant to be maintained.<sup>37</sup>

This passage contains the classic justification for judicial review in a system where the constitution is supreme and the rule of law is adhered to. It is premised on the idea that a supreme written constitution would be of little use if the courts could not declare invalid those laws that contravene sections of the constitution. Where promises are made in a constitution, but no impartial body is empowered to enforce those promises, they may very well remain illusory. However, it does not deal with the question of whether unelected judges – or individuals belonging to another institution or body – should be awarded the power to declare invalid laws duly passed by the democratically elected legislature.

One major contribution to constitutional law that can arguably be attributed to judicial review has been the development of a body of law that deals with how governmental power under a supreme constitution is to be properly exercised. This body of law also deals with how the relations between the different branches or levels of government should be balanced and resolved on the basis of constitutional principles rather than politics. The US form of judicial review, based on its Bill of Rights, has also greatly influenced the development of human rights norms and standards.

Table 2.1 A comparison of constitutional supremacy and parliamentary supremacy

	Constitutional supremacy	Parliamentary supremacy
Country of origin	US	UK
Supreme source of law	Constitution	Parliament
Effect of supremacy of such law	The Constitution is supreme and any law or conduct established to be inconsistent with the Constitution stands to be struck down by the courts	Parliament is the supreme law-making authority. Laws made by Parliament cannot be struck down except where they have been enacted without following the correct procedures

### 2.2.4.3 The German constitutional model

Thus far we have considered the two constitutional models that, first, have endured substantially unchanged for several centuries and, second, that are recognised as being significant contributors to the development of our understanding of constitutionalism, especially in South Africa. There is, however, one other model that we shall consider that has been of some influence before turning to the South African constitutional model. This is the German model.<sup>38</sup>

Germany has a long constitutional history that dates back at least to the 1800s. Despite this long history, Germany has gone through several significant constitutional changes and configurations caused by shifts in state power, state form and, more importantly, the intervention of two world wars. As such, our interest in the German constitutional model commences from 1948 after the Second World War and the fall of the Nazi regime.<sup>39</sup> The constitutional model established in this period was in many ways a reaction to Nazi atrocities in much the same way that parts of the South African Constitution were drafted in reaction to South Africa's apartheid past. The German model sought to ensure that the inhumane excesses of the period could never be re-enacted under a new constitutional dispensation. The Constitution that was produced in response to this history is one from which South African constitutional law has drawn as it has also sought to deal with South Africa's own past of racial violence, exploitation and exclusion. In this section, we highlight some of the most significant features of this model, especially those that we believe resonate with the current South African constitutional dispensation.

Like the US constitutional model, the German model is premised on the notion of constitutional supremacy. However, in developing its unique constitutional model, Germany has, by the inclusion of constitutional values, added another important layer to the notion of the constitution being supreme. In this respect, the drafters of the German Constitution sought to establish a value-based democratic order that attempts to 'secure democratic rule in Germany by binding the democratic process to the values and principles expressed in the constitution'.<sup>40</sup> The Constitution is thus not viewed as a neutral document that merely regulates state power, but as a document that aims to impose a normative value system on that country.<sup>41</sup> This means that where the German Constitution is applied or interpreted, it should entail an application or interpretation that accords with and promotes the values embodied in the Constitution. Central to this value-based order is the value of human dignity which, under the German Constitution, is declared to be 'inviolable' and cannot be

amended.<sup>42</sup> The dimension that this value-based democratic order adds is that it recognises the importance of establishing a constitutional culture of broadly shared values and that such values may actually be just as important as the rules, processes and institutions established under the constitution.

The concept of Rechtsstaat is yet another defining feature of the German constitutional model.<sup>43</sup> In terms of Rechtsstaat, the Constitution is established as the higher law with which all other laws and state conduct must comply.<sup>44</sup> However, the importance of the concept of Rechtsstaat in the German constitutional system is that it demands more than mere formal constitutional compliance or procedural safeguards that prohibit the arbitrary exercise of power. It also demands that the law and state actors must 'strive to protect freedom, justice and legal certainty'.<sup>45</sup> With regard to legal certainty, the concept of Rechtsstaat is closely linked to the notion of the rule of law as it also encompasses the idea that legal rules must be clear and enforced equally.<sup>46</sup> However, it is often said to encompass a more substantive aspect: in a Rechtsstaat, the Constitution, as interpreted by the Constitutional Court, ensures the normative preconditions on which the realisation of the rule of law and especially the formulation of individual human rights claims are based.<sup>47</sup> In this sense, a German understanding of the Rechtsstaat will always be bound to the context of the democratic and social constitutional state. If the democratic or the social welfare aspects of the state are fundamentally eroded, the Rechtsstaat will no longer be respected.

Another major feature of the German constitutional model is that it established Germany as a social state.<sup>48</sup> By establishing Germany as a social state, the Constitution places the state under an obligation to provide for the basic needs of members of German society, including housing, water, electricity and education.<sup>49</sup> The social state is premised on the value of human dignity. It holds that every person has an inherent value as a human being which was denied by the Nazi government. As such, the state has an obligation to create an environment in which people can reach their full potential as human beings. The social state is, therefore, about more than just state welfare. It is a philosophical principle which assumes that the value of human dignity can only be respected where the state plays a role in protecting individuals and by providing the basics which make living one's life meaningful. Although the German Constitution clearly establishes a social state, it interestingly does not expressly include any socio-economic rights in its Bill of Rights in the sense of individually enumerated rights.<sup>50</sup> Instead, under the notion of a social state and underpinned by a strong culture of entrenched human rights, the German model establishes an effective balance between limiting the power of the state and upholding the rights of citizens, including providing for the basic material needs of a life worth living.

## COUNTER POINT

The notion of a social state versus a free-market system

A social state can arguably be said to reflect the same concerns expressed by adherents to the values of ubuntu as it focuses on the idea of human solidarity. It represents a rejection of an overly individualistic worldview and affirms the importance of community and the fact that all people in society are demeaned when some people do not have their basic social and economic needs met. Bauman describes the social state in the following manner:

A state is 'social' when it promotes the principle of communally endorsed, collective insurance against individual misfortune and its consequences. It is primarily that principle –

declared, set in operation and trusted to be in working order – that recast the otherwise abstract idea of ‘society’ into the experience of felt and lived community through replacing the ‘order of egoism’ (to deploy John Dunn’s terms), bound to generate an atmosphere of mutual mistrust and suspicion, with the ‘order of equality,’ inspiring confidence and solidarity. It is the same principle which lifts members of society to the status of citizens, that is, makes them stakeholders in addition to being stockholders: beneficiaries, but also actors – the wardens as much as the wards of the ‘social benefits’ system, individuals with an acute interest in the common good understood as a network of shared institutions that can be trusted and realistically expected, to guarantee the solidity and reliability of the state-issued ‘collective insurance policy’.[51](#)

Some critics of the social-state principle argue that, in essence, it establishes an unfree or even undemocratic state that does not protect the free market as it does not sufficiently restrict the ability of a government to intervene in the economy. The freedom of individuals to act as they see fit, and to make a profit and exploit their own talents to the best of their abilities, would be better protected in a less welfarist state. This, they argue, is required to enable freedom to flourish, something that is fundamental to the proper functioning of a constitutional democracy. They reject the notion that unbridled capitalism would be fundamentally unjust to a large majority of citizens in a state and that while some would reap huge financial gains, it would visit misery on others. They argue that a more radical free-market system would unleash economic growth that would eventually benefit all members of society. This, in turn, would better safeguard democracy.

Those who express these views are often, perhaps unkindly, called market fundamentalists. The views of market fundamentalists who oppose – to different degrees – the introduction of social welfare elements in a constitution are difficult to square with the provisions in the South African Constitution and with the idea that the South African Constitution is transformative in nature.[52](#) As we will see later, the South African Constitution includes a set of justiciable social and economic rights. This gives credence to the proposition that, like the German Constitution, it creates some form of a social state.

The German constitutional model also incorporates a system of separation of powers. The system divides power along the usual lines into the three branches, namely the legislature, the executive and the judiciary. In terms of this system, a bicameral Parliament is established that comprises a Bundestag [53](#) (the lower House) and the Bundesrat [54](#) (the upper House). Apart from law making, the lower House is responsible for the election of the Federal Chancellor, the equivalent of a prime minister, who is usually the leader of the dominant party in the Parliament.[55](#) The Chancellor selects his or her Cabinet and is responsible, with the Cabinet, for developing public policy and executing laws.[56](#) The German Constitution also makes provision for a President whose main function is to serve as a ceremonial head of state akin to the role played by the British monarch.[57](#) The system also has a system of administration of justice that includes a Constitutional Court.[58](#) The primary function of the Constitutional Court is to adjudicate constitutional matters arising from disputes between state organs, as well as between the state and private citizens, especially in instances of alleged rights violations.[59](#)

The final feature that bears mentioning for our purposes is that of the federal system. The German Constitution establishes Germany as a federal republic. Under the federal government are the provincial or Länder governments.[60](#) Although the Länder governments have their own constitutions, such constitutions must generally be in conformity with the

German Constitution.<sup>61</sup> The German Constitution also provides the Länder governments with the authority to regulate their own affairs subject, of course, to limits placed by it. The Constitution stipulates areas or subject matter over which the Länder have exclusive competence to legislate and others over which they have concurrent competence with the Bundestag.

### 2.2.5 Constitutionalism in South Africa: a brief overview

We discussed South Africa's constitutional history in chapter 1 and will therefore not repeat it here. Instead, the aim of this section is to demonstrate the influence that the different constitutional models discussed above have had on the development of the various constitutional models in South Africa since the formation of the modern South African state in 1910. As noted in chapter 1, we do not agree with the view that South Africa's constitutional history can be explained solely with reference to the formal structures imposed by the colonial rulers and that South Africa's constitutional history started in 1910. Nor do we wish readers to lose sight of the bifurcated nature of the constitutional arrangements in place from 1910 to 1994. However, as the governance traditions of indigenous South Africans have had a limited impact on the provisions of the South African Constitution, we focus here on the colonial history of constitutionalism in South Africa. We therefore do not claim that the models considered here are the only ones that have influenced South African constitutional developments, but it is most certainly arguable that they have had the most significant and identifiable influence on the constitutional structure and content of present-day South Africa.

#### 2.2.5.1 The era of the dominance of the Westminster constitutional model

As discussed in chapter 1, the 1910 Union Constitution <sup>62</sup> established a colonial government that was tied to the British monarchy in several significant aspects. Apart from such formal colonial ties, another significant way in which such ties were manifested was in the constitutional model adopted at the National Convention of South Africa in 1908–9 which led to the Union Constitution of 1910. The Union Constitution adopted a manifestly Westminster form of government which made no provision for a bill of rights and provided little by way of constitutional guarantees limiting the power wielded by Parliament.

In 1961, South Africa cut ties with the British Commonwealth and adopted a republican Constitution.<sup>63</sup> Institutionally, very little changed from the previous Westminster-style Union Constitution, save that the head of state was no longer the British monarch and the position of a state president was created to serve a similar ceremonial role previously served by the monarch.<sup>64</sup> In terms of the 1961 Constitution, the prominence of parliamentary sovereignty as a defining constitutional feature was left in no doubt as the doctrine was provided for in explicit terms. Section 59 of the 1961 Constitution reads as follows:

Parliament shall be the sovereign legislative authority in and over the Republic, and shall have full power to make laws for the peace, order and good government of the Republic.

No court of law shall be competent to enquire into or to pronounce upon the validity of any Act passed by Parliament other than any Act which repeals or amends or purports to repeal or amend the provisions of section one hundred and eight or one hundred and eighteen.<sup>65</sup>

Given the bifurcated nature of the state and the apartheid policies of the National Party (NP) which governed South Africa from 1948–1994, it is not surprising that during this period the NP government used parliamentary supremacy as a powerful instrument to secure political power for the white minority. In addition, the NP government used parliamentary supremacy to insulate the many legal provisions which discriminated against black South Africans and which restricted the basic rights of citizens from effective judicial scrutiny.

Having said this, however, we must be careful not to confuse the substance of the Westminster constitutional model with the abuses to which it was put and can potentially be put. The British experience with parliamentary supremacy is markedly different from that of South Africa and bears testimony to the fact that as a model of constitutionalism, there is nothing inherently flawed or problematic with the Westminster model. Like all other constitutional models it has its strengths and weaknesses, but any weaknesses it may have are not directly responsible for the system of racial exclusion and apartheid. Often, such weaknesses can be traced back to problems with the political culture and political parties and not necessarily with constitutional structures.

However, the tainted history of the Westminster system in South Africa most likely contributed to its not being wholly adopted as the preferred model during constitutional negotiations in the early 1990s.<sup>66</sup> While the end of apartheid brought with it an end to the era of parliamentary supremacy in South Africa, aspects of the Westminster system nevertheless found their way into the South African Constitution in amended form.

#### 2.2.5.2 The era of constitutional supremacy

We discussed the history of the constitutional negotiations in chapter 1 and detailed the context that informed the choices made by the drafters of the Constitution. In this section, we therefore describe and discuss the prominent features of South Africa's democratic Constitution that arose from constitutional negotiations.

##### 2.2.5.2.1 Constitutional supremacy

By far the most definitive feature of South Africa's post-apartheid constitutional system is that of constitutional supremacy. This notion of a supreme constitution is an important one on which South Africa's democratic constitutional dispensation is based. The Constitution in its founding provisions <sup>67</sup> expresses supremacy first as a foundational value, and second, declares the supremacy of the Constitution as a binding and enforceable rule in no uncertain terms. Section 1(c) of the Constitution provides:

The Republic of South Africa is one sovereign, democratic state founded on the following values ... [s]upremacy of the Constitution and the rule of law.

Section 2 of the Constitution provides:

This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.<sup>68</sup>

The decision by the drafters to make the Constitution supreme has had far-reaching implications for how the current democratic state operates, how the various structures and institutions relate to one another and how governmental power is exercised. The meaning of

constitutional supremacy has already been dealt with above and that understanding applies with equal force to South Africa. What is, however, of interest to us here (and this is a question that is peculiar to the South African Constitution) is whether there is a difference between constitutional supremacy as a value captured by section 1 of the Constitution and the declaration of constitutional supremacy as a binding and enforceable rule set out in section 2. Notionally, we would assume that there should be some difference or significance to the drafters having included the idea of constitutional supremacy in two different provisions with two differing connotations in the Founding Chapter of the Constitution.

However, judging from the case law, it appears that the courts have made nothing of the difference between the two concepts. In fact, we find that there are few references in the case law to these provisions, save for passing, unsubstantiated references to the fact that the Constitution is supreme.<sup>69</sup> With respect to the declaration of supremacy in section 2, a possible reason put forward for the lack of judicial consideration of it is ‘due to the clarity of the rule it states’.<sup>70</sup> In other words, there is little room for alternative interpretations of the provision. This position finds support in the General Provisions Chapter <sup>71</sup> of the Constitution in which section 237 demands that ‘all constitutional obligations must be performed diligently and without delay’.

There is a difference in the procedure for the amendment of section 1 and section 2. On the one hand, the Constitution imposes a higher threshold for the amendment of section 1 where it requires the supporting vote of at least 75% of the members of the National Assembly (NA) and the support of six provincial delegations in the National Council of Provinces (NCOP).<sup>72</sup> For section 2, it requires the supporting vote of two-thirds of the members of the NA.<sup>73</sup> However, it is doubtful that Parliament would be able to amend section 2 without infringing on the values set out in section 1. If this happens, the constitutional question will arise whether the amendment of section 2 in effect amends section 1 and thus requires the more onerous amendment procedure to be followed to be validly passed.

While little seems to turn on whether constitutional supremacy is appealed to as a value or a binding and enforceable rule, constitutional supremacy is certainly a defining feature of South African constitutionalism as it renders the entire Constitution justiciable. Any law or conduct can thus potentially be tested against the provisions of the Constitution and must be declared invalid if it fails to comply with these provisions. Given the justiciability of the Constitution, an important incidence of constitutional supremacy is therefore the institutionalisation of judicial review which enjoins the courts to declare any law or conduct inconsistent with the Constitution invalid.<sup>74</sup> This power vested in the judiciary is an important one that secures the rights of all rights-holders under the Constitution as well as securing the Constitution itself against violation as no authority or law is higher than the Constitution. We discuss the institution of judicial review further in this and subsequent chapters of this book.

#### PAUSE FOR REFLECTION

Exploring the effects of the supremacy of the Constitution on the legal system

Chaskalson CJ conveyed the primacy (or supremacy) of the Constitution lucidly and strongly in *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex parte President of the Republic of South Africa and Others* where he stated: ‘There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law,



including the common law, derives its force from the Constitution and is subject to constitutional control.’ [75](#) This declaration by the Constitutional Court is pivotal for South African law in general as it affirms the Constitution as the founding law of the Republic. It also affirms the unity of the South African legal system which derives its legitimacy and its binding force from the Constitution alone. Michelman explained the further significance of this passage as follows: [76](#)

In those two sentences, the CC [Constitutional Court] claims for the Final Constitution [FC] not just one special virtue as compared with the rest of South Africa’s laws but three of them, two of which go well beyond the claim (which also is there) for the Constitution’s supremacy in the unadorned, norm-trumping sense declared by FC s 2. The first of these additional claims is for the pervasiveness of the Final Constitution’s norms – ‘all law ... is subject to constitutional control.’ The second is the claim for the Final Constitution’s status as the basic law of South Africa – ‘all law ... derives its force from the Constitution.’ Certainly there is no other law in South Africa of which it may be said either that all (other) law is subject to its control or that the force of all (other) law flows or stems from it. Now, a law to which these unique virtues are ascribed, along with trumping-sense supremacy, would be about as superlatively – or ‘radically’ – supreme as a law can get. Suppose, then, that the CC’s attribution to the Final Constitution of the three special virtues combined could be seen to posit or reflect a value to which South Africa’s embrace of the Final Constitution could defensibly be said to have committed the country; a value, that is, that stands distinct from and additive to the other human and societal goods posited as founding values by FC s 1. If we could see the threefold attribution in such a light, then we might understand ‘supremacy of the Constitution’ as it occurs in FC s 1’s list of founding values to be the textual pointer toward the CC’s claims in *Pharmaceutical Manufacturers* for the pervasiveness and the basic-law status, as well as the normative-trumping force, of the Final Constitution... . ‘Supremacy of the Constitution’ names the value of legal-systemic harmony in the service of the vision of the good society staked out by the entire list of founding values set forth in FC s 1 and instinct in the rest of the Final Constitution. We deal here with the value of the unity of the legal system — meaning the system’s normative unity or, as one might say more poetically, its visionary unity. The value in question is the value of having all the institutional sites in which the legal order resides — and especially all of its courts of law — pulling in the same and not contrary directions, working in ultimate harmony (which is not to say without difference and debate) toward the vision (the elements of which must always be open to interpretation) of a well-ordered South African society depicted in very broad-brush fashion by the other founding values listed in FC s 1: human dignity, equality, human rights and freedoms, non-racialism, non-sexism, and the basic accoutrements of an open, accountable, representative-democratic system of government.

If Michelman is correct, it means that the Constitution, and the norms or values enshrined in it, must now animate all aspects of South African law (as interpreted, developed and applied by all South African courts) in the pursuit of justice. The supremacy of the Constitution then signifies not only the absolute unity of the legal system, but such a unity that stands in the ‘service of transformation by, under, and according to law’.[77](#) No aspect of South African law, including the common law and customary law, would then be immune from the influence of the basic values of human dignity, equality, human rights and freedoms, non-racialism and non-sexism, as well as the basic accessories of an open, accountable, representative-democratic system of government which are embodied in the Constitution. Any development of the common law and customary law will have to occur with reference to these basic constitutional values. The principle of constitutional supremacy, in this

understanding, will thus have a far more profound effect on the legal system than merely indicating that all law inconsistent with the specific provisions of the Constitution will now be unconstitutional. The trajectory of the development of all forms of law in South Africa will be fundamentally altered by the supremacy of the Constitution, thus understood. This radical aspect of South Africa's constitutional model is not always appreciated by lawyers and judges who continue to work with the common law, customary law and legislation as if these are entirely insulated from the norms enshrined in the Constitution.

#### 2.2.5.2.2 A value-based constitutional system

Section 1 of the Constitution affirms that the South African constitutional model is not only descriptive but prescriptive. This section sets out some of the most important values on which the South African constitution model is founded. Section 1 reads as follows:

The Republic of South Africa is one, sovereign, democratic state founded on the following values:

1. (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
2. (b) Non-racialism and non-sexism.
3. (c) Supremacy of the constitution and the rule of law.
4. (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

Section 1 of the Constitution is of profound importance as it sets out the foundational values on which the current constitutional dispensation is based. In so doing, it is self-evident that these values espoused in the provision reflect a break from the past and establish the foundations of a new society in the making. This society is governed by law, but the law derives its force from the Constitution and its development is animated by the values contained in section 1 of the Constitution. The importance of these values within the overall constitutional scheme is reflected in the fact that section 1 is an entrenched provision that can only be amended subject to special procedures and majorities being attained in Parliament.<sup>78</sup>

#### COUNTER POINT

##### Amending the founding provisions of the Constitution

The founding provisions are often lauded as being central to South African democracy and, as Michelman points out, to the legal system as a whole. However, we will see below that the values they protect are not inviolable. Amendment may be made to the founding provisions provided 75% of the members of the NA and six provinces in the NCOP vote for such an amendment. Therefore, Parliament could alter the provision that states that the Constitution (and not Parliament) is supreme if a required majority of members of the NA and delegations in the NCOP support this. So too could the provisions that state the values of human dignity, the achievement of equality and the advancement of human rights and freedoms. If Parliament were to make an amendment of this kind to the Constitution (an unlikely scenario as no political party has ever acquired the 75% majority in the NA), it would be possible to restore Parliament to the position of supremacy it enjoyed during the apartheid era. Such a Parliament would also be able to abolish the rule of law.

Some critics argue that it would have been more prudent of the drafters of the Constitution to have made section 1 unchangeable (something the German constitution-makers did) [79](#) to safeguard the democratic and non-racial character of the South African constitutional system. Others argue that circumstances and the political, economic and social context in a country may change over time and that future generations should not be absolutely and finally held to ransom by the drafters of the 1996 Constitution. Such a system, they say, would in extreme cases invite the government of the day that enjoys legitimacy and overwhelming electoral support to suspend the Constitution in its entirety.

How a person views this issue will depend on his or her commitment to the values enshrined in section 1 as well as on his or her view of the political landscape and whether an elected Parliament would ever be able to muster the requisite heightened majority to abolish the basic values on which the 1996 Constitution is based.

It is therefore clear that in addition to the clearly articulated values found in section 1, there are also some unarticulated values embodied in the Constitution which, together with those in section 1, form the normative basis of how the South African Constitution is to be interpreted.[80](#) In other words, our Constitution does not simply set out the rules, processes and structures that place limits on governmental power. The Constitution also expresses itself on the ideals and characteristics to which we, as a society, deem worthy to aspire. This idea should be familiar to us as it is derived from the notion of a value-based democratic order as found in the German model discussed above.[81](#) In the South African context, the courts have recognised the significance of the value-based constitutional system where they have asserted that the democratic constitutional order has established an ‘objective normative value system’.[82](#) However, this notion, while appearing to be incredibly important, has not been the subject of much attention from the courts [83](#) or academic commentators in South Africa.[84](#)

#### 2.2.5.2.3 Co-operative federalism

The final characteristic of South African constitutionalism that we shall discuss in this section is that of the federal division of power. The Constitution provides for what can be deemed a quasi-federal division of power across three levels or spheres of government, namely national, provincial and local spheres. This system differs from the traditional federal system where the powers and functions of different levels of government are clearly delineated and where each sphere is empowered to deal exclusively with certain distinct subject matters.

According to Chapter 3 of the Constitution, the model adopted is that of co-operative federalism or co-operative government. Chapter 3 makes it clear that while the three spheres of government are distinct, all three spheres are expected to work together to deliver the vision of the Constitution.[85](#) Rather than competing with each other, the Constitution envisages a co-operative relationship between the three levels of government that entails their sharing responsibilities in a mutually supportive fashion.[86](#)

Co-operation between the three levels of government is not always easy, especially if different political parties govern different entities in different spheres. For example, if the African National Congress (ANC) governs nationally, the Democratic Alliance (DA) governs the Western Cape Province and a coalition of political parties governs one of the municipalities in the Western Cape, this will present specific challenges. In terms of Chapter 3, the ANC national government, the DA Western Cape government and the coalition municipal government are required to co-operate with each other. This task is made

even more difficult as the national government, the provincial governments and municipalities sometimes are all empowered to deal with a specific subject matter, for example the provision of housing. If political parties are unable to work together, the governments in the various spheres will not be able to deliver on their housing mandate in an effective manner. This is why the provisions of Chapter 3 are of utmost importance for the smooth running of the country. We will discuss the details of co-operative federalism in chapter 8 of this book.

## 2.3 Separation of powers

### 2.3.1 The purpose and principles of the doctrine of separation of powers

Constitutional restrictions on the exercise of public power can be both procedural and substantive in nature. Substantive restrictions are achieved through a justiciable bill of rights and the constitutional commitment to other values such as the rule of law. The exercise of public power can also be restricted in a procedural way. One of the most important mechanisms through which this is achieved in a constitutional democracy is through the separation of powers.<sup>87</sup> The separation of powers doctrine seeks to limit the powers of each individual branch of government: the legislature, the executive and the judiciary. The doctrine is therefore the basis for an institutional, procedural and structural division of public power to create a society in which the abuse of power by government is curtailed and public power is exercised wisely, or at least prudently, and not in an abusive manner.

The South African Constitution makes no express mention of separation of powers. However, the Constitutional Principles that formed part of the interim Constitution required that the final Constitution contain a separation of powers between the three branches of government as well as the appropriate checks and balances on the exercise of power of each of these branches to 'ensure accountability, responsiveness and openness'.<sup>88</sup> It is thus against this background that the doctrine of separation of powers must be seen as forming an integral component of South African constitutionalism.

Historically, as a means of limiting governmental power, separation of powers is primarily concerned with establishing procedural limits on the exercise of power. As a mechanism to achieve this broad aim, separation of powers seeks to ensure that power is not concentrated in one institution or branch, or in one person or office. This is to prevent abuses of power by an all-powerful government which has concentrated all power in one body or in one individual such as a president. Separation of powers can be said to be premised on the understanding that rather than trusting in the benevolence of rulers, a more predictable and transparent way to prevent tyranny is by distributing power between different branches of government which can, individually, be better held to account. Such distribution seeks to limit the possibility of an overconcentration of power in any one branch and also to create some level of exclusiveness or specialisation of functions in each of the branches.

Beyond limiting governmental power by distributing it, the modern conception of separation of powers is also closely associated with the protection of human rights more generally in addition to safeguarding political liberty. This is so because separation of powers aims to protect society against the abuse of political power, something that is required to protect human rights. The procedural nature of the separation of powers can therefore be seen as having a substantive aim – the protection of the human rights of all and the prevention of the abuse of power.

Before discussing separation of powers in some depth, it is worthwhile to lay out the four principles that make up the modern conceptualisation of the doctrine.<sup>89</sup> The four principles are as follows:

- First, there is the division of governmental power across the three branches, namely the legislative branch (parliament), the executive branch (president/prime minister and cabinet) and the judicial branch (the courts). This division is often referred to as the trias politica.
- Second, the principle of separation of functions entails conferring distinct areas of responsibility and authority on each of the three branches of government and preventing one branch from taking responsibility for the tasks allocated to another branch.
- Third, the principle of separation of personnel entails that each branch of government must have assigned to it specific persons who are responsible, often exclusively, for the performance or execution of that branch's function.
- Last, the provision of checks and balances entails that one branch can be held accountable by other branches to check the exercise of power by that branch. In certain circumstances, this allows one branch to veto the actions taken by another branch. This ensures, first, that the branches remain connected in the discharge of their functions, and second, that the branches hold each other to account where provided for by the constitution.

### Figure 2.3 Separation of powers doctrine

The principles set out above are generally accepted as the pillars on which the doctrine of separation of powers is based. However, it is acknowledged that no constitutional system encompasses a full separation of governmental authority where power is exercised by each individual branch of government in isolation from the others.<sup>90</sup> Instead, the division of power, functions and personnel, and the provision for checks and balances, differ extensively among constitutions that subscribe to the doctrine.

#### 2.3.2 A brief history of the doctrine of separation of powers

The doctrine of separation of powers as a distinct theory of government is often said to have its origins in the political philosophy of the Enlightenment in seventeenth-century Europe.<sup>91</sup> However, this may be an oversimplification. Although no separation of powers as currently understood existed in pre-colonial southern African societies because traditional leaders performed all functions of government,<sup>92</sup> traditional leaders were nevertheless expected to consult with an advisory body or to seek approval from the population at large. They could not take any important decision without discussing it first in the council. This allowed for a check on the exercise of power by the relevant chief.<sup>93</sup> Nevertheless, the modern concept of separation of powers is said to have emerged as a model to explain the English constitutional model developed by John Locke.<sup>94</sup> Locke's writing on this topic emerged in the wake of the constitutional developments in England which ended the absolute power of the monarch. Locke was concerned that absolute monarchic power should not be replaced by absolute parliamentary power. His writing therefore wrestled with ways of countering the power-accumulating tendencies of those in power and the tendency of those in power to abuse the

power they accumulated.<sup>95</sup> Locke never envisaged the separation of powers between the executive and the judiciary. This task fell to French theorist, Charles Baron de Montesquieu, who devised the modern concept of separation of powers as we know it today.<sup>96</sup> This concept envisaged the division of governmental power into the trias politica, namely the three branches of government, the legislative branch, the executive branch and the judicial branch.

The development of the modern concept of separation of powers must be seen against a history of absolute monarchy that existed in many parts of Europe in the seventeenth century.<sup>97</sup> During these times, kings or queens were believed to rule by divine right. This meant that all powers of governance were located in the person of the king or queen. It was, therefore, against the danger of an overconcentration of power in the hands of the monarch that the need to distribute and balance power became self-evident. At the time, such ideas were regarded as revolutionary as they sought to bring about radical social change. This included the disruption of the prevailing social order in which power was the preserve of a narrow ruling class who were closely associated with the monarch.<sup>98</sup> While initially conceived as a reaction to the absolute power of kings, the central concern of preventing an over-accumulation of power remained at the core of the development of the doctrine as constitutional theorists, such as Locke, warned against the dangers of any one institution, even parliament, having too much power.<sup>99</sup> This modern concept was to find its earliest, clearest expression in the adoption of the US Constitution wherein the idea of separation of powers provided a basis for the distribution of power and the very structure of government.

### 2.3.3 Separation of powers: the South African experience

As mentioned above, Constitutional Principle VI in the interim Constitution required that the final Constitution incorporate a system of separation of powers. However, this Principle was silent as to the exact nature of the distribution of power between the three branches and the institutional limits to be put in place on the exercise of power by each of the branches. Instead, what Constitutional Principle VI did specify was the purpose for which the separation of powers had to be incorporated into the 1996 Constitution. This purpose was to uphold and safeguard important democratic values and norms, namely ‘accountability, responsiveness, and openness’.<sup>100</sup> It was, therefore, left to the drafters of the 1996 Constitution to determine how the South African model of separation of powers was to be conceptualised and incorporated.

Note that there is no universal model of separation of powers. Moreover, in democratic systems of government in which checks and balances result in the imposition of restraints by one branch of government on another, there is no separation that is absolute.<sup>101</sup> The concept can be incorporated in a constitution in different ways: it can require a more or less strict separation of functions and personnel as well as more or less powerful mechanisms that would allow one branch of government to enforce checks and balances on another. In interpreting separation of powers in the South African context, what is clear is that the Constitutional Court is reluctant to measure the South African model against the standards of other countries or other models of separation of powers. It is, therefore, important to recognise that we must interpret and judge South Africa’s model of separation of powers with our own historical experiences and political context in mind.<sup>102</sup> In this respect, the Constitutional Court has captured this idea crisply in *De Lange v Smuts NO and Others* when Ackermann J wrote as follows:

I have no doubt that over time our courts will develop a distinctively South African model of separation of powers, one that fits the particular system of government provided for in the Constitution and that reflects a delicate balancing, informed both by South Africa's history and its new dispensation, between the need, on the one hand, to control government by separating powers and enforcing checks and balances, and, on the other, to avoid diffusing power so completely that the government is unable to take timely measures in the public interest.<sup>103</sup>

The Constitutional Court has previously held that although there is no explicit reference or mention of separation of powers in the Constitution, it is implicit in the Constitution and is of equal force as an express constitutional provision.<sup>104</sup> However, this apparent omission must be read against the structure of the Constitution which clearly makes provision for the separation of powers in terms of its institutional and substantive arrangements.<sup>105</sup> We can infer the implicitness of the doctrine in the Constitution from the manner in which governmental power is actually distributed primarily between the legislative, the executive and the judicial branches of government. Other provisions in the Constitution also support this implicit inclusion of the separation of powers doctrine. These provisions include the regulation of the distribution of functions; the identification of the appropriate personnel to perform the functions; and, more generally, the framework of control and interaction between the branches of government and the personnel therein. To demonstrate the substance of this implicit doctrine, we discuss the methods by which separation of powers manifests in the Constitution below.

#### COUNTER POINT

Does the legislature in South Africa in fact hold the executive accountable?

In *Certification of the Constitution of the Republic of South Africa, 1996*,<sup>106</sup> the Constitutional Court had to deal with arguments that the South African Constitution, which provides for members of the executive also to be members of legislatures, contravened the principle of the separation of powers. The reason for this was that it did not allow for a complete separation of personnel between the legislature and the executive as members of the Cabinet remain members of the legislature. By virtue of their positions, Cabinet members are thus able to exercise a powerful influence over the decisions of the legislature. In rejecting this criticism the Constitutional Court noted that there is more than one model of separation of powers and stated that:

While in the USA, France and the Netherlands members of the executive may not continue to be members of the legislature, this is not a requirement of the German system of separation of powers. Moreover, because of the different systems of checks and balances that exist in these countries, the relationship between the different branches of government and the power or influence that one branch of government has over the other, differs from one country to another. The principle of separation of powers, on the one hand, recognises the functional independence of branches of government. On the other hand, the principle of checks and balances focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another. In this sense it anticipates the necessary or unavoidable intrusion of one branch on the terrain of another. No constitutional scheme can reflect a complete separation of powers: the scheme is always one of partial separation. In Justice Frankfurter's words, '[t]he areas are partly interacting, not wholly disjointed'. ... As the separation of powers doctrine is not a fixed or rigid

constitutional doctrine, it is given expression in many different forms and made subject to checks and balances of many kinds. It can thus not be said that a failure in the [final Constitution] to separate completely the functionaries of the executive and legislature is destructive of the doctrine. Indeed, the overlap provides a singularly important check and balance on the exercise of executive power. It makes the executive more directly answerable to the elected legislature.[107](#)

It is unclear whether this view of the Constitutional Court has proven to be correct. Although – as we will see – the executive is in theory accountable to the legislature, in practice this accountability can seem illusory. This is because the members of the majority party in the legislature are required to hold accountable the members of the executive who are also, more often than not, members of the leadership of the political party to which the majority of members of the legislature belong. It is not always easy for the members of the legislature to hold the executive to account when this would require them to challenge the authority of the leaders of the political party to which they belong. This difficulty is further exacerbated by the fact that members of the legislature are not individually elected. Because of the electoral system in operation in South Africa, they depend for their election to the legislature on the leadership of the party to which they belong.

#### 2.3.3.1 The legislature

A strict version of the separation of powers doctrine requires the creation of a separate legislature with its own personnel empowered to exercise its powers independently from the other branches of government.[108](#) Chapter 4 of the Constitution creates a slightly less strict separation between the legislature and other branches of government. As far as a separation of functions is concerned, the Constitution vests the national legislative authority in Parliament [109](#) which consists of the National Assembly (NA) and the National Council of Provinces (NCOP). Chapter 4 also determines that the exercise of legislative authority, broadly speaking, entails the power to make laws. This includes amending the Constitution, making general laws as well as the power to assign or delegate Parliament's legislative powers.[110](#) When Parliament exercises its legislative authority, it is only constrained by the fact that it must act in accordance with and within the limits of the Constitution.[111](#) Chapter 4 also specifies in whom the powers to legislate vest. These powers are conferred on members of the legislature who comprise members of the NA [112](#) and members of the NCOP.[113](#) In their capacity as Members of Parliament, the Constitution empowers both members of the NA as well as members of the NCOP respectively to regulate their own processes.[114](#) Closely related to this power, the Constitution confers on the members of both Houses parliamentary privilege for all speeches made in Parliament and its committees.[115](#) We will discuss the content and limits of these powers and privileges in chapter 4 of this book.

However, the Constitution does not provide for a strict separation of powers between the legislature and the executive. First, while it establishes Parliament as the distinct legislative branch with its particularised function of law making and its own personnel, the Constitution also makes provision for the involvement of the executive in the performance of the legislative functions.[116](#) Apart from being allowed to introduce legislation in the NA, members of the executive are given the power to develop and implement policy, as well as to prepare and initiate legislation.[117](#) In addition to this, the executive enjoys limited law-making powers in that it is empowered to make subordinate legislation, a power usually conferred on the executive in the empowering legislation.[118](#)



Second, there is an overlap in personnel between the legislature and the executive: apart from the President and a maximum of two other members of Cabinet, all members of the executive are also required to serve as members of the NA.<sup>119</sup> This connection between the legislature and the executive can be seen simply as being rooted in and a continuation of the Westminster tradition of parliamentary government as discussed above. It can be argued that this overlap of the personnel in the legislature and the executive should be judged in light of the injunction in Constitutional Principle VI that there be checks and balances between the branches. Viewed thus, the close involvement of the executive in the legislative process could be argued to serve the purpose of promoting efficiency and accountability between these two branches, especially considering that governing has and continues to become more and more complicated with an ever-increasing need for regulation. Members of Parliament do not always have the expertise to make complex decisions on specialised topics. They therefore rely on the executive to formulate policy and to translate policies into draft legislation that is then scrutinised by the legislature. Where the members of the executive and members of the legislature overlap, this process (so it is argued) will run more smoothly, improving the efficiency of both the legislature and the executive.

### COUNTER POINT

Does South Africa's electoral system weaken the power of the legislature?

The electoral system in force in South Africa requires that political parties compile electoral lists from which members of the NA and provincial legislatures are then drawn after an election. Some argue that this system weakens the legislature in relation to the executive. This is because the leaders of the majority party, who will often also be members of the executive, may have a decisive say in who appears on the party's election lists. According to this argument, members of the majority party in the legislature may be reluctant to hold the executive to account – they have to safeguard their position in the legislature and they have to respect party discipline which requires strict adherence to the dictates of the party. Such members of the legislature may even bend over backwards to implement the legislative programme of the executive. This weakens the system of checks and balances that goes hand in hand with any effective system of separation of powers. Moreover, it is often argued that in a modern state in recent times, the legislature has declined in political influence in comparison to the executive which 'has burgeoned in size, influence over the legislature and power over the citizenry'.<sup>120</sup> This has turned the legislature into an ineffective body in relation to the executive whose members also dominate the legislature and help to emasculate it.

However, it is unclear whether a change in the electoral system would automatically strengthen the separation of powers and improve the ability of the legislature to hold the executive accountable. It has been pointed out that at the local government level half the municipal councillors are not elected via the electoral list system, but rather in constituencies. This has not necessarily improved accountable and responsive government. According to this view, merely changing the electoral system will not change much. Unless the power of the leaders of political parties to decide who is nominated to represent them in constituencies is weakened, the power of political leaders who serve in the executive over the Members of Parliament who are their juniors in the political party will not be broken. How can even independently elected members of the legislature hold the executive accountable if they know that they will only be renominated as a candidate in a specific seat to contest the election on behalf of the majority party if they do not upset the leadership of the party? <sup>121</sup>

The Constitutional Court has had occasion to consider questions about the power of the executive to interfere with the law-making functions of the legislature in the important early Constitutional Court judgment of *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others*.<sup>122</sup> This case involved a challenge to provisions in an Act of Parliament which delegated powers to the President, allowing him to amend the Local Government Transition Act <sup>123</sup> by proclamation. The Constitutional Court readily accepted that in a modern society, the act of governing would require some level of delegation of law-making power to the executive. Chaskalson P, writing the majority judgment, wrote as follows:

In a modern state detailed provisions are often required for the purpose of implementing and regulating laws, and Parliament cannot be expected to deal with all such matters itself. There is nothing in the Constitution which prohibits Parliament from delegating subordinate regulatory authority to other bodies. The power to do so is necessary for effective law-making. It is implicit in the power to make laws for the country and I have no doubt that under our Constitution parliament can pass legislation delegating such legislative functions to other bodies.<sup>124</sup>

However, in this case, the delegation in question was found to be unconstitutional. In coming to this decision, the judges of the Court delivered several judgments, all concurring that the delegation was invalid but for different reasons. A common thread, though, among the judgments was the fact that while delegation of legislative power is indeed permissible, the doctrine of separation of powers demands that there be limits to the nature or the extent of the power to be delegated by Parliament to the executive. It was with respect to the determination of the extent or even the factors to be taken into account that the judges failed to reach agreement.<sup>125</sup> However, in spite of such disagreement, all the judges concurred on the point that Parliament could not delegate its plenary powers to make or amend a statute to the executive branch. By attempting to do so, Parliament had contravened the separation of powers principle inherent in the structure of the Constitution.

#### 2.3.3.2 The executive

Chapter 5 of the Constitution vests executive authority in the President <sup>126</sup> who is both Head of State and head of the national executive.<sup>127</sup> The Constitution provides a broad definition of the scope of the executive function. In terms of the Constitution, the executive is responsible for the development, preparation and implementation of national policy and legislation as well as for co-ordinating the functions of state departments and administration.<sup>128</sup> More generally, the executive is responsible for the execution and implementation of law, policy and administration.

In the President's capacity as Head of State and head of the national executive, he or she is duty-bound to uphold and defend the Constitution as the supreme law of the Republic.<sup>129</sup> In terms of the Constitution, the President exercises executive authority together with the Cabinet which comprises the Deputy President and Ministers.<sup>130</sup> The President as head of the executive has the power to appoint and dismiss the other members of the Cabinet who serve at the President's pleasure.<sup>131</sup> Although enjoying the power to select the Cabinet of his or her own choice, the President is constrained by provisions of the Constitution that require him or her to select all but two members of the Cabinet from the NA.<sup>132</sup>

While the executive function is undoubtedly an expansive one and has significant powers, these powers must be viewed in light of other constitutional provisions that place the executive under the scrutiny of Parliament. In particular, the Constitution provides that members of the Cabinet are accountable individually and collectively to Parliament.<sup>133</sup> Although the accountability is to 'Parliament' as a whole, section 55(2) affirms that, in effect, this power resides with one of the two Houses, the NA.<sup>134</sup> Cabinet members must also provide full and regular reports concerning matters under their control.<sup>135</sup> Beyond this, the Constitution confers on the NA the ultimate checking power, namely the powers to remove or recall the executive. These powers, on the one hand, permit the NA to remove the entire Cabinet or only the Deputy President and Ministers by way of a vote of no confidence by a majority of the members. This is essentially a political power where the majority of members of the NA have lost confidence in the Cabinet or in the President.<sup>136</sup> On the other hand, these powers also permit the NA to remove the President by way of a two-thirds vote by the members where the President is found to have violated the Constitution or the law, engaged in serious misconduct or when she or he is found to be no longer able to perform his or her functions of office. This is essentially the power of impeachment.<sup>137</sup>

### 2.3.3.3 The judiciary

Unlike the relationship between the executive and the legislature, there is an absolute separation in personnel and (arguably) <sup>138</sup> also in powers between the legislature and executive on the one hand and the judiciary on the other.<sup>139</sup> This is the bedrock principle of the separation of powers doctrine in a constitutional state. Thus, Chapter 8 of the Constitution vests judicial authority in the courts,<sup>140</sup> establishes a hierarchy of courts comprising the Constitutional Court, the Supreme Court of Appeal (SCA), the High Court of South Africa and the magistrates' courts,<sup>141</sup> and establishes the Constitutional Court as the apex court in all matters.<sup>142</sup>

The primary function of the courts is the adjudication of legal disputes, including those that require the interpretation and application of the Constitution.<sup>143</sup> For present purposes, our primary focus is on courts' constitutional jurisdiction, in particular the courts' powers of judicial review.<sup>144</sup> As discussed above, the essence of judicial review is that it empowers the courts to declare as constitutionally invalid any law or conduct found to contravene the Constitution. The legislation or actions declared invalid in this way will have no legal force or effect. This means that the courts – with the Constitutional Court at the apex – have enormous power to check the exercise as well as the abuse of power by the other two branches of government. Unlike the US Constitution where it took the Supreme Court's own doing to assert its powers of judicial review, the South African Constitution clearly makes provision for judicial review in several ways. This includes specifically conferring on the courts, including the High Court of South Africa and the SCA, the power to declare law or conduct to be invalid to the extent that such law or conduct is inconsistent with the Constitution.<sup>145</sup>

The Constitution also provides for the appointment of judges. Owing to the important role played by the courts in enforcing the Constitution, the process of the appointment of judges is carefully detailed and regulated by the Constitution.<sup>146</sup> In particular, the Constitution makes provision for structures and procedures for the appointment of judges that involve all three branches of government and other relevant bodies and organisations through the involvement of the Judicial Service Commission (JSC).<sup>147</sup> A major part of the reasoning underlying the

need to include such detailed provisions and procedures for the appointment of judges is the need to secure the independence of the judiciary.

Judicial independence is a fundamental concept of constitutionalism in as far as the functioning of courts is concerned and is a pivotal requirement for the effective functioning of the separation of powers doctrine. This is evident in the manner in which the Constitution provides for it. The Constitution demands that the courts, in the exercise of their judicial authority, shall be independent and subject only to the Constitution and the law which they must apply impartially and without fear, favour or prejudice.<sup>148</sup> As a safeguard for the independence of the courts, the Constitution creates a prohibition against interfering with the functioning of the courts that applies to everyone, including other branches and organs of state.<sup>149</sup> In addition to this, the Constitution places a positive duty on organs of state to take measures to assist and protect the courts in ensuring their independence, impartiality, dignity, accessibility and effectiveness.<sup>150</sup> These constitutional provisions seek to protect an important element of independence, namely the institutional independence of the courts. In this respect the Constitutional Court in *South African Association of Personal Injury Lawyers v Heath and Others* made the point as follows:

The separation of the judiciary from the other branches of government is an important aspect of the separation of powers required by the Constitution, and is essential to the role of the courts under the Constitution ... Under our Constitution it is the duty of the courts to ensure that the limits to the exercise of public power are not transgressed. Crucial to the discharge of this duty is that the courts be and be seen to be independent.<sup>151</sup>

The other important element of judicial independence relates to the personal independence of judges. This is of crucial importance if they are to perform their functions with impartiality and without fear, favour or prejudice. The Constitution provides for such independence by way of guaranteeing the judges' security of tenure,<sup>152</sup> as well as their salaries and benefits which may not be reduced as long as they remain in office.<sup>153</sup>

The judiciary, like the other branches, is subject to important checks on its power. Judges may be removed from office before the end of their designated tenure where they are proven to be suffering from incapacity, or they have been found guilty of gross incompetence or gross misconduct.<sup>154</sup> The process for the removal of a judge entails the JSC conducting an investigation and then making a finding on one of the grounds previously mentioned.<sup>155</sup> Thereafter, the matter would come up for the consideration of the NA which must adopt a resolution supported by two-thirds of all its members ordering the removal of the judge in question. Where such a resolution is successfully passed, the President is then obliged to effect the removal of the judge in question.<sup>156</sup>

Table 2.2 The manner in which checks and balances are effected by each branch of government on the others

Checks	Legislature	Executive	Judiciary
		The executive checks the legislature by:	The judiciary checks the legislature by:
Legislature		<ul style="list-style-type: none"> <li>• developing and implementing</li> </ul>	<ul style="list-style-type: none"> <li>• invalidating laws enacted by</li> </ul>

Checks	Legislature	Executive	Judiciary
		<ul style="list-style-type: none"> <li>• policy</li> <li>• preparing and initiating legislation</li> <li>• making subordinate legislation</li> <li>• assenting to Bills passed by the legislature.</li> </ul>	<ul style="list-style-type: none"> <li>the legislature that do not comply with the Constitution</li> <li>• ensuring the legislature complies with the procedural requirements prescribed in the Constitution.</li> </ul>
	<p>The legislature checks the executive by:</p>		<p>The judiciary checks the executive by:</p>
Executive	<ul style="list-style-type: none"> <li>• requiring members of the executive to provide full and regular reports concerning matters within their control</li> <li>• appointing the President</li> <li>• removing or recalling national executive members</li> <li>• approving the extension of states of emergency.</li> </ul>		<ul style="list-style-type: none"> <li>• invalidating acts by members of the executive that do not comply with the Constitution</li> <li>• ensuring that the executive fulfils its constitutional obligations diligently and without delay.</li> </ul>
	<p>The legislature checks the judiciary by:</p>	<p>The executive checks the judiciary by:</p>	
Judiciary	<ul style="list-style-type: none"> <li>• indirectly taking part in the appointment of judges through selected representatives on the JSC</li> <li>• taking part in the removal of judges who, before the end of their designated tenure, are proven to be suffering from incapacity or have been found guilty of gross incompetence or gross misconduct</li> </ul>	<ul style="list-style-type: none"> <li>• taking part in the appointment of judges as some of its members sit on the JSC which appoints judges</li> <li>• formulating legislation (in conformity with the Constitution) to respond to judicial decisions (structured</li> </ul>	

Checks	Legislature	Executive	Judiciary
	<ul style="list-style-type: none"> <li>• • passing legislation (in conformity with the Constitution) to respond to judicial decisions (structured dialogue).</li> </ul>	dialogue).	

### 2.3.4 The counter-majoritarian dilemma

In a constitutional democracy, like that established by the South African Constitution, the constitution and not parliament is supreme. The judiciary is independent and empowered to review and set aside the actions of the other two branches of government. The judiciary thus necessarily wields enormous power even though its members are not democratically elected. Although this is a necessary result of the particular system of separation of powers and judicial review adopted by the drafters of the South African Constitution, this system raises many conceptual and practical difficulties. A system which affords the power of judicial review to courts and thus permits an unelected judiciary (which is arguably the least accountable branch of government) to declare unconstitutional and invalid laws made and actions taken by democratically elected and accountable members of the legislature and executive can appear to be anti-democratic.

It is true that judicial review is an institution that is generally accepted as being of central importance to the South African constitutional project. However, judicial review, rather than serving to answer or resolve important constitutional questions, raises many of its own that go to the heart of our understanding of democracy and separation of powers. For example, if we accept judicial review as being a legitimate practice in a constitutional democracy, how do we account for the fact that judicial review allows for the invalidation of laws supported by a majority? [157](#) How is it possible that the judiciary can substitute its own decision for that of the executive when declaring a particular government policy to be unreasonable, even in instances where the executive has consulted widely? [158](#) What makes the decision of a few unelected judges carry more weight than the choices of the majority?

These questions are commonly referred to as the counter-majoritarian dilemma or difficulty. The essence of the dilemma is that judicial review, while recognised as having a legitimate purpose in the main, involves the courts taking undemocratic decisions that often go against the popular will. [159](#) The obvious underlying apprehension is that while the constitutional system may be founded on democratic principles and practices, judicial review allows for the democratic will to be displaced by unelected and seemingly unaccountable judges.

With the US constitutional system being rooted in constitutional supremacy while making no explicit provision for judicial review, it is not surprising that the institution of judicial review has, for a long time, been the subject of much controversy among US constitutional law scholars. [160](#) At its core, the enduring controversy around judicial review relates to concerns regarding the nature and extent of the power that it places in the hands of an unelected judiciary and that allows judges to make decisions with overtly political consequences and to encroach on the domain of the other branches. These controversies have led to much debate on the precise nature of the democratic curtailment and the separation of powers issues raised by judicial review and how to resolve them or otherwise account for them as being somehow

aligned with democracy.<sup>161</sup> In the main, attempts to account suitably for counter-majoritarianism have elicited three main types of responses:

- Some view judicial review as being a severe constraint on the participation of citizens in political decisions affecting them and, as such, see judicial review as being irreconcilable with the ideals of majoritarian democracy.<sup>162</sup>
- Others downplay the significance of the difficulties judicial review poses. They instead regard encroachments occasioned by judicial review as contributing to the democratic process.<sup>163</sup>
- Yet others attempt to establish a workable interpretative theory in terms of which judicial review can be justified as legitimising judicial interventions in a manner that contributes to the attainment of substantive democratic ends.<sup>164</sup>

While we must concede that most of the debates have been conducted in a US context, we must ask whether similar counter-majoritarianism concerns arise in the South African context, particularly in light of the fact that our Constitution clearly makes provision for judicial review. The short answer to this question must be an unqualified yes. We will explore why this is the case below.

The fact that the Constitution makes explicit provision for judicial review is important as it confirms that the democratically elected Constitutional Assembly freely chose a system of judicial review, thus bestowing some democratic legitimacy on the process of judicial review. However, apart from directly answering the question of the constitutional basis for judicial review, such fact alone does not account for why we should accept judicial review as a legitimate feature of South Africa's democracy. Because judicial review operates in essentially the same way irrespective of the jurisdiction and tends to result in the curtailment of democracy in a generalised sense, it will also be an issue in South Africa. Of particular interest, however, in the South African context, is the question of how we ensure that the courts perform judicial review in a manner that balances the need to promote and respect the majoritarian nature of our democracy while at the same time ensuring that the Constitution's transformative vision is enforced. In other words, while the Constitution may provide for judicial review, it is unable to determine in advance how judges will use the power of judicial review. Because enforcement of the Constitution via judicial review necessarily entails judicial interpretation, it becomes important how judges make their decisions and whether they are possibly influenced by their own political, religious, moral or cultural viewpoints.<sup>165</sup> Bearing this in mind, an important question then becomes how society safeguards against judges using their powerful positions to advance their own political, religious or moral interests. Put differently, how do we as society guarantee that judges, while performing the function of judicial review, are, in fact, enforcing the Constitution rather than simply imposing their own will or morality on the majority?

#### COUNTER POINT

Does public acceptance of a court's decision as legitimate suffice to address counter-majoritarianism concerns?

Let us take a moment to consider the case of Makwanyane, the Constitutional Court decision that struck down the death penalty. This matter resulted in the judges of the Constitutional Court handing down 11 different concurring decisions, all of whom determined that the continued use of the death penalty was not in keeping with the letter and spirit of the

Constitution. This decision was in stark contrast to the prevailing majority or popular sentiment that the death penalty was in keeping with public morality and the demands of a crime-riddled, divided society.<sup>166</sup> In capturing the prevailing public attitudes of the majority and their influence on the judicial review, Chaskalson P opined as follows:

The Attorney General argued that what is cruel, inhuman or degrading depends to a large extent upon contemporary attitudes within society, and that South African society does not regard the death sentence for extreme cases of murder as a cruel, inhuman or degrading form of punishment. It was disputed whether public opinion, properly informed of the different considerations, would in fact favour the death penalty. I am, however, prepared to assume that it does and that the majority of South Africans agree that the death sentence should be imposed in extreme cases of murder. The question before us, however, is not what the majority of South Africans believe a proper sentence for murder should be. It is whether the Constitution allows the sentence.

Public opinion may have some relevance to the enquiry, but in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty, and a retreat from the new legal order established by the 1993 Constitution. By the same token the issue of the constitutionality of capital punishment cannot be referred to a referendum, in which a majority view would prevail over the wishes of any minority. The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us, that all of us can be secure that our own rights will be protected.

This Court cannot allow itself to be diverted from its duty to act as an independent arbiter of the Constitution by making choices on the basis that they will find favour with the public.<sup>167</sup>

Interestingly, despite public opinion opposing the abolition of the death penalty, South Africans nevertheless accepted the Constitutional Court decision as legitimate. The question still remains, however, whether public acceptance of a decision as legitimate alone suffices to address the counter-majoritarianism concerns raised above. We would argue that it does not for at least three reasons:

- First, public acceptance of a court decision need not necessarily mean that judges have acted in a manner that actually promotes constitutionalism or democracy.
- Second, what the public is willing to accept at any given time does not necessarily reflect what is acceptable in a democratic constitutional state.
- Third, and most importantly for us presently, public acceptance takes us no closer to providing us with a sound theoretical basis that justifies why or even how judges should exercise powers of judicial review. In other words, for judicial review to be palatable and address the concerns raised by the counter-majoritarian dilemma, we need to have some acceptable theoretical basis that assures us that when judges decide a matter, they are applying criteria of sufficient determinacy to enable judges of



different political, religious or moral predispositions to arrive at generally consistent results when faced with similar facts or circumstances.

In light of the above, an obvious question that then bears asking is why include judicial review in South Africa's constitutional system if it poses so many difficult conceptual and practical questions. A better question, though, may be what the justification is for the inclusion of judicial review in South African constitutionalism taking into account the curtailment of democracy it necessarily entails. Before putting forward some arguments in support of the inclusion of judicial review, it is necessary to concede that due to the nature of judicial review, it can never be fully reconciled with a purely majoritarian concept of democracy.<sup>168</sup> The nature of the adjudicative function and the powers exercised therein simply do not lend themselves to being exercised by a plurality of the population in a democratic society. Therefore, if we accept that the judiciary is to play a legitimate part in upholding the Constitution, then we must be able to justify, in a reasoned manner, why important decisions affecting millions should be left in the hands of a relatively few unelected judges whose decisions may not necessarily be wiser, more principled or moral than those of the majority in a democracy. Despite inherent counter-majoritarian concerns, there are several good arguments or justifications that have been put forward in support of judicial review. We will discuss a few of these below:

- While judicial review does tend to diminish democracy from a majoritarian point of view, democracy, when viewed substantively and especially in a plural political society, is never simply majority rule. While the elected representatives of the political majority must exercise political power in a democratic society, this does not necessarily give the majority a blank cheque to govern in whatever way it desires. There are in place mechanisms that regulate and limit the exercise of power in a way that seeks to secure the welfare of all members of a particular political community. Those subscribing to this view would argue that where all people enjoy the same rights in a democracy, all people are entitled to be treated as equals irrespective of whether they are part of the majority or not.<sup>169</sup> So understood, democracy entails much more than conferring power on a particular majority on any given day. It also necessarily entails finding a balance between enabling those in the majority to govern and limiting the things that they can do while in power, especially where such power can be used to violate the rights of others or undermine the very nature of the democracy.
- Another argument in support of judicial review holds that the judiciary is ideally positioned to decide on disputes and matters of principle. The reasons for this are the specialised nature of judges' adjudicative expertise, the judiciary's detached institutional positioning relative to the other democratically elected branches and its entrenched independence. According to those who hold this view, the courts are institutionally stronger and better positioned than the other two branches for purposes of protecting rights and upholding democratic principles as they do not have to pander to the demands that may be placed on the other branches by an electorate.<sup>170</sup>
- Another argument in support of judicial review, related to the preceding one, is that the courts can be seen as a forum that can actually enhance democracy, particularly deliberative democracy. Those subscribing to this view argue that the courts provide an important platform where citizens may challenge the decisions or actions of their elected representatives. In effect, citizens can enter into a structured dialogue with elected representatives through the courts.<sup>171</sup>

## COUNTER POINT

Counter-majoritarianism opening up the possibility of a non-technical ethics

Van der Walt and Botha have a distinct view on the counter-majoritarian difficulty and approach the matter from a theoretically more critical perspective: [172](#)

We wish to make clear from the outset that we have no solution to the counter-majoritarian problem. We believe it is irresolvable ... [However,] the problem must be addressed. Irresolvable problems are, after all, the only ones we can address. Resolvable problems are not real problems. Resolvable problems are fake problems, temporary technical hiccups, often spectacularly disguised as crises. The counter-majoritarian problem and the problem of significant social dissent are not technical hiccups. They constitute aporias. They allow no way through. They confront us with the impossible. Paradoxically, however, this impossibility opens up the possibility of social deliberation that would exceed technical procedure. It opens up the possibility of a non-technical ethics. It gives politics a chance.

In this view, although the counter-majoritarian problem cannot be resolved, it can tentatively be addressed by admitting that there will always be a tension between the demand for democratic accountability on the one hand and the demand for judicial review on the other. How these demands are balanced against each other in a given case will depend on many factors and may well change over time. This approach is often associated with a view of the Constitution as flexible and open-ended.

These arguments briefly set out above merely represent some of the views that have been put forward in an attempt to justify or account for the inclusion of the institution of judicial review in a democratic system of government. In and of themselves, they can be challenged and can be found wanting in as far as completely dispelling accusations that judicial review does tend to curtail or subtract from majoritarian democracy. However, judging by the acceptance of judicial review in some democratic societies, including South Africa, we can conclude that there is some level of acceptance of the idea that there should be a branch of government that must be tasked with the role of interpreting and upholding the constitution and the rights of all citizens. Put differently, there appears to be some acceptance that for constitutional democracy to flourish, it is sometimes necessary to employ some outwardly undemocratic means to achieve long-term democratic ideals such as inclusiveness, broad representativity, accountability and transparency. It has been suggested that instead of glossing over judicial review's democratic deficit, there is a need to think of constitutions such as South Africa's as being mixed constitutions. The mixture in this sense is that such constitutions, although grounded in democratic principles and practice by necessity, also include an anti-democratic practice such as the inclusion of judicial review. [173](#)

Figure 2.4 The counter-majoritarian dilemma

### 2.4 The rule of law

An elemental feature of South African constitutionalism is the principle of respect for the rule of law. The rule of law is often equated with the German principle of the Rechtsstaat

discussed above, but although there are many similarities between the two concepts, the rule of law is arguably a more limited concept than the Rechtsstaat. The two terms are nevertheless often used interchangeably and below we consider whether the inclusion of the rule of law as a founding value in the South African Constitution should require us to view it as being akin to the Rechtsstaat principle known from German constitutional law. The importance of the rule of law in South African constitutional law is clearly demonstrated by the fact that the rule of law is a founding value entrenched in section 1 of the Constitution. However, there is some difference of opinion about the scope and content of the rule of law and this is the subject of much debate among constitutional law scholars.<sup>174</sup> Apart from being a value, the rule of law is also recognised as an enforceable principle on which the exercise of public power and legislative acts can be challenged. In this section we briefly consider the rule of law in order to detail its historical understanding under apartheid and then its development and how it has been received by the courts in the constitutional era.

#### 2.4.1 A brief history of the rule of law

To understand the evolution of the rule of law it is helpful to consider an early formulation of the concept put forward by Dicey who is considered to be the earliest proponent of the principle of the rule of law.<sup>175</sup> According to Dicey, the rule of law comprises three main principles:

- First, since the law is supreme, public power can only be exercised in terms of authority conferred by law and no one may exercise public power arbitrarily.
- Second, everyone is equal before the law, the law must be applied equally to all persons irrespective of their status and all must be subject to the jurisdiction of the ordinary courts.
- Third, the ordinary courts are responsible for enforcing the ordinary laws of the land, the common law and statute in a manner that protects the basic rights of all so that these laws function as a constitution. (Recall that Dicey wrote about the British constitutional system in which there was, and there still is, no written constitution in place.<sup>176</sup>)

Broadly speaking, the Diceyan conception of the rule of law has remained an influential source even though substantially different interpretations and applications of the rule of law have developed, ranging from the formal to the substantive.

#### Figure 2.5 The Diceyan conception of the rule of law

The question of whether the rule of law was fundamentally respected during the apartheid era is a controversial one. The discussions about this issue highlight the fact that respect for the rule of law on its own is not sufficient to protect the basic rights of individuals in a society. Although it later emerged that the apartheid state had also flouted the very laws it claimed to respect by sanctioning in an explicit or implicit way the extrajudicial killing and torture of political opponents, the apartheid government maintained that it respected the rule of law because it governed in terms of laws duly passed by Parliament. However, in as much as the apartheid government did so, it was only in the formal sense that it could ever have been said to respect the rule of law. The apartheid government relied to a large extent on the law to

enforce unjust and oppressive policies fashioned under the legislative freedom conferred by parliamentary supremacy. It is well documented how racist and violent laws were crafted, enacted, executed and enforced through the combined force of state organs, including the courts, acting in unison to bring about the NP's mission of an exclusive white state.<sup>177</sup> The inherent unjustness and inequality of the system at the time, however, did not prevent some from still speaking of the system as being premised on the basis of the rule of law.<sup>178</sup> This equation of 'rule of law with rule by law' <sup>179</sup> represents a formalistic understanding of the importance of law as an instrument of governance rather than a substantive understanding that also concerns itself with the content of the laws.<sup>180</sup> Therefore, the understanding of the rule of law under apartheid was mostly formalistic. This means that as long as there was a legislative provision enabling governmental conduct, then the enforcement of such law was generally considered to be lawfully warranted.<sup>181</sup> Such an approach clearly emasculated the concept of the rule of law and subjected it to much justifiable criticism.

## COUNTER POINT

### The Law of Lagos

In 1960, the NP was consolidating its rule in South Africa via the formation of an exclusive white republic rooted in parliamentary sovereignty and a narrow, formal conception of the rule of law. In numerous other parts of the African continent the period of decolonisation and independence was just commencing. In an apparent response to these changes from the authoritarianism that accompanied colonial rule, a movement developed that was driven by the International Commission of Jurists (ICJ). The ICJ sought to promote the rule of law in countries undergoing the process of decolonisation. In 1961, the ICJ met in Lagos, Nigeria at a conference on the rule of law to deliberate on the role of the rule of law in Africa. At the end of that conference the delegates produced what was to become known as the Law of Lagos. We reproduce the Law of Lagos below so as to contrast the evolving conception or approach to the rule of law internationally to that developing in South Africa at the time.

### The Law of Lagos

Having discussed freely and frankly the rule of law with particular reference to Africa, and

Having reached conclusions regarding human rights in relation to government security, human rights in relation to aspects of criminal and administrative law, and the responsibility of the judiciary and of the Bar for the protection of the rights of the individual in society,

## NOW SOLEMNLY

Recognises that the rule of law is a dynamic concept which should be employed to safeguard and advance the will of the people and the political rights of the individual and to establish social, economic, educational and cultural conditions under which the individual may achieve his dignity and realise his legitimate aspirations in all countries, whether dependent or independent,

Reaffirms the Act of Athens and the Declaration of Delhi with special reference to Africa, and

Declares:

1. 1. That the principles embodied in the Conclusions of the Conference which are annexed hereto should apply to any society, whether free or otherwise, but that the rule of law cannot be fully realised unless legislative bodies have been established in accordance with the will of the people who have adopted their constitution freely;
2. 2. That in order to maintain adequately the rule of law all governments should adhere to the principle of democratic representation in their legislatures;
3. 3. That fundamental human rights, especially the right to personal liberty, should be written and entrenched in the constitutions of all countries and that such personal liberty should not in peacetime be restricted without trial in a court of law;
4. 4. That in order to give full effect to the Universal Declaration of Human Rights of 1948, this Conference invites the African governments to study the possibility of adopting an African Convention of Human Rights in such a manner that the Conclusions of this Conference will be safeguarded by the creation of a court of appropriate jurisdiction and that recourse thereto be made available for all persons under the jurisdiction of the signatory states;
5. 5. That in order to promote the principles and the practical application of the rule of law, the judges, practising lawyers and teachers of law in African countries should take steps to establish branches of the International Commission of Jurists.

This Resolution shall be known as the Law of Lagos.[182](#)

Although much could be said about the Law of Lagos, we will limit ourselves to two comments that highlight important substantive advances in the way the rule of law is conceived here. First, the rule of law is conceived as a ‘dynamic concept’. But what was meant by this? Why was it important to isolate the rule of law, draw attention to it and seek to entrench it as an overarching principle applicable to any society, free or otherwise? From the proceedings of the conference, it seems that against the background of colonialism and the demands of decolonisation, there was a recognition of the dangers presented by a narrow and formalistic conception of the rule of law. As such, the Law of Lagos sought to transcend this by presenting the rule of law as a positive rights-reinforcing principle that promoted not only political rights, but one that also self-consciously recognised its role as a significant contributor to the attainment of the socio-economic well-being of people. Second and most significantly, the rule of law was here closely associated with the ideas of the protection and promotion of human rights and democracy rather than simply being seen as a guarantee of the supremacy of the law and the equal application of the law. This latter view was being demonstrated in South Africa and other colonies where it was deemed to be compatible with laws that were patently unjust and unequal.

#### 2.4.2 The rule of law under the 1996 Constitution

In spite of its chequered history in pre-democratic South Africa, the rule of law has assumed a pre-eminent role in the current constitutional dispensation. As already mentioned above, the rule of law, alongside the supremacy of the Constitution, is enshrined as a founding value in section 1(c) of the Constitution. This inclusion of the rule of law as a founding value in the Constitution may at first glance seem peculiar and unnecessary. This is so because the Constitution also establishes the supremacy of the Constitution and contains an enforceable Bill of Rights. The provisions of the Bill of Rights provide more extensive and far-reaching protection against the abuse of power and the infringement of human rights than could ever be afforded by the principle of the rule of law. We may therefore ask whether we should read or interpret this coupling to have more meaning than mere drafting convenience. In other

words, should the declaration of the rule of law as a value alongside that of constitutional supremacy influence our understanding of the rule of law in South Africa? Alternatively, is the manner in which the rule of law is captured in our Constitution more in keeping with the Rechtsstaat idea derived from German constitutionalism or is it closer to Dicey's conception? To gain a better understanding of the place of the rule of law in South African constitutionalism, it is necessary to consider how it has been applied in cases before the courts.

Interestingly, the rule of law continues to be an important foundational concept in South African constitutional law. Its prominence is evidenced by the manner in which the courts have invoked the rule of law as a mechanism primed to limit, regulate as well as give more precise meaning to how governmental power is exercised. As such, the rule of law has emerged as a powerful practical principle that can be invoked before our courts to ensure that the exercise of state power conforms to basic minimum criteria. The rule of law, as a constitutional principle, has been invoked in many cases where it has been raised as the basis of a constitutional challenge against Acts of Parliament or the executive. This has occurred in cases where the actions of the legislature or the executive were not challenged on the basis that these actions somehow infringed on any of the rights contained in the Bill of Rights.

An early example of such a matter was that of *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others*.<sup>183</sup> This matter was decided under the interim Constitution and entailed a challenge by Fedsure to the Johannesburg local government's powers to levy substantially higher property rates. Fedsure initially instituted the challenge on the basis of an alleged breach of its constitutional right to administrative justice.

The Constitutional Court held that the powers under which the local government acted were not administrative in nature and, therefore, could not be tested against the constitutional right in question. Nevertheless, the Court went on to hold that the powers exercised by local government remained subject to the Constitution and, in particular, the exercise of such powers was constrained by the rule of law. The Court held that the local government was permitted only to exercise powers that it had had lawfully conferred on it. In particular, the Court stipulated that the principle of legality – as an incidence of the rule of law – is what determines whether public bodies act lawfully or not. The Court made its point as follows:

The rule of law – to the extent at least that it expresses this principle of legality – is generally understood to be a fundamental principle of constitutional law. It seems central to the conception of our constitutional order that the legislature and the executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law.<sup>184</sup> (our emphasis)

From the Fedsure case and subsequent cases it would appear that the principle of legality has become possibly the most important and oft-invoked principle of the rule of law.<sup>185</sup> An obvious question at this stage must be what the principle of legality is and why it has risen to such prominence in our understanding of the rule of law. It is to this question that we shall turn briefly before discussing its application in more detail below.

The principle of legality, as an incidence of the rule of law, can be described as the notion that the exercise of public or governmental power is legitimate and valid only where it is lawful. In other words, the principle of legality demands that where individuals or institutions

exercise public power, those acts are binding only in as far as they are authorised by law, notwithstanding the fact that such law may itself be challenged for its constitutionality. The principle of legality has developed into an important constitutional law principle in that it has general and residual application.<sup>186</sup> Thus understood as underlying all exercise of public power, the principle of legality can be applied seemingly to any and all instances of the exercise of public power which can be tested to determine whether they conform to this principle. This idea of the generality of the principle in constitutional law is cogently captured in the following dictum by Ngcobo J in *Affordable Medicines Trust and Others v Minister of Health and Another*:

The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution ... In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power.<sup>187</sup>

As a constitutional principle deriving from the rule of law, the principle of legality is extremely useful in that where there is no right or specific constitutional provision, rule or principle that crisply and directly addresses a question before a court, as was the case in *Fedsure*, then the principle of legality may be readily invoked. In such an instance, the principle of legality demands that, even where there is an enabling law in place, for an exercise of public power in terms of such law to be legitimate, then the body or official in question must have acted only within the limits of the powers conferred on the body or official by the law. In other words, the act or conduct must not be arbitrary or a demonstrable abuse of power or discretion.

A case that clearly demonstrates this point is that of *Pharmaceutical Manufacturers*. In this matter, the President had mistakenly brought into force legislation that required the prior or simultaneous promulgation of regulations and schedules so that it could be implemented properly.<sup>188</sup> There being no specific rule or law permitting the President to undo an erroneous action that he had taken lawfully in terms of powers conferred on him by the Constitution, the Constitutional Court had to decide whether his actions were reviewable and the basis on which this could be done. The Court found that:

The President's decision to bring the Act into operation in such circumstances cannot be found to be objectively rational on any basis whatsoever. The fact that the President mistakenly believed that it was appropriate to bring the Act into force, and acted in good faith in doing so, does not put the matter beyond the reach of the Court's powers of review. What the Constitution requires is that public power vested in the executive and other functionaries be exercised in an objectively rational manner. This the President manifestly, though through no fault of his own, failed to do.<sup>189</sup>

The courts' employment of the rule of law has not been limited to its appeal to the principle of legality. The courts have also had occasion to use the rule of law to demand that public officials not act in an arbitrary way and that they must exercise their powers in a rational manner related to the purpose for which the power was given.<sup>190</sup> In *Lesapo v North West Agricultural Bank and Another*, the legislative provision in question allowed for the respondent bank to seize and sell the property of defaulting debtors without any recourse to the courts.<sup>191</sup> In the matter, Mokgoro J denounced the use of public power to perform such

acts and described them as self-help which is inimical to the rule of law. In capturing the rule of law principle forbidding self-help, Mokgoro J said the following:

Self help, in this sense, is inimical to a society in which the rule of law prevails ... Taking the law into one's own hands is thus inconsistent with the fundamental principles of our law.<sup>192</sup>

Mokgoro J added further:

The Bank, as an organ of State, should be exemplary in its compliance with the fundamental constitutional principle that proscribes self help. Respect for the rule of law is crucial for a defensible and sustainable democracy. In a modern constitutional state like ours, there is no room for legislation which, as in this case, is inimical to a fundamental principle such as that against self help. This is particularly so when the tendency for aggrieved persons to take the law into their own hands is a constant threat.<sup>193</sup>

There are numerous other instances where a court has invoked the rule of law as a principle in deciding cases or in its reasoning of the cases. A few examples of such instances are as follows. The rule of law has been invoked to demand that rules must be conveyed in a clear and accessible manner for them to comply with the standards required by the Constitution.<sup>194</sup> The rule of law has, further, been invoked to challenge legislation for vagueness and uncertainty where the provisions of the legislation in question conferred broad discretionary powers on a Minister.<sup>195</sup> The Constitutional Court has also held that judicial independence and impartiality are implicit in our understanding of the rule of law as a constitutional principle.<sup>196</sup>

Overall, the rule of law seems to occupy pride of place as a constitutional value alongside that of constitutional supremacy. The rule of law simultaneously operates as an independent and enforceable principle with an important and equally useful derivative in the form of the principle of legality. We can thus argue that the current conception of the rule of law is one that extends beyond the formal Diceyan understanding. Judging from the manner in which the rule of law has been invoked in our case law, it is evident that under the rubric of the rule of law, we are now also concerned with the impact of laws on those affected, the substantive content of laws as well as how public officials and bodies exercise their powers even in the face of enabling laws. In short, our conception of the rule of law under the Constitution has evolved.

## COUNTER POINT

### Formal versus substantive conceptions of the rule of law

Some commentators <sup>197</sup> have argued that the inclusion of the rule of law as a founding value in the South African Constitution may be of little effect if the rule of law is conceptualised in a narrow way as requiring little more than legality and rationality from law makers and state officials acting in terms of the law. They point out that if the rule of law exists when the principle of legality is observed, then the apartheid government also largely observed this principle. The fact that law was used as an instrument of apartheid ideology would then simply show that the principle of legality or the rule of law is by itself morally insignificant. What matters is the content of the law – the nature of the ideology of which the law is the instrument. It follows, then, that the explicit commitment in the final Constitution to the supremacy of the Constitution and the rule of law is in itself empty. What matters is not that



commitment but that the final Constitution guarantees a list of rights and liberties. In addition, it gives to the judiciary the authority both to ensure that the exercise of public power has a legal warrant and that any legal warrant is consistent with constitutional guarantees.

However, this limited conception of the rule of law is controversial in legal theory and was contested in legal practice during apartheid. Lawyers who mounted challenges to government oppression through law often argued in court that the judiciary should read statutes in the light of common law presumptions protecting the individual interest in liberty and the equality of those subject to the law. According to this view, only to the extent that a statute explicitly requires that these interests are not to be protected by the statute should judges countenance that the legislature intended to subvert rather than serve the interest of all those subject to the law in liberty and equality. The idea is that the commitment of the legal order to the supremacy of the Constitution and to the principle of legality includes constitutional, albeit unwritten, commitments to protecting these interests. Should officials implement statutes in ways that go beyond these unwritten constitutional constraints, so judges should find that they acted outside the scope of their legal authority. This latter, more expansive, conception of the rule of law is often referred to as a substantive conception of the principle. The question arises whether such a substantive conception of the rule of law is required in South Africa, given the existence of a supreme Constitution and a justiciable Bill of Rights which includes the right to fair administrative action.

## 2.5 Democracy

One of the major rallying calls informing the struggle for liberation in South Africa was the demand of ‘democracy for all’.<sup>198</sup> As unambiguous an aspiration as that sounded, what it concealed was the fact that the concept of democracy is one that can and has been described as ‘controversial’<sup>199</sup> or is at the very least contested.<sup>200</sup> The supposed ‘controversy’ underlying democracy is related to the fact that as a concept, democracy has proven immensely difficult to define in a singular and uncontested manner, with many writers preferring to provide their own definitions or understandings of the word. Contributing to the supposed ‘controversy’ is the fact that the term ‘democracy’ is commonly used in conjunction with other concepts such as ‘liberal’, ‘constitutional’ or ‘majoritarian’. Despite this supposed ‘controversy’, democracy’s pre-eminence as one of the dominant political ideas of modern times is unassailable. Certainly in the South African Constitution, the idea of democracy is a prominent one that permeates virtually all aspects of the Constitution. Beyond the Preamble, section 1 of the Constitution ushers in democracy by declaring South Africa to be ‘a sovereign, democratic state’. Section 1(d) builds further on this by setting out the democratic values and principles on which South Africa is founded, namely ‘[u]niversal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness’. While not defining what democracy means in South Africa, the section goes a long way towards making explicit those elements of democracy that are paramount in the South African constitutional context.<sup>201</sup> In this section we consider the idea of democracy and its place in the South African constitutional system.

### 2.5.1 Conceptions of democracy

Although having already conceded that democracy as a concept defies singular definition, it is nonetheless imperative that we put forward an understanding of what democracy entails. One conception that we have found useful, particularly in a constitutional law setting, is that

put forward by Roux who attempts to encapsulate the foundational social idea of democracy as well as the contemporary political understanding of democracy in practice. Roux tells us that:

[t]he core idea – that decisions affecting the members of a political community should be taken by the members themselves, or at least by elected representatives whose power to make those decisions ultimately derives from the members – is more or less settled.[202](#)

This description, while it does not seek to be comprehensive, serves as an adequate starting point as it can be adapted to speak to various conceptions of democracy from the perspective of the persons affected or from a perspective that recognises that modern democracy is exercised mainly through institutionalised politics that entails citizens electing individuals or organisations to represent their interests. This idea of democracy is therefore linked to the notion that the will of the people should prevail and that people should have a say in how they are governed. It does not seek to convey any idealised form of democracy. Instead, it seeks to convey the foundational reason for democracy, namely that of enabling members of a political community to act together in matters that affect them and to take decisions collectively with respect to such matters. The fact that it also lends itself to a variable understanding of democracy is of particular use in studying the Constitution as the Constitution clearly embodies several different conceptions of democracy. A study of the constitutional text will reveal that there are several different conceptions or understandings of democracy that can be identified, namely direct democracy, representative democracy (such as a multiparty democracy), participatory democracy and constitutional democracy.[203](#) The presence of the varied conceptions of democracy in the Constitution serves to demonstrate not only the varied understandings of democracy, but also the centrality of democracy in defining the type of society post-apartheid South Africa seeks to become. We turn to discuss the different conceptions below.

### 2.5.2 Direct democracy

Direct democracy means a system of governance that entails direct participation on the part of the citizenry, rather than elected representatives, in the rule and decision making of their political community.[204](#) Historically, direct democracy is generally regarded as the ‘purest’ form of democracy that comes closest to achieving the rule of the people.

In the context of the modern nation-state, examples of direct democracy are not always self-evident since most decisions are taken not by the citizenry but by their elected representatives in legislatures. Owing to numerous factors, not least its complex structure and internal workings, the modern nation-state has left little room for direct democracy. Direct democracy would, in practice, demand a vote on every piece of legislation by every eligible member of society. Instead, prevailing democratic systems of governance usually comprise elected legislatures whose rule is premised on a mandate from the citizenry who periodically confer the power to decide on their behalf to selected political organisations, such as political parties, or individuals.

As a result of this, it seems widely accepted that direct democracy, where it does exist, exists in a limited sense in modern democracies. That is to say, there is virtually no modern example of a political system that operates primarily in accordance with the basic tenets of direct democracy as outlined above. The same is true for South Africa, save to say that there are elements of South Africa’s conception of democracy that can be said to be premised on

ideas of direct democracy. We turn to consider these manifestations of direct democracy in the South African constitutional scheme below.

The Constitution makes no mention of or reference to the concept of direct democracy in its text. However, the constitutional expression of direct democracy is to be found in several provisions that guarantee and recognise mechanisms for citizens to act directly in influencing decisions. An important instance where the Constitution makes provision for direct citizen action is by guaranteeing everyone's right to assemble, demonstrate, picket and present petitions peacefully and unarmed.<sup>205</sup> In terms of this guarantee, all citizens are free to engage to make their views known and to seek to influence decisions affecting them unhindered subject to the limitation that they do so unarmed and maintain the peace. As an expression of direct democracy, this right is pivotal as it recognises that despite the predominance of representative governance, citizens must always enjoy the space to advance their own agendas or paths with respect to any issues that they believe affect them as individuals or groups.<sup>206</sup>

Other expressions of direct democracy identified in the Constitution are to be found in the provisions that allow for the executive to seek citizens' views on a particular issue or set of issues directly through the ballot by way of referenda.<sup>207</sup> Although to date no referendum has been called in the post-democratic era, this is a potentially important mechanism in as far as it allows citizens to have an unmediated voice on a particular issue. One criticism that can be levelled against these provisions as representing an instance of direct democracy is that it is actually at the discretion of the President or Premier to call the referendum. There are no mechanisms by which the citizenry can initiate or even demand that a referendum be held, nor are there directives or guidelines as to which matters should require a referendum be held.

#### PAUSE FOR REFLECTION

To what extent does the Constitution provide for direct democracy?

*Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* <sup>208</sup> was a matter brought before the Constitutional Court concerning the manner in which the legislature had opted to deal with the location of Merafong City. Prior to an amendment to the Constitution Merafong City had straddled North West and Gauteng Provinces. The issues in this case focused on public participation and the duty of the legislature to facilitate public involvement. Interestingly, in this matter there had been a consultative process that allowed the community to air their views on relocation. The majority were opposed to the local municipality being located in the North West Province (74% of the residents were prior to the relocation Gauteng residents).<sup>209</sup> However, in spite of this opposition by a majority of the residents, the constitutional amendment was effected and upheld by a majority of the Constitutional Court who held that the legislature had fulfilled its duty to facilitate public involvement and had acted rationally in the face of opposition.

The decision of the majority in the Constitutional Court, while legally defensible, must be viewed against the background of events on the ground, so to speak, within the municipality. Building up to the decision to relocate the municipality and subsequent to it, the community had vociferously made their disaffection with regard to relocation known. They had done this through public meetings, written submissions, mass public protests, marches and ultimately widespread civic disobedience characterised by public violence and the destruction of private and public property.<sup>210</sup> Ultimately, when the matter came before the Constitutional Court,

parts of Merafong, particularly the township of Khutsong, had become ‘ungovernable’ and resembled a war zone as residents refused to accept the decision to relocate the municipality.[211](#)

This judgment raises some searching questions about the content and limits of direct democracy in South Africa. For example, does South Africa’s Constitution actually entail a substantive form of direct democracy that allows citizens to take decisions about things that affect them directly and where those decisions are binding? Or do the expressions of direct democracy we identify above more accurately represent a right to be heard as seems to be the essential holding of Merafong? Would there be any purpose served by making provision for citizens to demand that certain matters be subject to referenda? Does the fact that we now live in a more technologically connected age not present opportunities to make some advances in making direct democracy more possible to implement?

### 2.5.3 Representative democracy

Representative democracy as a conception of democracy entails a system of governance in which the members of a political community participate indirectly through elected representatives in the governance of their community.[212](#) In other words, at its heart, this form of democracy presupposes that citizens elect representatives who govern on their behalf for a limited period of time until the next election. Political parties are often central to this form of democracy because electoral systems require voters to vote for political parties as opposed to individual representatives. Also, political parties influence the choices of voters and often lead people to elect representatives partly because of their party political affiliations.

Representative democracy, as mentioned above, has become the predominant form of democracy in the nation-state system.[213](#) Since the emergence of the nation-state as a political entity that occupies a particular geographical space and houses a sizeable population, representative democracy has become widely accepted as the only ‘workable’ system of democracy.[214](#) A major reason for this is said to be that as a matter of practicality, governance is far too complex to expect government to operate in a fashion that takes account of each individual citizen’s viewpoint on decisions that affect them or even simply to afford them such an opportunity. There are multiple hurdles such as a lack of information, geographical spread, unequal access to resources and citizen apathy among others. Also, the sheer enormity of the task of gathering and collating all these views has made the development of political parties or similar civic organisations as the vehicles of representative democracy appear to be inevitable. The result has therefore been that structurally and procedurally a constitution is tailored towards political parties playing a pre-eminent role in the governance of the country. It is, after all, a political party or a coalition of political parties that forms a government.

As noted above, the presence of political parties in a system of representative democracy has become integral to the functioning of modern democracies. Political parties, by organising, campaigning and electioneering, act to represent the interests of their members who will usually share a common agenda or vision. The role of political parties is further enhanced in South Africa by the electoral system and by strict party discipline. Therefore, while the Constitution does not overtly regulate the establishment, financing or activities of political parties, it does nonetheless recognise that political parties are very much a part of the modern

democratic political system and have an important role to play in constituting South Africa's democracy.<sup>215</sup>

Evidence of this recognition of political parties by the Constitution is found in certain constitutional clauses, both substantive and procedural. These clauses make it explicit that the type of democracy contemplated by the drafters was a representative one in which political parties have a major role to play. For instance, according to section 1 of the Constitution, South Africa is founded on, among other values, the democratic values of '[u]niversal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government ...' <sup>216</sup> The primary organ of citizen representation is the NA that is elected to represent the people and to ensure government by the people.<sup>217</sup> Furthermore, provisions relating to the composition of the NA demand that its members must be elected in terms of an electoral system that, in general, results in proportional representation.<sup>218</sup> In prescribing a system of proportional representation, the Constitution goes further by demanding that representation of citizens through their political parties must be provided for in the internal arrangements, proceedings and procedures of the NA.<sup>219</sup>

The High Court decision of *De Lille and Another v Speaker of the National Assembly* <sup>220</sup> highlighted the importance of ensuring that the citizenry is properly represented in the working of the NA. In this matter, the Court was required to decide on the constitutionality of a decision by an ad hoc committee of the NA to suspend a member of the NA as a form of punishment for statements she had made before it.

In answering the question in the negative, the Court recognised the NA's constitutional powers to regulate its own affairs. However, the Court held that such powers did not include the power to suspend a member for contempt as a form of punishment.<sup>221</sup> According to the Court, such action, if permitted, would be inconsistent with the requirements of representative democracy. The reason for this is that it would punish not only the member who was found to have acted contemptuously, but also the party and the citizens who had voted for her party. This would deprive them of their proportionate representation in the NA.<sup>222</sup> Although this finding was not the main basis for the final outcome, the Court's reasoning that connects the the most important reason for the member being in the NA with the electorate is important. Its importance lies in the Court's recognising that the NA should take into account the interests of the electorate as a whole in the decisions it makes; it cannot simply focus on the individual concerned.

Even the rights concerning voting are clearly crafted towards a system of representative democracy. The Constitution makes it clear that this is one of the primary conceptions envisioned by the drafters by capturing the effect of representative democracy in the political rights provision of the Bill of Rights. Section 19 is an important democratic right in the sense that it grants citizens the right to participate in various ways in the political life of the country. Again, while not directly mentioning that this right to participate is within a political system of representative democracy, this idea is implicit in the way the right is framed. Section 19(1) confers on citizens the right to make political choices. It also seems to envisage that citizens exercise these choices within or via a party political system. Hence, the section explicitly states that the right includes that of forming, joining or campaigning for a political party. Section 19(2) further cements the implicitness of the political system being that of representative democracy by stipulating that the citizens have the right to free and fair elections. Finally, section 19(3) adds to this by conferring on every adult citizen the right to vote in elections, to stand for public office and to hold such office if elected.

The courts have on several occasions pronounced on the right to vote and its significance for democracy.<sup>223</sup> The courts have also had occasion to consider the relationship between the citizenry and their elected representatives. In the main, the courts have considered this relationship within the context of constitutional democracy. Some of the pronouncements also serve to shed much light on how the courts view representative democracy in South Africa. O'Regan J's comments in *Richter v The Minister for Home Affairs and Others* shed much light on the democratic nature of and the responsibilities that characterise the relationship between voters and their elected representatives:

The right to vote, and the exercise of it, is a crucial working part of our democracy. Without voters who want to vote, who will take the trouble to register, and to stand in queues, as millions patiently and unforgettably did in April 1994, democracy itself will be imperilled. Each vote strengthens and invigorates our democracy. In marking their ballots, citizens remind those elected that their position is based on the will of the people and will remain subject to that will. The moment of voting reminds us that both electors and the elected bear civic responsibilities arising out of our democratic Constitution and its values.<sup>224</sup>

Section 19 of the Constitution, read in conjunction with section 1(d) of the Constitution, underscores the idea that an integral aspect of our conception of representative democracy is that it is a multiparty democracy rather than a one-party state or some other formulation that places limits on political participation at a party-political level. In *United Democratic Movement (UDM) v President of the Republic of South Africa and Others (No 2)* the Court made the point as follows:

A multiparty democracy contemplates a political order in which it is permissible for different political groups to organise, promote their views through public debate and participate in free and fair elections. These activities may be subjected to reasonable regulation compatible with an open and democratic society. Laws which go beyond that, and which undermine multiparty democracy, will be invalid.<sup>225</sup>

#### PAUSE FOR REFLECTION

The controversial constitutional amendment that allowed floor crossing

The dictum in the UDM case quoted above was made with respect to a controversial constitutional amendment that allowed for floor crossing in spite of the fact that South Africa's electoral system is based on proportional representation and a list system. The amendment, in effect, permitted members of the NA representing one political party to change political parties between elections and still maintain their seat in the NA. The effect of this was that member 1, whose membership in the NA came about as a result of being on party X's list, could defect during a specified period and join party Y while retaining the seat he or she occupied owing to being a member on the electoral list of party X. In a highly criticised decision, the Constitutional Court held that the constitutional amendment was constitutional. This was despite the fact that the provision clearly robbed the voters of party X of their representation by allowing an individual for whom they may not necessarily have voted to cross the floor with their party's seat. In justifying its decision to uphold the amendment as constitutional the Court had this say: <sup>226</sup>

This case is not about the merits or demerits of the provisions of the disputed legislation. That is a political question and is of no concern to this Court. What has to be decided is not

whether the disputed provisions are appropriate or inappropriate, but whether they are constitutional or unconstitutional. It ought not to have been necessary to say this for that is true of all cases that come before this Court. We do so only because of some of the submissions made to us in argument, and the tenor of the public debate concerning the case which has taken place both before and since the hearing of the matter.[227](#)

The Court went on to add the following passage in the judgment:

None of the rights specified in section 19, seen on its own or collectively with others, is infringed by a repeal or amendment of the anti-defection provisions. The rights entrenched under section 19 are directed to elections, to voting and to participation in political activities. Between elections, however, voters have no control over the conduct of their representatives. They cannot dictate to them how they must vote in Parliament, nor do they have any legal right to insist that they conduct themselves or refrain from conducting themselves in a particular manner.[228](#)

In light of the above here are some questions to consider:

- • What are we to make of these statements made by the Court in this case?
- • Can law and politics be separated in the manner suggested by the Court here?
- • Is the practice of democracy simply to be left to the determination of Parliament even where the effect of the constitutional amendment in question seems to violate the right to vote?
- • How do we reconcile floor crossing with representative democracy and at the same time take voting rights seriously?

In the final analysis, the controversy fuelled by floor crossing was such that the law permitting it was reversed early in 2009.

In conclusion, it is important to acknowledge that against the background of South Africa's struggle against apartheid where the right to vote was acquired or denied on the arbitrary basis of race, this right came to assume an overriding significance. The establishment of a system of representative democracy has succeeded in affirming and recognising the equal citizenship and political agency of all, especially for those who previously suffered the indignity of being denied the franchise. However, it is equally important to realise that there are limitations of the system that may have long-term consequences. We briefly outline a few of these below:

- • The failure to regulate political parties in the Constitution may give rise to an elite-driven democracy. The fact that there is no requirement that the parties practise some form of internal democracy ultimately has the effect of conferring a huge amount of power on the party leadership who may dominate party affairs and impose their preferred representatives.
- • The lack of opportunity for the electorate to influence directly their representatives outside the five-year election intervals is also less than ideal. In similar fashion to the point raised above, it leaves the electorate in the position of onlookers as elected representatives take decisions in the name of the electorate without an opportunity to oppose independently unpopular decisions.
- • Another major limitation of the system is that it makes it difficult for people who are not actively involved in political parties to make an impact on legislative and policy

issues affecting them. In other words, for those without party affiliations and therefore no representative, the opportunities to contribute their views effectively are severely limited.

- Finally, and possibly most controversially, the fact that the South African political landscape is dominated by one party, namely the ANC, presents its own challenges. This situation is referred to as a dominant party democracy.<sup>229</sup> It is of particular concern as it affects democratic accountability and limits democratic participation by making the governing party the primary site for all debate and decision making. The fact of one-party dominance does not in and of itself present an immediate crisis of democracy. However, in the long run, it has been shown to lead to an entrenchment of a system of patronage, erosion of the separation between party and state, and, ultimately, the domination of all aspects of national life by the party.<sup>230</sup>

#### 2.5.4 Participatory democracy

In the section above the picture we sought to convey was that of representative democracy being at the heart of the South Africa's democracy both in terms of the structures that the Constitution establishes as well in terms of how democracy works in practice. With this in mind, it is also equally important that we point out that representative democracy is subject to its own limitations. In particular, representative democracy in the way it operates carries with it the potential to be disempowering as far as the citizenry is concerned. Elections take place periodically, usually every five years in South Africa. This inevitably entails citizens' conferring their mandate on a political party to represent their interests over a period of time. It is quite conceivable that in a system of representative democracy, decision making on matters of national concern can be made without taking citizens' views into account. There is, therefore, a need to somehow counteract this potentially disempowering aspect of representative democracy. The Constitution does this by including in its conception of democracy the element of participatory democracy.

Participatory democracy is primarily concerned with ensuring that citizens are afforded an opportunity to participate or otherwise be involved in decision making on matters that affect their lives. Put differently, it adds a participatory element to representative democracy, augments and enhances it, but does not replace it. As a conception of democracy, it is in a sense a derivative of representative democracy as it seeks to ensure that while citizens may confer a mandate on elected representatives, they are not totally excluded from the decision-making process in matters that concern them. In essence, participatory democracy seeks to ensure that citizens are afforded real opportunities to participate meaningfully in decision making that affects them.<sup>231</sup> The Constitution recognises participatory democracy as a vital element of South Africa's democracy. In *Doctors for Life International v Speaker of the National Assembly and Others*, Ngcobo J, writing for the majority, captured this idea as well as elucidating on what participatory democracy entails when he wrote as follows:

In the overall scheme of our Constitution, the representative and participatory elements of our democracy should not be seen as being in tension with each other. They must be seen as mutually supportive. General elections, the foundation of representative democracy, would be meaningless without massive participation by the voters. The participation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of government and become familiar with the laws as they are made. It enhances the civic dignity of those who participate by enabling their voices to be



heard and taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people. Finally, because of its open and public character it acts as a counterweight to secret lobbying and influence peddling. Participatory democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist.<sup>232</sup>

In recognising the importance of these participatory elements of democracy, the Constitution contains various provisions that seek to underscore the fact that this form of democracy is an indispensable feature of our system of governance. At the national and provincial levels of government, the Constitution places the legislatures under a duty to facilitate public involvement in their legislative and other processes, including their committee work.<sup>233</sup> The exact nature of this duty or whether, in fact, it constitutes a justiciable constitutional duty was determined in *Doctors for Life*. In this case, the issue before the Court related to a complaint from the applicants that in passing certain pieces of legislation, namely four Bills affecting health professionals, the NCOP had failed to involve the public as demanded by the Constitution. The applicants contended that the NCOP and the affected provincial legislatures had failed to provide for public involvement by failing to call for written submissions and hold public hearings. At issue in the case was the question as to the nature and scope of the duty to facilitate public involvement and the extent to which such duty was justiciable.<sup>234</sup> In making its determination that such a duty indeed exists, the majority reasoned that this duty correlates with the right to participation as recognised in international human rights instruments.<sup>235</sup> As such, in the context of South Africa's constitutional democracy, it was acknowledged that ours is a democratic government that is partly representative and partly participatory.<sup>236</sup>

#### 2.5.5 Constitutional democracy

What should be clear at this point is that South Africa's conception of democracy is multifaceted. The Constitution, as previously pointed out, recognises and embraces different conceptions of democracy while simultaneously holding democracy up as a central organising principle. For example, the importance attached to democracy in South Africa's constitutional project is discernible from its prominence in several provisions that can at best be said to be tangentially related such as the following: the Preamble; the Bill of Rights; <sup>237</sup> the limitation clause; <sup>238</sup> the interpretation clause; <sup>239</sup> the principles of co-operative governance; <sup>240</sup> and the provisions regulating legislative bodies and their procedures. Democracy is in many ways the central pillar around which our constitutional state is arranged, thus making South Africa a constitutional democracy. But what does it mean to be a constitutional democracy?

It has been pointed out that the term 'constitutional democracy' has no technical meaning nor does it have an underlying theory attached to it; it is said fundamentally to be a descriptive term.<sup>241</sup> As a descriptive term, constitutional democracy is used to describe a political system in which a particular political community's decisions are made in terms of a constitution. This constitution prescribes the terms and conditions under which such decisions may be made.<sup>242</sup> In our context, the term should be understood as something of a composite understanding of democracy that seeks to emphasise the purpose or role played by democracy in our constitutional system rather than its component parts. In other words, constitutional democracy seen as a whole is more than a sum of its parts as it comprises direct, representative, participatory, deliberative or majoritarian forms of democracy. The

Constitution makes no claim to aspiring towards a particular form of democracy as representing a societal ideal. Instead, it posits a view of the type of democratic society that it seeks to build. The Constitution does this by trumpeting the important elements of this society, such as a supreme and justiciable Constitution, a culture of human rights and a commitment to a broad range of democratic ideals, non-racialism, multiculturalism and multilingualism. In practice, this means a democratic society that is not simply majoritarian in its orientation and practice and also one that accepts that judicial review is legitimate where it is employed to give effect to the Constitution. In terms of this conception, constitutional democracy must be viewed as a purposive concept. This means that democracy is not an end in itself but a means to achieve an end.<sup>243</sup>

Indeed, the courts' use of the term can certainly be read as appealing to this purposive understanding of constitutional democracy. In *Doctors for Life*, Ngcobo J captures this idea when recognising that 'our constitutional democracy is not only representative but also contains participatory elements'.<sup>244</sup> In recognising this point, Ngcobo J does this within the context of discussing the Constitution's overarching vision, its goal, its values and its principles. In other words, these specific forms of democracy must be interpreted or viewed within the overall South African constitutional context that is closely attuned to South Africa's history of colonialism and apartheid.

## SUMMARY

This chapter deals with the basic concepts of constitutional law which inform the more detailed discussion of the various aspects of the South African Constitution in subsequent chapters.

Constitutionalism is a multifaceted term and is concerned with the distribution and allocation of powers in an organised way within a given political community in which a government is established. It provides for the establishment of the institutions of governance, such as the legislature, the executive and the courts, as well as the allocation of powers, duties and functions to the various institutions of government which legitimise the exercise of power – within the limits set by the Constitution – of each of these institutions. Constitutionalism also plays an important role in determining the nature and basis of relations as they exist between institutions of government and those they govern.

The principle of the separation of powers deals with the division of governmental power across the three branches, namely the legislative branch (parliament), the executive branch (president/prime minister and cabinet) and the judicial branch (the courts). These branches ordinarily have separate functions and are staffed by different personnel. This allows the various branches to check the exercise of power of the other branches and thus ensures accountability. There are, however, several models of separation of powers and it is important to study these models and to understand the specific model adopted by the South African Constitution as well as the practical and legal consequences that flow from the adoption of this model.

The counter-majoritarian dilemma arises in a constitutional democracy (like that established in South Africa) in which the constitution rather than parliament is supreme and in which the judiciary is independent and empowered to review and set aside the actions of the other two branches of government. This is because the system affords the power of judicial review to courts. It thus permits an unelected and seemingly unaccountable judiciary to declare

unconstitutional and invalid laws made and actions taken by democratically elected and accountable members of the legislature and executive. This can appear to be anti-democratic. It is important to engage with the arguments justifying the legitimacy of this system and attempting to resolve the counter-majoritarian difficulty.

The rule of law is a founding value of the South African Constitution and is based on the notion that the law is supreme. Hence, public power can only be exercised in terms of the authority conferred by law and in a non-arbitrary manner. Inherent in this concept is also the principle that everyone is equal before the law, the law must be applied equally to all persons irrespective of their status and all must be subject to the jurisdiction of the ordinary courts. The rule of law can be conceptualised in formalistic terms or it can entail a more substantive notion.

The core idea at the heart of democracy is that decisions affecting the members of a political community should be taken by the members themselves or at least by elected representatives whose power to make decisions ultimately derives from the members. Different, and sometimes overlapping, forms of democracy can exist within a state: direct democracy; representative democracy; participatory democracy and constitutional democracy. It is important to be able to distinguish the various forms of democracy and to understand how these forms of democracy relate to one another.

1.

<sup>1</sup>See Hogg, P (2007) Constitutional Law of Canada 5th ed 2.

<sup>2</sup>See generally Currie, I and De Waal, J (2001) The New Constitutional and Administrative Law, Vol 1 Constitutional Law 10.

<sup>3</sup>The British constitutional system, to be discussed in detail below, is one notable exception in that the Constitution is not contained in one written document.

<sup>4</sup>(CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995) para 262.

<sup>5</sup>Currie and De Waal (2001) 10.

<sup>6</sup>1952 (2) SA 428 (A).

<sup>7</sup>Discussed in ch 1.

<sup>8</sup>Akiba, O 'Constitutional government and the future of constitutionalism in Africa' in Akiba, O (ed) (2004) Constitutionalism and Society in Africa 5.

<sup>9</sup>Akiba (2004) 5–6.

<sup>10</sup>For example, a society that has a monarchy or other form of traditional leadership which enjoys popular legitimacy may make provision for the recognition of such persons within the constitutional framework.

11Currie and De Waal (2001) 26–31 list the main features that constitutions contain as follows: (1) a preamble; (2) a chart of the state system; (3) an amending provision; (4) a bill of rights; and (5) financial provisions.

12See generally Bogdanor, V (2009) *The New British Constitution* and King, A (2007) *The British Constitution*.

13Modern British constitutional conventions and arrangements are said to have their origin in the English Charter called the Magna Carta that was enacted in 1225 AD.

14There have at various times been calls for the adoption of a written constitution. In this respect see Institute for Public Policy Research (1991) *A Written Constitution for the United Kingdom*.

15Dicey, AV (1885) *Introduction to the Study of the Law of the Constitution* 10th ed (1959).

16See De Smith, SA and Brazier, R (1998) *Constitutional and Administrative Law* 8th ed ch 4.

17See Mann, FA (1990) *Further Studies in International Law* 104.

18Munro, CR (1999) *Studies in Constitutional Law* 2nd ed 135.

19Motala, Z (1994) *Constitutional Options for a Democratic South Africa: A Comparative Perspective* 48.

20Currie and De Waal (2001) 14.

21But see the discussion of the Human Rights Act below.

22Available at <http://www.hmsso.gov.uk/acts1998/42/data.pdf>.

23See Elliot, M (2004) *United Kingdom: Parliamentary sovereignty under pressure* *International Journal of Constitutional Law* 2(3):545–627 at 553.

24Currie and De Waal (2001) 15.

25See generally Chemerinsky, E (2009) *Constitutional Law* 3rd ed; Hall, DE, Bailey, SJD and Barron, C (2006) *Constitutional Law*; Curtis, MK, Parker, C, Douglas, D and Finkelman, P (2010) *Constitutional Law in Context: Volume 1* 2nd ed.

26Currie and De Waal (2001) 17.

27Motala (1994) 50.

28Tenth Amendment of the US Constitution.

29Currie and De Waal (2001) 19–20.

30Motala (1994) 51.

[31](#)Currie and De Waal (2001) 18.

[32](#)The Bill of Rights was not contained in the US Constitution originally adopted but was introduced by the first 10 amendments to the Constitution, which were ratified on 15 December 1791. Several further amendments adding to the Bill of Rights were subsequently adopted.

[33](#)5 US (1 Cranch) 137 (1803).

[34](#)The classic discussion of this dilemma can be found in Bickel, AM (1962) *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*. See also Ackermann, BA (1984) *The Storrs lectures: Discovering the Constitution* *Yale Law Journal* 93:1013–72 and Chemerinsky, E (1989) *Foreword: The vanishing Constitution* *Harvard Law Review* 103:43–102.

[35](#)The US Supreme Court said in *Marbury v Madison* para 176: ‘The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained.’ See also para 177: ‘The constitution is either superior, paramount law, unchangeable by ordinary means or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitution are absurd attempts, on the part of people, to limit a power, in its own nature illimitable.’

[36](#)Currie and De Waal (2001) 20.

[37](#)*Marbury v Madison* 5 US (1 Cranch) 137 (1803) paras 177–9.

[38](#)See generally Heun, W (2010) *The Constitution of Germany: A Contextual Analysis* and Crosby, MB (2008) *The Making of a German Constitution: A Slow Revolution*.

[39](#)Davis, D, Chaskalson, M and De Waal, J ‘Democracy and constitutionalism: The role of constitutional interpretation’ in Van Wyk, DH, Dugard, J, De Villiers, B and Davis, D (eds) (1994) *Rights and Constitutionalism: The New South African Legal Order* 69–70.

[40](#)Davis et al (1994).

[41](#)The German Constitutional Court affirmed this, using the German phrase, ‘eine objektive Wertordnung’ in BVerfGE 39, 1 para 41: ‘The jurisprudence of the Federal Constitutional Court is consistently to the effect that the basic right norms contain not only defensive subjective rights for the individual but embody at the same time an objective value system which, as a fundamental constitutional value for all areas of the law, acts as a guiding principle and stimulus for the legislature, executive and judiciary.’

[42](#)See Arts 1 and 79(3) of the German Basic Law for the Federal Republic of Germany. This is the German Constitution. The position with respect to the basic rights contained in Art 1 (dignity) and Art 20 (constitutional principles) is that they also cannot be amended.

[43](#)Since 1949, the term ‘Rechtsstaat’ has appeared in Art 28 para 1 which states that ‘the constitutional order in the Länder shall conform to the principles of the republican, democratic and social state governed by the Rechtsstaat within the meaning of this Basic Law’. Since the revision of 21 December 1992, the expression has also appeared in para 1 of the new Art 23 dealing with the European Union which states that ‘with a view to establishing a united Europe the FRG shall participate in the development of the European Union, which is committed to democratic, Rechtsstaat, social and federal principles as well as to the principle of subsidiarity, and ensures protection of basic rights comparable in substance to that afforded by this Basic Law’.

[44](#)See Blaauw-Wolf, L and Wolf, J (1996) A comparison between German and South African limitation provisions SALJ 113:267–96 at 268 who, while conceding that ‘[a] coherent concept of Rechtsstaat has not yet been developed’, tell us that the concept is one that has a formal and a material conception. The authors say of Rechtsstaat that ‘[t]he formal concept consists of a number of elements for which no uniformly accepted definition exists. The material concept ... is based on the idea of justice in law and in administrative decisions’.

[45](#)Stern, K (1977) *Das Staatsrecht der Bundesrepublik Deutschland* Volume One 615 quoted in Blaauw-Wolf and Wolf (1996) 268.

[46](#)Stern (1977) 615 quoted in Blaauw-Wolf and Wolf (1996) 268.

[47](#)Kunig, P ‘Der Rechtsstaat’ in Badura, P and Dreier, H (eds) (2001) *Festschrift 50 Jahre Bundesverfassungsgericht* 421–44 at 434.

[48](#)See Art 20(1) of the German Basic Law.

[49](#)Motala (1994) 54.

[50](#)Davis et al (1994) 71.

[51](#)Bauman, Z (2007) *Consuming Life* 140.

[52](#)See ch 1.

[53](#)Arts 38–49 of the German Basic Law deal with the Bundestag.

[54](#)Arts 50–3 of the German Basic Law deal with the Bundesrat. The Bundesrat’s involvement in law making is limited to matters concerning the Länder (provinces) only.

[55](#)Art 63 of the German Basic Law.

[56](#)Arts 64–5 of the German Basic Law.

[57](#)Arts 54–61 of the German Basic Law. See also Motala (1994) 55.

[58](#)Arts 92–104 of the German Basic Law.

[59](#)Art 93 of the German Basic Law. See also Davis et al (1994) 75–7.

[60](#)Arts 20–37 of the German Basic Law.

[61](#)Art 28 of the German Basic Law. See also Davis et al (1994) 75.

[62](#)The Union of South Africa Act, 1909. This Act was passed through both Houses of the Imperial Parliament in the United Kingdom exactly as it was forwarded after the South African Convention was held. King Edward VII assented to the Act on 20 September 1909. A Royal Proclamation of 2 December 1909 declared the date of the establishment of the Union to be 31 May 1910.

[63](#)Republic of South Africa Constitution Act 32 of 1961.

[64](#)Ss 7–15. See also Dugard, J (1978) Human Rights and the South African Legal Order 35.

[65](#)Ss 108 and 118 entrenched English and Afrikaans as the two official languages of South Africa with equal status and prohibited amendment of the entrenched sections except with the support of two-thirds of the members of the House of Assembly and the Senate. However, a later amendment allowed homelands to recognise one or more of the other indigenous languages for that particular self-governing territory.

[66](#)The post-1994 Constitutions did adopt a form of parliamentary government usually associated with the Westminster constitutional model as – unlike in the US system – most members of the executive remain members of the legislature.

[67](#)Ch 1.

[68](#)These provisions are augmented by s 165(5) of the Constitution which states that ‘[a]n order or decision issued by a court binds all persons to whom and organs of state to which it applies’ while s 172(1) states that ‘[w]hen deciding a constitutional matter within its power, a court must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency’.

[69](#)See, for example, Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex parte President of the Republic of South Africa and Others (CCT31/99) [2000] ZACC 1; 2000 (2) SA 674; 2000 (3) BCLR 241 (25 February 2000) para 44. See also Roederer, C ‘Founding provisions’ in Woolman, S and Bishop, M (eds) (2013) Constitutional Law of South Africa 2nd ed rev service 5 13.18. Roederer is of the view that the role of the proclamation of supremacy in s 2 is to specify further the value in s 1(c).

[70](#)Roederer (2013) 13.25.

[71](#)Ch 14.

[72](#)S 74(1).

[73](#)S 74(3).

[74](#)See S v Mamabolo (CCT 44/00) [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) (11 April 2001) para 38.

[75](#)(CCT31/99) [2000] ZACC 1; 2000 (2) SA 674; 2000 (3) BCLR 241 (25 February 2000) para 44.

[76](#)Michelman, F ‘The rule of law, legality and the supremacy of the Constitution’ in Woolman and Bishop (2013) 11.37–11.38.

[77](#)Michelman (2013) 11.38.

[78](#)See s 74(1)(a) and (b).

[79](#)Art 79(3) of the German Basic Law states: ‘Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.’

[80](#)See Roederer (2013) 13.3–13.8 where he makes the point that section 1 does not explicitly contain all the foundational values, for example separation of powers, ubuntu, transformation, social justice and constitutionalism. The courts have recognised these values and several others and we will discuss them in the chapters to follow.

[81](#)See Woolman, S ‘Application’ in Woolman and Bishop (2013) 31.93–31.94.

[82](#)See *Carmichele v Minister of Safety and Security* (CCT 48/00) [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) (16 August 2001) para 56 where the Constitutional Court confirmed that the Constitution contained an ‘objective value system’, but declined to discuss what this value system might be. See also Roederer (2013) 13.9–13.15.

[83](#)See *Carmichele and Geldenhuys v Minister of Safety and Security and Another* 2002 (4) SA 719 (C) 728G–I where the Court affirmed that the ‘objective normative value system’ seeks to establish a society based on human dignity, equality and freedom ‘and institutions of government which are open, transparent and accountable to the people whom they serve. The content of this normative system does not only depend on an abstract philosophical inquiry but rather upon an understanding that the constitution mandates the development of a society which breaks clearly and decisively from the past and where institutions which operated prior to our constitutional dispensation had to be instilled with a new operational vision based on the foundational values of our constitutional system.’

[84](#)However, see Woolman (2013) 31.90 as well as Michelman (2013) 11.40.

[85](#)S 40(1) describes the three levels of government as being ‘distinctive, interdependent and interrelated’.

[86](#)See s 41(1)(h)(i) to (vi). See also Currie and De Waal (2001) 119–20.

[87](#)Seedorf, S and Sibanda, S ‘Separation of powers’ in Woolman and Bishop (2013) 12.1.

[88](#)Constitutional Principle VI of Schedule 4 of the interim Constitution provided: ‘There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.’



[89](#)The two classical texts on this subject are Vile, MJC (1967) *Constitutionalism and the Separation of Powers* and Gwyn, WB (1965) *The Meaning of the Separation of Powers: An Analysis of the Doctrine from its Origin to the Adoption of the United States Constitution*.

[90](#)See Rautenbach, IM and Malherbe, EFJ (2012) *Constitutional Law* 6th ed. See also Pieterse, M (2004) *Coming to terms with judicial enforcement of socio-economic rights* SAJHR 20:383–417 at 386.

[91](#)See Calabresi, SG, Berghausen, ME and Albertson, S (2012) *The rise and fall of the separation of powers* *Northwestern University Law Review* 106(2):527–50 at 529–36.

[92](#)See ch 1.

[93](#)See Bennett, T and Murray, C ‘Traditional leaders’ in Woolman and Bishop (2013) 26.4 and 26.53. See also Seedorf and Sibanda (2013) 12.3 for a discussion on the roots of this doctrine.

[94](#)Locke, J (1690) *Second Treatise on Government* (1986) 143–4, 150 and 159. See also Van der Vyver, JD (1993) *The separation of powers* SAPL 8:177–91 who points out that Locke’s initial conception of separation of powers classified the threefold governmental powers as legislative power, executive power (including adjudication) and federative power (foreign relations).

[95](#)Seedorf and Sibanda (2013) 12.5.

[96](#)De Montesquieu, C (1748) *De l’Esprit des Loix* (Nugent, T (tr), Neumann, F (ed) (1949) *The Spirit of the Laws*).

[97](#)For an overview on the history of separation of powers preceding this era, see Seedorf and Sibanda (2013) 12.3–12.10.

[98](#)Seedorf and Sibanda (2013) 12.1.

[99](#)Seedorf and Sibanda (2013) 12.5.

[100](#)These values are enshrined in s 1(d) of the Constitution.

[101](#)*Certification of the Constitution of the Republic of South Africa, 1996* (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996) para 108.

[102](#)See *S v Dodo* (CCT 1/01) [2001] ZACC 16; 2001 (3) SA 382 (CC); 2001 (5) BCLR 423 (CC) (5 April 2001) para 17.

[103](#)(CCT26/97) [1998] ZACC 6; 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (28 May 1998) (CC) para 60.

[104](#)*South African Association of Personal Injury Lawyers v Heath and Others* (CCT27/00) [2000] ZACC 22; 2001 (1) SA 883; 2001 (1) BCLR 77 (28 November 2000) paras 18–22.

[105](#)The Constitutional Court made this point in First Certification paras 106–113.

[106](#)(CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996).

[107](#)First Certification paras 108–12.

[108](#)See ch 4.

[109](#)See ss 43(a) and 42(1).

[110](#)S 44(1)(a) read with s 44(2)(b).

[111](#)S 44(4) provides that when Parliament exercises its legislative authority, it is only bound by the Constitution and must act in accordance with and within the limits of the Constitution.

[112](#)See ss 46 and 47 for provisions relating to the composition, election and membership of the NA.

[113](#)See ss 60 and 61 for provisions relating to the composition and allocation of delegates to the NCOP.

[114](#)See s 57 in respect of the NA and s 70 in respect of the NCOP.

[115](#)See s 58 in respect of the NA and s 71 in respect of the NCOP.

[116](#)S 73(2) permits members of the Cabinet or Deputy Ministers to introduce Bills in the National Assembly. S 79(1) enjoins the President to assent to and sign a Bill which has been passed by Parliament.

[117](#)See s 85(1)(b) and (d).

[118](#)See *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others* (CCT27/95) [1995] ZACC 8; 1995 (10) BCLR 1289; 1995 (4) SA 877 (22 September 1995) para 51. See also *AAA Investments (Proprietary) Limited v Micro Finance Regulatory Council and Another* (CCT51/05) [2006] ZACC 9; 2006 (11) BCLR 1255 (CC); 2007 (1) SA 343 (CC) (28 July 2006) paras 49, 93 and 122–3; *Constitutionality of the Mpumalanga Petitions Bill, 2000* (CCT 11/01) [2001] ZACC 10; 2002 (1) SA 447 (CC); 2001 (11) BCLR 1126 (5 October 2001) para 19; *Executive Council of the Province of the Western Cape v Minister for Provincial Affairs and Constitutional Development and Another, Executive Council of KwaZulu-Natal v President of the Republic of South Africa and Others* (CCT15/99,CCT18/99) [1999] ZACC 13; 2000 (1) SA 661; 1999 (12) BCLR 1360 (15 October 1999) paras 123–4; *Justice Alliance of South Africa v President of Republic of South Africa and Others, Freedom Under Law v President of Republic of South Africa and Others, Centre for Applied Legal Studies and Another v President of Republic of South Africa and Others* (CCT 53/11, CCT 54/11, CCT 62/11) [2011] ZACC 23; 2011 (5) SA 388 (CC); 2011 (10) BCLR 1017 (CC) (29 July 2011) para 53.

[119](#)See s 91(3).

120See Pieterse (2004) 388.

121See De Vos, P (2012, 14 August) Towards a parliament for the people Constitutionally Speaking available at <http://constitutionallyspeaking.co.za/towards-a-parliament-for-the-people/>.

122(CCT27/95) [1995] ZACC 8; 1995 (10) BCLR 1289; 1995 (4) SA 877 (22 September 1995). See also Justice Alliance.

123Act 209 of 1993.

124Executive Council of the Western Cape Legislature para 51.

125See also Currie and De Waal (2001) 98–102.

126S 83(a).

127Ss 84(1) and 85(1). For a discussion as to the import of the distinction between these two capacities in which the President exercises power, see ch 5.

128S 85(2)(a)–(e).

129S 83(b).

130S 91(1).

131S 91(2).

132S 91(3).

133S 92(2).

134The dominant role of the NA becomes apparent if we compare s 55 with the comparable s 68 dealing with the powers of the NCOP. The latter section makes no mention of an accountability or oversight role for the NCOP.

135S 92(3)(b).

136S 102 establishes two different motions, one that provides for the removal of the Cabinet excluding the President and another motion that provides for the removal of the entire Cabinet, including the President.

137S 89(1).

138Because of the proliferation of quasi-judicial administrative bodies within the executive, this absolute separation of functions is becoming less clear.

139See also ch 6.

140S 165(1).

[141](#)S 166(a)–(e).

[142](#)S 167(3)(a).

[143](#)See s 34 which confers on everyone the right to access the courts.

[144](#)Owing to the fact that s 170 precludes the magistrates' courts or other courts of a status lower than the High Court from reviewing the constitutionality of legislation or conduct of the President, this discussion necessarily excludes magistrates' courts.

[145](#)S 172 details the various types of orders that the courts can make in relation to constitutional matters. It is important to note that in so far as Acts of Parliament, Acts of the provincial legislatures and conduct of the President are concerned, only the Constitutional Court may issue an order of final invalidity, after which point such an order has full force and effect (s 167(5)).

[146](#)S 174.

[147](#)See s 174 wherein the procedure for the appointment of judicial officers is set out. See also s 177 which deals with the provisions in respect of the removal of judges.

[148](#)S 165(2).

[149](#)S 165(3).

[150](#)S 165(4).

[151](#)(CCT27/00) [2000] ZACC 22; 2001 (1) SA 883; 2001 (1) BCLR 77 (28 November 2000) para 25.

[152](#)See s 176(1) and (2) which stipulates how long judges remain in office. In terms of this section, Constitutional Court judges serve for a maximum term of 12 years or until such time as they attain the age of 70, whichever occurs first. Other judges remain in office until they are discharged from active service which is normally at the age of 75.

[153](#)See s 176(3).

[154](#)See s 177 which deals in detail with the procedure in respect of the removal of judges.

[155](#)The process that must be followed by the JSC when a complaint is laid against a judge is set out in the Judicial Service Commission Act 9 of 1994.

[156](#)S 177(2).

[157](#)See Makwanyane paras 87–9.

[158](#)See generally Minister of Health and Others v Treatment Action Campaign and Others (No 2) (CCT8/02) [2002] ZACC 15; 2002 (5) SA 721; 2002 (10) BCLR 1033 (5 July 2002).

[159](#)See Bickel (1962) 16.

[160](#)See Friedman, B (2002) The birth of an academic obsession: The history of the counter-majoritarian difficulty, Part five Yale Law Journal 112(2):153–260.

[161](#)See Lenta, P (2004) Democracy, rights disagreements and judicial review SAJHR 20(1):1–31 for a detailed account and critique of some of the various arguments in support of and against judicial review contributing to the ideals of democracy.

[162](#)One of the views discussed by Lenta (2004) 4 is that of Waldron, J (1999) Law and Disagreement who argues that judicial review is undemocratic. According to Lenta, Waldron premises his argument on the fact that judicial review negates the democratic right of citizens to participate equally in decisions concerning them and their interests. The arguments put forward by Waldron seek to dispel the notion that there is something about the courts that makes them especially equipped to make better decisions on constitutional rights or questions of political morality. Instead, according to Waldron, the right to participate being a foundational element of democracy is unjustifiably diminished when judicial review denies citizens an opportunity to participate in decisions that are made the preserve of the courts.

[163](#)See Lenta (2004) 5 for a discussion of Ely's view that judicial review is legitimate or justifiable on the basis that there are times when the courts may be called on to guarantee or safeguard the democratic process (Ely, JH (1980) Democracy and Distrust: A Theory of Judicial Review).

[164](#)See Lenta (2004) 6 for a discussion on Dworkin's conception of a constitutional democracy where Dworkin argues that judicial review is an integral part of a democracy in that it sees democracy as being more than simple majoritarianism (Dworkin, R (1986) Law's Empire). See also generally Davis et al (1994) 6–7.

[165](#)Lenta (2004) 5–6.

[166](#)See Makwanyane para 88 for the views of Chaskalson P on the place of public opinion in constitutional adjudication.

[167](#)Makwanyane paras 87–9.

[168](#)See Lenta (2004) 1 for a detailed account and critique of some of the various arguments in support of and against judicial review contributing to the ideals of democracy. See also Van der Walt, J and Botha, H (2000) Democracy and rights in South Africa: Beyond a constitutional culture of justification Constellations 7(3):341–62 at 350.

[169](#)See Lenta (2004) 10–11 where he discusses Dworkin's substantive conception of democracy that demands that a balance be struck between collective decisions and individual rights by placing limitations on the majoritarian legislatures by means of mechanisms such as judicial review (Dworkin (1986)).

[170](#)See Lenta (2004) 17–18.

[171](#)See Pieterse (2004) 391–2.

[172](#)Van der Walt and Botha (2000) 353–5.

173Lenta (2004) 31 makes this point as follows: ‘They are mixed because, even if the people are deemed to have agreed to the inclusion of rights in their constitution, their consent cannot be taken to extend to controversial judicial interpretations.’

174See, for example, Magen, A (2008) The rule of law and its promotion abroad: Three problems of scope *Stanford Journal of International Law* 45(1):51–116 and Rosenfeld, M (2001) The rule of law and the legitimacy of constitutional democracy *Southern California Law Review* 74(5):1307–52.

175Dicey(1959) xcvi–cli (also referred to in Currie and De Waal (2001) 75–7).

176Dicey (1959) 45–54. See also Dugard (1978) 37.

177See Klug, H (2010) *The South African Constitution: A Contextual Analysis* 225–9 where the author describes how the courts (especially the magistrates’ courts) were ‘part of the state’s disciplinary machinery’.

178Dugard (1978) 43.

179Dyzenhaus, D (2007) The pasts and future of the rule of law in South Africa *SALJ* 124(4):734–61 at 738.

180See Dyzenhaus (2007) 738–9.

181See Klug (2010) 32 where he describes how a substantive conception of the rule of law developed as part of human rights law. See also Dugard (1978) 39ff.

182See Centre for Human Rights University of Pretoria available at [http://www.1chr.up.ac.za/images/files/documents/ahrdd/theme36/rule\\_of\\_law\\_lagos\\_1961.pdf](http://www.1chr.up.ac.za/images/files/documents/ahrdd/theme36/rule_of_law_lagos_1961.pdf).

183(CCT7/98) [1998] ZACC 17; 1999 (1) SA 374; 1998 (12) BCLR 1458 (14 October 1998).

184Fedsure para 56.

185See also *President of the Republic of South Africa and Others v South African Rugby Football Union and Others (SARFU III)* (CCT16/98) [1999] ZACC 11; 2000 (1) SA 1; 1999 (10) BCLR 1059 (10 September 1999) paras 38 and 148; *Pharmaceutical Manufacturers* paras 20–21; *Affordable Medicines Trust and Others v Minister of Health and Another* (CCT27/04) [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) (11 March 2005) para 49; *Albutt v Centre for the Study of Violence and Reconciliation and Others* (CCT 54/09) [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (2) SACR 101 (CC); 2010 (5) BCLR 391 (CC) (23 February 2010) para 49; *Democratic Alliance v President of South Africa and Others* (CCT 122/11) [2012] ZACC 24; 2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC) (5 October 2012) para 12.

186See Hoexter, C (2007) *Administrative Law in South Africa* 321.

[187](#)(CCT27/04) [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) (11 March 2005) para 49.

[188](#)Pharmaceutical Manufacturers para 66.

[189](#)Pharmaceutical Manufacturers para 89.

[190](#)Lesapo v North West Agricultural Bank and Another (CCT23/99) [1999] ZACC 16; 2000 (1) SA 409; 1999 (12) BCLR 1420 (16 November 1999).

[191](#)(CCT23/99) [1999] ZACC 16; 2000 (1) SA 409; 1999 (12) BCLR 1420 (16 November 1999) para 1.

[192](#)Lesapo para 11.

[193](#)Lesapo para 17.

[194](#)Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others (CCT35/99) [2000] ZACC 8; 2000 (3) SA 936; 2000 (8) BCLR 837 (7 June 2000) para 47.

[195](#)Janse van Rensburg and Another v Minister of Trade and Industry and Another (CCT13/99) [2000] ZACC 18; 2001 (1) SA 29; 2000 (11) BCLR 1235 (CC) (29 September 2000) para 25.

[196](#)S and Others v Van Rooyen and Others (General Council of the Bar of South Africa Intervening) (CCT21/01) [2002] ZACC 8; 2002 (5) SA 246; 2002 (8) BCLR 810 (11 June 2002) para 18.

[197](#)See Dyzenhaus (2007) 734–61.

[198](#)In a press statement issued in 1992 by former President Nelson Mandela, he described ‘democracy for all South Africans’ as the final goal of negotiations. Available at <http://www.sahistory.org.za/archive/press-statement-nelson-r-mandela-president-anc-ancnp-summit-meeting-world-trade-centre-johan>.

[199](#)Motala (1994) 19.

[200](#)See, for example, Kurki, M (2012) Democracy and conceptual contestability: Reconsidering conceptions of democracy in democracy promotion International Studies Review 12(3):362–86; Benhabib, S (1996) Democracy and Difference: Contesting the Boundaries of the Political.

[201](#)While not a definition of democracy, the principles and values in section 1(d) do, to a significant degree, tend to tally with certain elements or practices which have been identified and are said to be indicative of a democratic society. For example, (1) government based on consent of the governed through free and fair elections; (2) the active participation of the people, as citizens, in politics and civic life; (3) protection of the human rights of all citizens; (4) respect for the rule of law; (5) majority rule and respect for minority rights; and (6)

constitutional limits of government. In general, see Beetham, D (2004) Towards a universal framework for democracy assessment *Democratization* 11(2):1–17.

[202](#)Roux, T ‘Democracy’ in Woolman and Bishop (2013) 10.1.

[203](#)See *Doctors for Life International v Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) (17 August 2006) paras 96–117.

[204](#)See generally Scarrow, SE (2001) Direct democracy and institutional change: A comparative investigation *Comparative Political Studies* 34(6):651–65 at 654–65.

[205](#)S 17.

[206](#)Woolman captures the importance of s 17 as follows: ‘By creating political space for crowd action, s 17 vouchsafes a commitment to a form of democracy in which the “will of the people” is not always mediated by political parties and the elites that run them.’ Woolman, S ‘Assembly, demonstration, picket and petition’ in Currie, I and De Waal, J (2013) *Bill of Rights Handbook* 6th ed 397–8.

[207](#)Ss 84(2)(g) and 127(2)(f) of the Constitution confer this power on the President and provincial Premiers respectively.

[208](#)(CCT 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC) (13 June 2008).

[209](#)Merafong para 29.

[210](#)See the dissenting judgment of Moseneke J in Merafong paras 133–40. For a more detailed description of how the civic protest unfolded, became violent and its impact on the residents of Merafong, particularly in Khutsong township, see Kirshner, J and Phokela, C (2010) *Khutsong and xenophobic violence: Exploring the case of the dog that didn’t bark* particularly 8–14. Available at [http://www.gcro.ac.za/sites/default/files/News\\_items/Xeno\\_reports\\_July2010/case\\_studies/5\\_Khutsong\\_reprint\\_lowres.pdf](http://www.gcro.ac.za/sites/default/files/News_items/Xeno_reports_July2010/case_studies/5_Khutsong_reprint_lowres.pdf).

[211](#)See Kirshner and Phokela (2010).

[212](#)See generally Kateb, G (1981) The moral distinctiveness of representative democracy *Ethics* 91(3):357–74.

[213](#)Sachs J in a concurring judgment in *Doctors for Life* stated that ‘representative democracy undoubtedly lies at the heart of our system of government ...’ para 229.

[214](#)Roux (2013) 10.13.

[215](#)See Currie and De Waal (2001) 86.

[216](#)S 1(d).



[217](#)S 42(3).

[218](#)S 46(1)(d); 105(1)(d); 157(2)(a).

[219](#)See s 57, in particular subsecs (1)(b) and (2)(b).

[220](#)1998 (3) SA 430 (C).

[221](#)De Lille para 27.

[222](#)De Lille para 27.

[223](#)For example *New National Party v Government of the Republic of South Africa and Others* (CCT9/99) [1999] ZACC 5; 1999 (3) SA 191; 1999 (5) BCLR 489 (13 April 1999); *August and Another v Electoral Commission and Others* (CCT8/99) [1999] ZACC 3; 1999 (3) SA 1; 1999 (4) BCLR 363 (1 April 1999); *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others* (CCT 03/04) [2004] ZACC 10; 2005 (3) SA 280 (CC); 2004 (5) BCLR 445 (CC) (3 March 2004).

[224](#)(CCT03/09, CCT 09/09) [2009] ZACC 3; 2009 (3) SA 615 (CC); 2009 (5) BCLR 448 (CC) (12 March 2009) para 52.

[225](#)(CCT23/02) [2002] ZACC 21; 2003 (1) SA 495; 2002 (11) BCLR 1179 (4 October 2002) para 26.

[226](#)For a critical appraisal of the disconcerting implications of this passage, see Roux, T (2009) Principle and pragmatism on the Constitutional Court of South Africa *International Journal of Constitutional Law* 7(1):106–38 at 128–30.

[227](#)UDM para 11.

[228](#)UDM para 49.

[229](#)See Choudhry, S (2009) ‘He had a mandate’: The South African Constitutional Court and the African National Congress in a dominant party democracy *Constitutional Court Review* 2:1–86 at 23; Southall, R (1994) The South African elections of 1994: The remaking of a dominant-party state *The Journal of Modern African Studies* 32(4):629–55; Giliomee, HB (1998) South Africa’s emerging dominant-party regime *Journal of Democracy* 9(4):128–42; Friedman, S ‘No easy stroll to dominance: Party dominance, opposition and civil society in South Africa’ in Giliomee, HB and Simkins, CEW (eds) (1999) *The Awkward Embrace: One Party Domination and Democracy* 97; Alence, R (2004) South Africa after apartheid: The first decade *Journal of Democracy* 15(3):78–92 at 78.

[230](#)See Choudhry (2009) 24–5.

[231](#)Currie and De Waal (2001) 87.

[232](#)(CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) (17 August 2006) para 115.

[233](#)See ss 59, 72 and 118.

[234](#)Doctors for Life para 75.

[235](#)Doctors for Life paras 106–8.

[236](#)Doctors for Life para 116.

[237](#)See s 7(1).

[238](#)S 36(1).

[239](#)S 39(1).

[240](#)S 41.

[241](#)Roux (2013) 10.18–10.19.

[242](#)Roux (2013) 10.19.

[243](#)Roux (2013) 10.19.

[244](#)Doctors for Life para 111.

## **CHAPTER 3**

Separation of powers and the three branches of government

### 3.1 Introduction

### 3.2 A new democratic constitutional dispensation within a system of separation of powers

#### Summary

#### 3.1 Introduction

A study of the different branches of government can best be done by using the separation of powers doctrine as a lens through which to look at how the three branches operate and how they relate to one another. In this chapter we therefore introduce the distinctly South African version of the doctrine of separation of powers. The judiciary is still developing this doctrine through the interpretation of the South African Constitution. In chapter 2 of this book we discussed the scope and content of the doctrine of separation of powers as it manifests in various constitutional systems in other parts of the world and, briefly, as it has thus far been developed in South Africa. In the next three chapters we focus more pertinently on the various branches of government established by the South African Constitution,<sup>1</sup> namely the legislature, the executive and the judiciary. We explore the composition, powers and functions of these branches of government and the nature of the relationship between the various branches with specific emphasis on the notion that these branches operate in accordance with a system of checks and balances. We also discuss the role, powers and functions of the National Prosecuting Authority (NPA).<sup>2</sup> This is an independent body created by the Constitution and tasked with overseeing the prosecution of accused persons.

The discussion of these separate branches of government and their relationship to each other takes place against the background of the particular South African context highlighted in chapter 1, most notably by what has been described as a ‘surprise re-entry’ and ‘resurgence’ of traditional leadership in South Africa in the post-apartheid era.<sup>3</sup> One of the most vexing constitutional questions in the democratic era relates to the role of traditional leaders and traditional governance structures, and where and how these structures fit into a scheme of separation of powers with its three branches of government.<sup>4</sup> We will address this question as we discuss the various branches of government. We do so as we contend that the resurgence of customary practices and leadership institutions in the democratic era is not as surprising as some commentators have argued. This is especially so given that ‘South Africa is as rich in tenacious institutions with indigenous roots as other African countries’ and that these institutions ‘were entrenched (albeit in distorted ways) over many decades of segregationist and apartheid rule’.<sup>5</sup> Moreover, if viewed from a historical perspective, it is sometimes argued that traditional authorities in southern Africa ‘have always engaged assertively with other sites of authority and forms of government’.<sup>6</sup> Current-day supporters of the maintenance and restoration of traditional governance institutions and customs have argued that traditional leaders have provided continuity of governance even though they are undoubtedly tainted by their association with segregation and apartheid. This is particularly so in rural areas where there were scant alternative governance structures and the influence of the institutions of the democratic state is at its weakest.<sup>7</sup> Others, however, see the resurgence of traditional governance institutions as a regressive step that undermines progress towards

democratic consolidation in South Africa because traditional governance structures are inherently undemocratic, patriarchal and potentially oppressive.<sup>8</sup>

Whatever a person's view on traditional leadership and traditional governance institutions, it is nevertheless important to explore the powers and functions of the various branches of government and the relationship between these branches with reference to these institutions. To this end we also discuss the powers and functions of the National House of Traditional Leaders. Parliament created this institution via the National House of Traditional Leaders Act (the National House Act) <sup>9</sup> and pursuant to section 212(2)(e) of the Constitution. This section permits the promulgation of legislation to deal with matters relating to issues of traditional leadership.

Traditional descriptions of South African constitutional law ignore those aspects of the South African political and governance context that do not neatly reflect the Western-style constitutional structures established by the Constitution. In this book we focus on these structures but do so with an awareness that there are different centres of power in South Africa. One is centred around the formal institutions of the legislature, the executive and the judiciary, all of which are described and regulated in the Constitution. Another is centred around a more informal and ever-changing set of institutions such as traditional leadership institutions.

Apart from discussing the various branches of government with reference to the role played by traditional leaders, we will also discuss the various branches of government with reference to the role played by political parties in bringing the Constitution into operation. Power is centred in such political parties – especially the leadership of the most dominant political parties, the African National Congress (ANC) and the Democratic Alliance (DA). The internal culture of these parties and the leadership style of their leaders thus influence how especially the legislature and the executive operate within the doctrine of separation of powers.

Lastly, we consider the composition, powers and functions of various other constitutional institutions created to support constitutional democracy. These are sometimes referred to collectively as the Chapter 9 institutions. These constitutional bodies are required to play an oversight role over the legislature, the executive and the judiciary, and to deepen and safeguard democracy. However, we limit our discussion in this regard to the following institutions: the Public Protector; <sup>10</sup> the Auditor-General; <sup>11</sup> and the Electoral Commission.<sup>12</sup> In addition, we consider the Judicial Service Commission (JSC).<sup>13</sup>

In the following chapters we therefore deal with four interrelated issues relating to the structures of government as these operate within a system of separation of powers:

- The current chapter sets out and explains the framework within which the three branches of government operate and provides a brief overview of the historical origins of the doctrine of separation of powers and its influence on South Africa's new constitutional dispensation.
- Chapter 4 deals with the composition and functioning of the legislature and its relationship with the other branches of government.
- Chapter 5 deals with the composition and functioning of the executive and its relationship with the other branches of government.

- Chapter 6 deals with the composition and functioning of the judiciary and its independence from the other branches of government as well as the prosecuting authority.
- Chapter 7 considers the role of certain Chapter 9 institutions.

### 3.2 A new democratic constitutional dispensation within a system of separation of powers

The new constitutional dispensation established by the 1993 Constitution (the interim Constitution) [14](#) and later the 1996 Constitution is often said to serve as a bridge between a past that was characterised by the worst forms of political repression and inhumane treatment of masses of people, and a future that uncompromisingly commits the state to the values of human dignity, freedom and equality for all persons, irrespective of race or creed.[15](#) As we have seen, when the interim Constitution was enacted, it signalled a dramatic change in the system of governance from one based on rule by Parliament to a constitutional state in which a supreme Constitution guarantees the rights of individuals. ‘It also signalled a new dispensation, as it were, where rule by force would be replaced by democratic principles and a governmental system based on the precepts of equality and freedom.’ [16](#)

But these dramatic changes were also reflected in necessary changes to the structures of government. The 1993 and 1996 Constitutions thus introduced significant changes to the composition and functioning of the legislative, executive and judicial branches of government as well as the composition and functioning of governance structures at the provincial and local level. At the heart of these changes we find a more decisive, if not entirely strict, division of power between the various branches of government and between different spheres of government at the national, provincial and local levels. In the following chapters we focus primarily on the national sphere of government and the institutions created by the Constitution to regulate and check the exercise of public power in this sphere. We then proceed to discuss the distribution of powers and functions between the national sphere of government and the other spheres in chapter 8 of this book.

The Constitution provides for the division of the national government into three separate branches:

- The national Parliament which consists of the National Assembly (NA) and the National Council of Provinces (NCOP). Its members are the people’s representatives and it is the highest law-making authority.
- The national executive consists of the President and the Ministers who together form the Cabinet. The Ministers are the political heads of different government portfolios and perform executive functions.
- The judiciary exercises judicial review of government conduct. Section 165 of the Constitution vests judicial authority in the courts. The courts must be independent and are subject only to the law and the Constitution which they must apply without fear, favour or prejudice.[17](#)

The Constitution is structured in such a way that different chapters are dedicated to the different branches of government, namely the legislative authority, executive authority and judicial authority. Chapter 4 of the Constitution deals exclusively with the legislative authority in the national sphere of government, Chapter 5 deals with the executive authority in the national sphere of government, while Chapter 8 is dedicated to the judicial authority of the Republic. This means that the doctrine of separation of powers, although never directly

mentioned in the document, is nevertheless firmly entrenched in the 1996 Constitution of South Africa. In *Glenister v President of the Republic of South Africa and Others* (*Glenister I*),<sup>18</sup> for example, Langa CJ, in reference to the separation of powers, stated that ‘although not expressly mentioned in the text, it was “axiomatic” that it was part of the constitutional design’.<sup>19</sup> And in *Doctors for Life International v Speaker of the National Assembly and Others*, Ngcobo J stated that ‘the structure of the provisions entrusting and separating powers between the legislative, executive and judicial branches reflects the concept of separation of powers’.<sup>20</sup>

However, in at least one sense, the doctrine does not require a strict separation between the judiciary on the one hand and the legislature and executive on the other as it requires the judiciary to check whether the other branches comply with the law and exercise their authority in conformity with the Constitution.<sup>21</sup> This potentially places the judiciary in the firing line as the courts, which must ultimately interpret the Constitution and flesh out the notion of separation of powers and its limits, are the final arbiters of the supreme Constitution.<sup>22</sup> Because the Constitution is supreme and binding on all branches of government,<sup>23</sup> and because the courts must interpret and enforce the Constitution, it means that when the legislature or executive exercises its constitutionally mandated authority, it must act in accordance with, and within the limits of, the Constitution as determined by the courts. As the Court stated in *Doctors for Life*:

The supremacy of the Constitution requires that ‘the obligations imposed by it must be fulfilled’. Courts are required by the Constitution ‘to ensure that all branches of government act within the law’ and fulfil their constitutional obligations. This Court ‘has been given the responsibility of being the ultimate guardian of the Constitution and its values’. Section 167(4)(e), in particular, entrusts this Court with the power to ensure that Parliament fulfils its constitutional obligations. This section gives meaning to the supremacy clause, which requires that ‘the obligations imposed by [the Constitution] must be fulfilled’. It would therefore require clear language of the Constitution to deprive this Court of its jurisdiction to enforce the Constitution.<sup>24</sup>

The courts must exercise this vital task while at the same time remaining conscious of the limits on judicial authority and the Constitution’s design and must leave certain matters to other branches of government. This means that the judiciary should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution.<sup>25</sup> Accordingly, the division of powers is not strictly enforced if it appears, for example, that one sphere of government is failing to comply with its constitutional obligations. The courts can always intrude to check the other branches when they fail to comply with their constitutional obligations.<sup>26</sup>

In this regard, the judgment in *Glenister I* is apposite where the Court held that:

it is a necessary component of the doctrine of the separation of powers that courts have a constitutional obligation to ensure that the exercise of power by other branches of government occurs within constitutional bounds. But even in these circumstances, courts must observe the limits of their powers.<sup>27</sup>

This is in accordance with the test formulated in *Doctors for Life* which provides that intervention by a court in the legislative process:

would only be appropriate if an applicant can show that there would be no effective remedy available ... once the legislative process is complete, as the unlawful conduct will have achieved its object in the course of the process. The applicant must show that the resultant harm will be material and irreversible.<sup>28</sup>

## PAUSE FOR REFLECTION

### A dialogic model of the separation of powers doctrine

The separation of powers doctrine in a liberal democracy is said to enable the complex task of governance, law making and law enforcement to be performed by the institution best equipped to do so. It is also said to disperse power to avoid the overconcentration of power in one body or one person.<sup>29</sup> But as Liebenberg points out, the doctrine as it is traditionally envisaged in liberal thought 'has the potential to frustrate transformation when it assumes an idealised form of strictly demarcated separate spheres, instead of a functional and pragmatic device to facilitate responsive, accountable government'.<sup>30</sup> What is envisaged in the South African model of constitutional democracy is a relationship between the three branches that ensures accountability as well as responsiveness and openness on the part of the various branches. Liebenberg argues that in this model, which we shall call the 'post-liberal' model, the focus is not so much on whether one branch of government has transgressed the boundaries of the other, but rather on 'whether the branches all remain able to participate in the process of mutually defining their boundaries'.<sup>31</sup> This is also sometimes called a dialogic model of the separation of powers as it envisages an ongoing, structured, constitutional dialogue between the three branches of government. Although the dialogue will often be robust and although severe tensions may arise among the three branches of government, the three branches will remain engaged with one another on a formal level to test the limits of power exercised by each branch. Liebenberg contends that this fluid, dialogic model of separation of powers is best suited to promoting transformative jurisprudence.<sup>32</sup> When considering the appropriate role of the three branches of government in the South African context, it is therefore important to take into account the transformative nature of the South African Constitution.

In *Certification of the Constitution of the Republic of South Africa, 1996*, the Constitutional Court affirmed that there was no universal model of separation of powers. It claimed that in democratic systems of government in which checks and balances result in the imposition of restraints by one branch of government on another, there is no separation that is absolute. It continued:

[t]he principle of separation of powers, on the one hand, recognises the functional independence of branches of government. On the other hand, the principle of checks and balances focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another. In this sense it anticipates the necessary or unavoidable intrusion of one branch on the terrain of another. No constitutional scheme can reflect a complete separation of powers: the scheme is always one of partial separation.<sup>33</sup>

This means that courts will inevitably play an important role in regulating and safeguarding the separation of powers. However, it also means that the courts may be accused of intruding too far into the domain of the other two branches of government when they do so. This raises the counter-majoritarian problem highlighted in chapter 2. However, as the ultimate

guardians of the Constitution, the courts not only have the right to intervene in order to prevent the violation of the Constitution, they also have the duty to do so.<sup>34</sup> This is because it is a necessary component of the doctrine of separation of powers that courts have a constitutional obligation to ensure that the exercise of power by other branches of government occurs within constitutional bounds. Courts must nevertheless observe the limits of their powers.

The converse question arises: can the legislature and the executive ever intrude on the terrain of the judiciary? For example, can the legislature impose limits on the power of the courts to sentence those convicted of criminal offences and, if so, to what extent? <sup>35</sup> Can the executive engage members of the judiciary in informal discussions, for example by creating ‘appropriate mechanisms’ in order ‘to facilitate for [sic] regular interface between the three spheres of the State to enhance synergy and constructive engagement among them in pursuit of common transformative goals that are geared to benefit the society at large’? <sup>36</sup> These are complex questions, but in essence the answer is that as there is no absolute separation of powers, there is no absolute bar on the other two branches intruding on the terrain of the judiciary. However, there is one important caveat, namely that no intrusion can ever be allowed if such an intrusion will undermine the independence or impartiality of the judiciary. For this reason, it is unlikely that a court will ever approve of the creation of a mechanism to facilitate regular private discussions between the judiciary and the other branches of government to enhance synergy and constructive engagement among them in pursuit of common transformative goals.<sup>37</sup>

## SUMMARY

The Constitution creates three branches of government – the legislature, the executive and the judiciary – and the study of each of these branches of government must be conducted with reference to the relationship between the branch being studied and the other two branches. It must also be understood with reference to the practices of traditional leadership and the culture within dominant political parties. Understanding the separation of powers doctrine is therefore pivotal for understanding how the various branches of government work and what the limits of the power of each branch are. In this regard, the judiciary must be treated as unique as it requires a high degree of independence from the other branches of government. The judiciary has the vital task of enforcing the provisions of the Constitution and of ensuring that the other branches of government act in accordance with its provisions. However, this format does not easily accommodate other structures of government such as traditional leadership or Chapter 9 institutions.

### 1.

<sup>1</sup>See, generally, Chapters 4, 5 and 8 of the Constitution which detail the provisions pertaining to Parliament, the President and the national executive, and the judiciary respectively, read with Chapters 3 (co-operative government), 6 (the provinces), 7 (local government) and Schedules 4 and 5 that delineate areas of concurrent national and provincial, and exclusive provincial legislative competences.

<sup>2</sup>See s 179 of the Constitution.



[3](#)Oomen, B (2005) *Chiefs in South Africa, Law, Power and Culture in the Post-Apartheid Era* 11.

[4](#)Addressing this problem is made even more difficult by the fact that many traditional leaders were co-opted by the apartheid regime. At the time of writing there has been a resurgence of support for traditional leadership institutions and the role of African customary law. Evidence of the latter can be garnered from the promulgation of the Communal Land Rights Act 11 of 2004 (CLaRA) and the subsequent constitutional challenge to it in *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* (CCT100/09) [2010] ZACC 10; 2010 (6) SA 214 (CC); 2010 (8) BCLR 741 (CC) (11 May 2010). See also *Pilane and Another v Pilane and Another* (CCT 46/12) [2013] ZACC 3; 2013 (4) BCLR 431 (CC) (28 February 2013). For the leading commentary on CLaRA, traditional leadership and communal land, see Claassens, A and Cousins, B (eds) (2008) *Land, Power, and Custom: Controversies Generated by South Africa's Communal Land Rights Act*.

[5](#)See Beall, J, Mkhize, S and Vawda, S (2005) Emergent democracy and 'resurgent' tradition: Institutions, chieftaincy and transition in *KwaZulu-Natal Journal of Southern African Studies* 31(4):755–71 at 756.

[6](#)Beall et al (2005) 756.

[7](#)Hobsbawm, E and Ranger, T (eds) (1983) *The Invention of Tradition and Vail, L (ed) (1989) The Creation of Tribalism in Southern Africa*.

[8](#)See Beall et al (2005) fn 5.

[9](#)Act 22 of 2009.

[10](#)S 181(1)(a) of the Constitution.

[11](#)S 181(1)(e) of the Constitution.

[12](#)S 181(1)(f) of the Constitution.

[13](#)S 178 of the Constitution.

[14](#)The Constitution of the Republic of South Africa 200 of 1993.

[15](#)See s 1 read with s 7 of the Constitution. The metaphor of a bridge was first introduced into South Africa's constitutional lexicon by the postamble to the interim Constitution titled 'National Unity and Reconciliation'. It was popularised by Etienne Mureinik – see Mureinik, E (1994) *A bridge to where? Introducing South Africa's interim Bill of Rights* SAJHR 10:30. See also *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995) para 262 where Mohamed DP, quoting in part the postamble to the interim Constitution, said: 'The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution ... What the Constitution expressly aspires to do is to

provide a transition from these grossly unacceptable features of the past to a conspicuously contrasting “future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex”.’

[16](#)Makwanyane para 220.

[17](#)S 165(1) and (2).

[18](#)(CCT 41/08) [2008] ZACC 19; 2009 (1) SA 287 (CC); 2009 (2) BCLR 136 (CC) (22 October 2008). This case is known as *Glenister I* as the Constitutional Court later handed down judgment in a similar matter in *Glenister v President of the Republic of South Africa and Others* (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) (17 March 2011), known as *Glenister II*.

[19](#)*Glenister I* paras 29–32.

[20](#)(CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) (17 August 2006) para 37. See also *Certification of the Constitution of the Republic of South Africa, 1996* (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996) paras 106–13 where the Court held that the provisions of the Constitution are structured in a way that makes provision for the separation of powers, and *South African Association of Personal Injury Lawyers v Heath and Others* (CCT27/00) [2000] ZACC 22; 2001 (1) SA 883; 2001 (1) BCLR 77 (28 November 2000) para 22.

[21](#)See, for example, s 172(1) of the Constitution which provides that a court: ‘(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and (b) may make any order that is just and equitable, including: (i) an order limiting the retrospective effect of the declaration of invalidity; and (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect’.

[22](#)S 167(5) of the Constitution provides: ‘The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force.’

[23](#)S1(c) read with s 8(1).

[24](#)*Doctors for Life* para 38.

[25](#)*Doctors for Life* para 37.

[26](#)See *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* (CCT8/02) [2002] ZACC 15; 2002 (5) SA 721; 2002 (10) BCLR 1033 (5 July 2002) para 99 where the Court stated: ‘The primary duty of courts is to the Constitution and the law, “which they must apply impartially and without fear, favour or prejudice”. The Constitution requires the state to “respect, protect, promote, and fulfil the rights in the Bill of Rights”. Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional

obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself.’

[27](#)Glenister I para 33. See also *Mazibuko v Sisulu and Another* (CCT 115/12) [2013] ZACC 28; 2013 (6) SA 249 (CC); 2013 (11) BCLR 1297 (CC) (27 August 2013) para 31 where the Constitutional Court affirmed its reluctance to interfere in the power of the NA to determine its own internal arrangements, proceedings and procedures, and to make rules and orders concerning its business.

[28](#)Doctors for Life para 44. This test applies equally to executive decision making and execution of law and policy.

[29](#)Glenister I para 35. See also Liebenberg, S (2010) *Socio-Economic Rights Adjudication under a Transformative Constitution* 67.

[30](#)Liebenberg (2010) 67.

[31](#)Liebenberg (2010) 69, quoting Minow, M (1990) *Making All the Difference: Inclusion, Exclusion and American Law* 361.

[32](#)Liebenberg (2010) 71.

[33](#)(CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996) paras 108–9. See also *De Lange v Smuts NO and Others* (CCT26/97) [1998] ZACC 6; 1998 (3) SA 785; 1998 (7) BCLR 779 (28 May 1998) para 60 where Ackermann J stated: ‘I have no doubt that over time our Courts will develop a distinctively South African model of separation of powers, one that fits the particular system of government provided for in the Constitution and that reflects a delicate balancing, informed both by South Africa’s history and its new dispensation, between the need, on the one hand, to control government by separating powers and enforcing checks and balances and, on the other, to avoid diffusing power so completely that the government is unable to take timely measures in the public interest.’

[34](#)Doctors for Life para 70.

[35](#)In *S v Dodo* (CCT 1/01) [2001] ZACC 16; 2001 (3) SA 382 (CC); 2001 (5) BCLR 423 (CC) (5 April 2001), the Constitutional Court found that the legislative prescription requiring courts to impose mandatory minimum sentences in certain cases did not necessarily infringe on the separation of powers doctrine. As checks and balances constitute an integral part of the separation of powers principle and prevent one arm of the state from becoming too powerful in the exercise of the powers allocated to it, legislation on penal sentencing does not, per se, infringe the separation of powers principle between the legislature and the judiciary.

[36](#)De Vos, P (2011, 24 November) *Cabinet statement on transformation of judicial system Constitutionally Speaking* available at <http://constitutionallyspeaking.co.za/cabinet-statement-on-transformation-of-judicial-system/>.

[37](#)See Yacoob, Z (2012) ‘The Dynamic Constitution’, Keynote Address, University of Cape Town Constitution Week, 12 March 2012, available at

<http://constitutionallyspeaking.co.za/justice-zac-yacoob-on-the-dynamic-constitution/> where, in reference to the proposed Department of Justice's 'review' of the jurisprudence of South Africa's Constitutional Court and Supreme Court of Appeal and an evaluation of the contribution or lack thereof of jurisprudence to the transformation of society, the Justice stated: '... this cannot be intended to mean that the executive and the legislature should be able to discuss matters of importance with the judiciary directly and outside a court hearing, in an effort to influence it. If this is what is meant I would find it difficult to agree.'

## **CHAPTER 4**

Separation of powers and the national legislature

### 4.1 Introduction

### 4.2 General rules regarding the operation of Parliament

#### 4.2.1 Introduction

#### 4.2.2 Openness and transparency in Parliament

#### 4.2.3 The powers and privileges of Members of Parliament

#### 4.2.4 Public involvement in the legislative and other processes of the National Assembly and the National Council of Provinces

### 4.3 The National Assembly

#### 4.3.1 The composition of the National Assembly

#### 4.3.2 Eligibility for election to the National Assembly

#### 4.3.3 Duration of the National Assembly, sittings and its dissolution

#### 4.3.4 Powers and functioning of the National Assembly

### 4.4 The National Council of Provinces

#### 4.4.1 The composition and functioning of the National Council of Provinces

#### 4.4.2 Procedures, internal arrangements and committees of the National Council of Provinces

### 4.5 Functions of Parliament

#### 4.5.1 Introduction

#### 4.5.2 National forum for public consideration of issues

#### 4.5.3 Holding the executive accountable to Parliament

#### 4.5.4 Maintaining oversight of the national executive authority and other organs of state

#### 4.5.5 Passing of legislation

#### 4.5.6 Delegation of legislative powers to executive or other legislatures

### 4.6 National House of Traditional Leaders

### Summary

Figure 4.1 The separation of powers and the national legislature

### 4.1 Introduction

In this chapter, we focus on the national sphere of government and discuss the powers, functions and operation of the national legislature or Parliament as it is referred to in the Constitution. Parliament has the power to:

- consider, pass, amend or reject legislation on any subject that falls within its jurisdictional areas of competence
- ensure that all executive organs of state in the national sphere of government are accountable to it
- maintain oversight of the exercise of national executive authority, including the implementation of legislation
- maintain oversight of any organ of state.<sup>1</sup>

Apart from considering, passing, amending or rejecting legislation, therefore, Parliament has the power to check the exercise of power by the national executive and other organs of state and to ensure that the national executive and various other organs of state are held accountable for the manner in which they exercise their powers.

Parliament is a bicameral legislature. This means that it is divided into two Houses. The lower House of Parliament is called the National Assembly (NA) and the upper House of Parliament is called the National Council of Provinces (NCOP).<sup>2</sup> Although legislative power is distributed between these two Houses, the NA is constitutionally and politically the dominant House. In essence, the idea behind bicameralism is that the two Houses of Parliament represent different interests and thus act as a check on one another.<sup>3</sup> Further, having two Houses is said to provide for better representation of the electorate in a heterogeneous society, to assist in alleviating Parliament's workload and to promote a thorough consideration of matters before Parliament.<sup>4</sup> We argue that the main justification for bicameralism is to ensure adequate democratic representation of different interests, namely the interests of the electorate in general by the NA on the one hand, and the interests of the nine provinces by the NCOP on the other hand.<sup>5</sup>

In most bicameral legislatures, including the South African Parliament, the members of each House are elected or appointed in different ways. In the case of the NA, members are elected via their respective political parties in a national election. In the case of the NCOP, they are elected via the provincial legislatures. The members of each House are elected or appointed in different ways because they are supposed to represent different broad interests and to act as a check on the exercise of power by the other House. In South Africa, the NA is intended to represent the interests of all South Africans<sup>6</sup> while the NCOP is intended to represent the interests of provinces in the national legislature.<sup>7</sup>

Although legislative authority and other powers are distributed between the two Houses, the NA is the dominant and more powerful House of Parliament. This is because:

- the NA elects <sup>8</sup> and can also dismiss <sup>9</sup> the President
- with the exception of two members, all the other members of the executive must be selected from and remain members of the NA<sup>10</sup>
- the NA is explicitly tasked with the duty to hold all executive organs of state in the national sphere of government accountable to it and to maintain oversight of the exercise of national executive authority, including the implementation of legislation <sup>11</sup>
- the NA plays a decisive role in various other appointments.<sup>12</sup>

The NCOP has a less defined role in holding the executive to account and has no role in the appointment or dismissal of members of the executive. Unlike the executive, which has its seat in Pretoria, the seat of Parliament is in Cape Town.<sup>13</sup> However, an Act of Parliament can determine that the seat of Parliament is changed as long as the correct procedure is followed.<sup>14</sup> Sittings of the NA or the NCOP are permitted at places other than the seat of Parliament, but only on the grounds of public interest, security or convenience, and if provided for in the rules and orders of the NA<sup>15</sup> or the NCOP.<sup>16</sup>

It is important to note that, whether in the NA or the NCOP, the democratic link between voters and the legislature is mediated by political parties. This means in practice a person cannot become a member of one of the Houses of the national legislature unless the person is

a member of a political party. The Constitution thus establishes not only a parliamentary system of government in which the majority party in the NA forms a government, but also a system of party government. This is because the system cannot function in the absence of political parties.<sup>17</sup>

Party government is usually defined as a system of government in which political parties have a decisive influence on the way in which the government is composed, on government policy and on the actions of the elected representatives in the legislature.<sup>18</sup> Through a mixture of conventions and traditions inherited from British constitutional law and the effects of the electoral system employed to select members of the NA, political parties and their leaders are extremely powerful in South Africa and loom large in any discussion of the composition and functioning of the national legislature. Despite the important role played by political parties, the Constitution (as well as national legislation) provides little guidance as to the manner in which political parties must operate and about the specific relationship between the leadership of a political party (who might not serve in the legislature) and its representatives in the legislature or the executive.<sup>19</sup> Thus it is unclear to what extent political party leaders can 'micromanage' their members in the legislature and the executive and whether the extraparliamentary leadership of a political party can dictate to its members what they must say and how they should act in the legislature or executive.

## CRITICAL THINKING

The rights of citizens as members of political parties

The relationship between political parties and their leaders, on the one hand, and the elected representatives of political parties serving in Parliament, on the other hand, is not clearly defined in the Constitution. However, in *Ramakatsa and Others v Magashule and Others* <sup>20</sup> the Constitutional Court affirmed the strong link between internal party democracy and the right of citizens to take part in the political process and to vote in elections. Thus Yacoob J stated that:

the right to participate in the activities of a political party confers on every political party the duty to act lawfully and in accordance with its own constitution. This means that our Constitution gives every member of every political party the right to exact compliance with the constitution of a political party by the leadership of that party.<sup>21</sup>

Our democracy is founded on a multiparty system of government. However, unlike the electoral system in place in the United Kingdom and in South Africa before 1994 (based on geographical voting constituencies), the present electoral system for electing members of the NA and of the provincial legislatures must 'result, in general, in proportional representation'.<sup>22</sup> This means a person who intends to vote in national or provincial elections must vote for a political party registered for the purpose of contesting the elections and not for a candidate. It is the registered party that nominates candidates for the election on regional and national party lists. Political parties are therefore indispensable conduits for the enjoyment of the right to vote in elections.

If a person chooses to become a member of a political party and wants to take part in its internal elections, that person has a right to do so in accordance with the rules of that party. The exercise of the right is protected not only against external interference but also against interference arising from within the party. Although it is left largely to political parties

themselves to regulate how they deal with internal elections, political parties may not adopt constitutions which are inconsistent with the right of citizens to join political parties and to participate in their activities. This means that the constitution of a political party that limits or extinguishes the rights of members of that party freely and fairly to take part in its internal elections may well be declared invalid by a court as being in breach of section 19 of the Bill of Rights.

As we have seen, in practical terms political parties and their leaders hold enormous power over elected members of the legislature in South Africa. There are four interrelated reasons for this:

- First, we inherited our system of parliamentary government from Britain. In this system the support of the majority party in Parliament is required to form the government.<sup>23</sup> Thus, the executive requires the continued support of the majority of members of the legislature to survive. This provides a strong incentive to members of the legislature to ‘toe the party line’, regardless of any differences an individual member of the legislature may have with the decisions or actions of the political party leadership. If members of the governing party fail to respect party discipline and vote with opposition parties and against the majority party, and the government loses a vote in Parliament, this can erode the democratic legitimacy of the government and can even lead to the fall of that government.
- Second, we also inherited the convention of strict party discipline from the Westminster system associated with the system of parliamentary government.<sup>24</sup> This convention places severe restrictions on individual Members of Parliament (MPs) to disobey party leaders when they engage in legislative or executive action. The convention of strict party discipline was applied in pre-democratic South Africa in the Westminster Parliament as well as in the tricameral Parliament. When the new democratic system replaced the old system, the convention of strict party discipline was retained. Thus, this convention remains intact in democratic South Africa and forms part of the parliamentary culture.
- Third, the internal culture of South African political parties places great emphasis on internal party discipline. This type of internal culture values and rewards party members who demonstrate loyalty to the party and the decisions democratically arrived at by that party. It also values respect for the leadership of the party and rewards those who display such respect.<sup>25</sup> At its most extreme, such a culture can be said to be one of democratic centralism. This allows internal party debate on an issue until the party has made a decision on that issue. Once the decision has been taken, all members of the party are required to support the decision and are not allowed to criticise that decision or act in a way that would undermine the authority of the party and the decision taken.
- Last, the electoral system in South Africa assists party leaders to enforce strict discipline among members of the legislature. This is because, as we shall see, members of the legislature depend on the support of their various political parties to get elected to the legislature and can also easily be removed from the legislature by their respective political parties. Accordingly, members of the legislature are, to some extent, beholden to the leadership of their respective political parties and to the party machinery to retain their positions. This means that the members of the legislature are not free to act as they see fit in fulfilling their various duties as members of the NA or the NCOP. Once the political party to whom a legislator belongs has made a decision on a pertinent issue being considered by the legislature, the members of that party are



usually bound by that decision and must follow it. For example, if a political party has decided to vote in favour of a Bill before Parliament and has instructed its legislators accordingly, they cannot refuse to vote for the Bill because for some reason or another they oppose the Bill. The members of that political party will usually be required to support the Bill and vote in favour of it even if a member disagrees with the position taken by his or her political party.<sup>26</sup> The situation is more fluid and complex in cases where the political party has not taken a final public stance on an issue being considered by the legislature or where members of the legislature are legally expected to fulfil their constitutional duty to consider and pass legislation, to hold the members of the executive accountable and to oversee the work of the executive in a diligent and responsible manner.

It is imperative to understand this delicate and sometimes complex relationship between members of the legislature, their respective political parties and the members of the executive in order to understand the practical day-to-day functioning of the legislature.

#### PAUSE FOR REFLECTION

Difficulties faced by MPs who must both fulfil their constitutional obligations while also toeing the party line

Section 5.4 of the Constitution of the African National Congress (ANC) states:

ANC members who hold elective office in any sphere of governance at national, provincial or local level are required to be members of the appropriate caucus, to function within its rules and to abide by its decisions under the general provisions of this Constitution and the constitutional structures of the ANC.<sup>27</sup>

Members who fail to adhere to this injunction can be disciplined and punished, and such punishment could include suspension or expulsion from the party.<sup>28</sup> Many other political parties in South Africa have roughly similar provisions to assist the party to enforce its discipline on its elected members.

In 2011, when members of the NA were called on to vote on a controversial Bill, the Protection of State Information Bill, one ANC member of the NA abstained from voting and another left the chamber just as votes were being cast to avoid having to vote for a Bill which they did not support. The ANC then announced that it would institute disciplinary proceedings against these two MPs for 'ill-discipline'.<sup>29</sup> This move was not surprising as political parties in South Africa usually enforce strict party discipline and require MPs to support decisions taken by the parliamentary caucus of that political party, including decisions on whether to support a piece of legislation or not.

In another case in 2010, the chairperson of the NA Committee on Defence and Military Veterans was removed from his post by the governing party after insisting that the then Minister of Defence and Military Veterans should account to that committee for the work done in her department in a manner that displeased the Minister.<sup>30</sup>

These events illustrate the difficulties faced by individual MPs who must both fulfil their constitutional obligations to hold the executive to account and to pass constitutionally valid

and appropriate legislation on the one hand while also being required to toe the party line on the other hand.

## 4.2 General rules regarding the operation of Parliament

### 4.2.1 Introduction

The NA and the NCOP have the power to determine and control their own internal arrangements, proceedings and procedures.<sup>31</sup> The Constitution authorises the NA and the NCOP to make joint rules and orders concerning the joint business of the two Houses.<sup>32</sup> The Constitution also authorises the two Houses to make rules separately regarding their own operations.<sup>33</sup> It also requires the NA and NCOP to make rules and orders to provide for the composition, powers and functioning of committees.<sup>34</sup> While Parliament can make such rules, these rules have to comply with and give effect to the provisions of the Constitution. Rules that clash with any section of the Constitution can therefore be declared invalid by a court of law.<sup>35</sup> Both Houses of Parliament and their committees have wide-ranging powers not dissimilar from a court of law and can summon any person, including the President and Cabinet Ministers, to appear before them to:

- • give evidence under oath or affirmation, or to produce documents
- • require any person or institution to report to it
- • compel, in terms of national legislation or the rules and orders, any person or institution to comply with a summons or requirement to produce documents
- • to receive petitions, representations or submissions from any interested persons or institutions.<sup>36</sup>

Usually, the relevant committee will request a witness to appear before it to answer questions and to produce any documents required, or institutions or individuals will request to make written and oral submissions to a committee. If a witness refuses to appear after being asked to do so by a committee, that witness can be summonsed to do so and can ultimately be compelled to appear and to answer questions. However, the Rules of the National Assembly <sup>37</sup> make it clear that this power should be exercised sparingly and prohibits any committee from summonsing a witness without first having satisfied the Speaker that the evidence of such witness will be material to the enquiry.<sup>38</sup>

It is therefore clear that the two Houses of Parliament have wide powers to fulfil their mandates in the best way chosen by each of them. However, there are at least three distinct ways in which these powers are curtailed by the Constitution:

- • First, both Houses are required to act in an open and transparent manner and cannot make Rules that would extinguish the constitutional requirement of openness.
- • Second, members of both Houses as well as Cabinet members who appear before them enjoy certain privileges which cannot be curtailed by Parliament or anyone else.
- • Third, both Houses are required to facilitate public involvement in their legislative and other processes.

### 4.2.2 Openness and transparency in Parliament

The Constitution requires both the NA and the NCOP to conduct their business in an open manner, and hold their sittings and those of their committees in public.<sup>39</sup> However,

reasonable measures may be taken to regulate public access, including access of the media, to Parliament and its committees, and to provide for the searching of any person and, where appropriate, the refusal of entry to or the removal of any person.<sup>40</sup> The NA and the NCOP are further explicitly prohibited from excluding the public, including the media, from a sitting of a committee unless it is reasonable and justifiable to do so in an open and democratic society.<sup>41</sup> Rule 40 of the Rules of the NA further regulates the possible limits on the openness and transparency of the NA by stating:

[t]he power to admit strangers to the precincts of this House or an extended public committee or an appropriation committee of this House, and the places set apart for them in a Chamber, shall vest in the Speaker, subject to the provisions of the Constitution.<sup>42</sup>

This means that normally it will not be allowed to hold a sitting of the NA or the NCOP or any of its committee meetings or other business of the NA or NCOP in secret or to prevent certain individuals from attending these events. These provisions entitle the public to access the proceedings of the NA and NCOP and their committees. In *Doctors for Life International v Speaker of the National Assembly and Others*, the Constitutional Court has hinted that non-compliance with these provisions ‘would have grave implications for the validity of any conduct that passes a law. It is a manner and form provision equivalent to the provision for a quorum, and the number of votes required to take a decision’.<sup>43</sup> This means that where the media or ordinary members of the public are excluded from committees or from the plenary session of the NA while it is considering a particular Bill, the Court might well declare the passing of such a Bill unconstitutional.

#### PAUSE FOR REFLECTION

Access to Parliament is a right not a privilege

This is an extract from an opinion piece written by Mbete and February:

While Parliament has many failings, its committees have always been open to the public. Yet it is easy to forget that the right the public has to attend committee meetings is granted by the Constitution and is not a privilege granted by Parliament, its presiding officers or its bureaucracy.

Last week, Parliament took a retrogressive step when nine members of the Right2Know campaign were prevented from attending a meeting of the ad hoc committee on the Protection of Information Bill. The bill has been the subject of controversy as the civil society campaign against the bill and the, at times, flawed processes of the ad hoc committee gains momentum. The members were informed at access control that they were not allowed to enter Parliament as they were ‘banned’. They were allowed into Parliament after nearly two hours, and the threat of court action, by which time the meeting had ended. The Speaker’s office says it was a ‘misunderstanding’.

However, a press statement released by Parliament on March 31 cited the Right2Know silent protest (in which members of the campaign donned masks depicting State Security Minister Siyabonga Cwele) on February 15 as the reason the delegation was refused entry. The statement said ‘security officials took precautionary security action by denying entry’, ostensibly to prevent another protest. The statement does not deny the Right2Know campaign has been banned from entering Parliament.

The Right2Know campaign is a coalition of 400 civil society organisations and 12 000 individuals. A ban of campaign members from Parliament is in effect a ban of civil society more generally. It is the arbitrariness of Parliament's action that should concern all who believe an open democracy is our right. Parliament has yet to provide details of who gave the security official the power to restrict access to the committee meeting. Who gave the instruction to 'ban' members from the committee meeting and on what grounds? Does a list exist of those 'banned' from Parliament? And if so, will those affected be granted access to such a list?[44](#)

After the writing of this piece the Right2Know campaigners were allowed back into the committee and the alleged 'ban' was therefore 'rescinded'. If the ban had not been rescinded, the legality of the passing of the Bill which was being discussed at the time may well have called into question. This incident illustrates that parliamentary officials must take care not to act in a way that may render the procedure for the passing of legislation unlawful.

#### 4.2.3 The powers and privileges of Members of Parliament

The power of Parliament to determine its own procedures is not only limited or qualified by the constitutional requirements regarding openness, accountability and transparency as well as specific duties imposed on Parliament by the Constitution.[45](#) It is also limited by the provisions regarding the privileges enjoyed by Cabinet Ministers, Deputy Ministers and members of the NA and NCOP with regard to anything they say or do in the NA or the NCOP or one of its committees. Parliament and its members thus enjoy parliamentary privilege so that they are able to perform their functions without outside hindrance or interference.[46](#)

Parliamentary privilege is based on the notion that MPs need to be able to speak freely and uninhibitedly to be able to do their work and to expose wrongdoing without the fear of being held legally liable for what they say. Without this protection, MPs would be handicapped in performing their parliamentary duties. In addition, the authority of Parliament itself in confronting the executive and as a forum for expressing the anxieties of citizens would be correspondingly diminished.[47](#)

#### PAUSE FOR REFLECTION

Parliamentary privilege does not extend to personal matters

In *Dikoko v Mokhatla*,[48](#) the respondent, who was the municipal manager of the Southern District Municipality in the North West Province, sued the applicant, who was the mayor of the same municipality, for defamatory remarks the applicant had made while giving evidence to the Standing Committee on Public Accounts of the North West Provincial Legislature. In his defence, the applicant argued that he was protected by section 28 of the Local Government: Municipal Structures Act<sup>49</sup> which confers the same privileges and immunities on municipal councillors that the Constitution confers on MPs.

The Constitutional Court rejected this argument on the grounds that the defamatory statements made by the applicant did not form a part of the legitimate business of the Southern District Municipality, but rather a part of his own personal business. In arriving at this decision, however, the Court set out the purpose underlying the defence of parliamentary privilege in a constitutional democracy. In this respect, the Court held that:[49](#)

[i]mmunising the conduct of members from criminal and civil liability during council deliberations is a bulwark of democracy. It promotes freedom of speech and expression. It encourages democracy and full and effective deliberation. It removes the fear of repercussion for what is said. This advances effective democratic government.[50](#)

Parliamentary privilege was developed in the British context to protect MPs from interference by the monarch. In the British context, parliamentary privileges are to be found chiefly in ancient practice, asserted by Parliament and accepted over time by the Crown and the courts as the law and custom of Parliament.[51](#) What the House of Commons originally claimed as customary rights in the course of repeated efforts to assert them eventually hardened into legally recognised privileges.[52](#) These privileges are now contained in the South African Constitution. Thus, Cabinet members, Deputy Ministers and members of the NA are guaranteed the freedom of speech in both the NA and the NCOP as well as in its committees, subject only to their rules and orders.[53](#) Members are also not liable to civil or criminal proceedings, arrest, imprisonment or damages for anything that they have said in, produced before or submitted to the NA or any of its committees, or anything revealed as a result of anything that they have said in, produced before or submitted to the NA or any of its committees.[54](#) Because the Constitution establishes a constitutional democracy and entrusts the judiciary with the power to enforce the Constitution, these privileges do not preclude the judiciary from enquiring into whether the procedures or limitations adopted by Parliament in this regard comply with the various provisions of the Constitution.

In South Africa, parliamentary privilege came under the spotlight in *Speaker of the National Assembly v De Lille MP and Another*.[55](#) The case arose from an incident in the NA in which one of the opposition members, Ms Patricia de Lille, stated that she had information that 12 members of the governing party had been spies for the apartheid government. When challenged, she mentioned eight names, some of which referred to people who were not members of the NA. The Speaker ruled that it was ‘unparliamentary’ to refer to some members of the NA as ‘spies’ and ordered her to withdraw her remarks, which she did.[56](#) An ad hoc committee of the NA recommended that Ms De Lille be directed to apologise and suspended for 15 parliamentary working days.[57](#) The NA adopted this recommendation.[58](#)

Ms De Lille had earlier successfully challenged the constitutionality of her suspension in the Cape High Court.[59](#) The Speaker argued that the NA had exercised its parliamentary privilege to control its own affairs and that the exercise of parliamentary privilege is not subject to judicial review. For this argument, the Speaker relied on section 5 of the Powers and Privileges of Parliament Act.[60](#) This section provides that a court shall stay proceedings before it if the Speaker issues a certificate to the effect that the matter in question is one which concerns the privilege of Parliament. The High Court held that, under a supreme Constitution, the exercise of parliamentary privilege is subject to judicial review. Hlophe J, as he then was, stated:

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

constituent parts, including the National Assembly, any powers not conferred on them by the Constitution expressly or by necessary implication.[61](#)

The Judge concluded:

The nature and exercise of parliamentary privilege must be consonant with the Constitution. The exercise of parliamentary privilege, which is clearly a constitutional power, is not immune from judicial review. If a parliamentary privilege is exercised in breach of constitutional provisions, redress may be sought by an aggrieved party from law courts ...[62](#)

The High Court held that Ms De Lille's suspension constituted an unjustified infringement of her constitutional rights to freedom of speech (section 16), administrative justice (section 33) and access to courts (section 34).[63](#)

The Supreme Court of Appeal upheld the decision of the Cape High Court, although on slightly narrower grounds.[64](#) Like Hlophe J, Mahomed CJ reasoned that section 58(1) of the Constitution expressly guarantees freedom of speech in the NA, subject only to its rules and orders. The threat that a member of the NA may be suspended for something said in the NA inhibits freedom of expression in the NA and must therefore adversely affect that guarantee.[65](#) Although section 58(2) states that other privileges and immunities of the NA may be prescribed by national legislation,[66](#) it must not be interpreted to detract from that guarantee of freedom of expression. What section 58(2) does is to authorise national legislation which will itself clearly and specifically articulate the 'privileges and the immunities' of the NA which affect the specific guarantee of free speech for members in the NA. There was furthermore nothing in the 'rules and orders' of the NA which qualified in any relevant way the right to freedom of speech in the NA guaranteed by section 58(1). Further, there is no constitutional authority for the NA to punish any member via suspension in this context.[67](#) As 'the right of free speech in the Assembly protected by section 58(1) is a fundamental right crucial to representative government in a democratic society ... [i]ts tenor and spirit must conform to all other provisions of the Constitution relevant to the conduct of proceedings in Parliament' [68](#) The NA therefore had no constitutional authority to suspend Ms De Lille.[69](#) The Rules have since been amended to provide the Speaker or Deputy Speaker with the authority to suspend a member for a period of between five and 20 parliamentary working days.[70](#)

#### 4.2.4 Public involvement in the legislative and other processes of the National Assembly and the National Council of Provinces

As we have seen, the South African Constitution establishes a democratic system of government with both representative and participatory elements. Part of the participatory aspect of democracy is the requirement that the NA and the NCOP should facilitate public involvement in the legislative and other processes of Parliament.[71](#) Parliament can therefore not pass legislation or engage in other important processes without considering the need to facilitate some form of public participation. **Democracy can only function optimally if members of the public are informed about** the activities of Parliament and if they are provided with an opportunity to get involved in some way or another in those activities. To this end, Parliament has taken steps to make its bodies and processes more accessible to the public, to build its profile as a key institution of democracy and to mobilise the media to provide information to the public about Parliament.[72](#)

In the negotiations leading to the establishment of the 1996 Constitution, it was clear that South Africa's democracy would emphasise active participation by the citizenry.<sup>73</sup> The Reconstruction and Development Programme, which was the lynchpin of government policy in the first few years after the advent of democracy, captured this new openness, stating:

Democracy for ordinary citizens must not end with formal rights and periodic one-person, one-vote elections. Without undermining the authority and responsibilities of elected representative bodies (Parliament, provincial legislatures, local government) the democratic order we envisage must foster a wide range of institutions of participatory democracy in partnership with civil society on the basis of informed and empowered citizens and facilitate direct democracy ... social movements and community based organisations are a major asset in the effort to democratize and develop our society.<sup>74</sup>

Participatory democracy simply means that individuals or institutions must be given an opportunity to take part in the making of decisions that affect them.<sup>75</sup> As such, public participation is a voluntary activity by which members of the public directly or indirectly engage with members of the legislature to provide input to the legislature during the law-making process.<sup>76</sup> The essence of public participation can be distilled by focusing on the various strategies that are the most important measures for public involvement in the legislative process. These include but are not limited to the following:

- Lobbying is used by organised groups in civil society to present well-reasoned arguments to targeted decision makers which may include detailed written representations outlining the group's views on a particular issue.
- Members of the public can raise issues at the constituency offices of their elected representatives, who then raise these issues in the legislature on their behalf.
- Petitions allow individuals or groups to raise issues in a formal way without having to go through a particular member of the legislature.
- Public hearings, which are normally convened by standing committees, afford the public the opportunity to make a written or oral submission on any matter for which a public hearing has been convened.<sup>77</sup>

In several cases<sup>78</sup> the Constitutional Court affirmed the principle that, in certain circumstances, where Parliament failed to take reasonable steps to facilitate public involvement in the law-making process, it would have failed to comply with section 59(1) or section 72(1) of the Constitution respectively,<sup>79</sup> and any law enacted in such a procedurally flawed way would then be null and void and of no effect.<sup>80</sup> The leading case on this point is the 2006 case of *Doctors for Life*.<sup>81</sup> This case dealt with the enactment by Parliament of four health statutes, among others, relating to the choice on termination of pregnancies. The applicants complained that during the legislative process, the NCOP and the provincial legislatures did not comply with their constitutional obligations to facilitate public involvement as required by section 72(1)(a) and 118(1)(a) respectively. Ngcobo J (for the majority) stated:

In the overall scheme of our Constitution, the representative and participatory elements of our democracy should not be seen as being in tension with each other as they are mutually supportive. General elections, the foundation of representative democracy, would be meaningless without massive participation by the voters. The participation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, identify

themselves with the institutions of government and become familiar with the laws as they are made. It enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people. Finally, because of its open and public character it acts as a counterweight to secret lobbying and influence peddling. Participatory democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist.<sup>82</sup>

The democratic government that is contemplated in the Constitution is thus both representative and participatory as discussed in chapter 2 of this book. It is also one which is accountable, responsive and transparent, and makes provision for the public to participate in the law-making process.<sup>83</sup> ‘Our constitutional framework requires the achievement of a balanced relationship between representative and participatory elements in our democracy.’<sup>84</sup> Although ‘the legislature will have considerable discretion in determining how best to achieve this balanced relationship’,<sup>85</sup> this discretion is not unfettered. What is required will vary from case to case but the test will be whether the legislature had acted reasonably or not.<sup>86</sup> The Court stated that ‘reasonableness is an objective standard which is sensitive to the facts and circumstances of a particular case’.<sup>87</sup> In other words, it is context specific. The factors that will be used to determine reasonableness are as follows: <sup>88</sup>

- ‘The nature and importance of the legislation and the intensity of its impact on the public’.
- What is practically possible, with reference to time and expense, which relate to the efficiency of the law-making process. The Court noted, however, that ‘the saving of money and time in itself does not justify inadequate opportunities for public involvement’.
- What Parliament itself considered ‘to be appropriate public involvement in the light of the legislation’s content, importance and urgency’.

This means Parliament has a duty, first, ‘to provide meaningful opportunities for public participation in the law-making process’ and, second, ‘to take measures to ensure that people have the ability to take advantage of the opportunities provided’.<sup>89</sup> Parliament has a positive duty to take practical steps to facilitate public involvement for everyone from all spheres of life regardless of their socio-economic circumstances. ‘They must provide notice of and information about the legislation under consideration and the opportunities for participation that are available’<sup>90</sup> to ensure citizens have an opportunity for effective participation in the process.

## CRITICAL THINKING

### The role of voters in the law-making process

In a minority decision in the *Doctors for Life* case, Yacoob J expressed a different understanding of the nature of the democracy established by the South African Constitution, focusing on the importance of political parties and the role of elected representatives in Parliament.<sup>91</sup> According to this view, MPs represent the people because they are chosen by the people. When MPs make decisions, therefore, they are not making decisions in their own interests but rather in the interests of the people. The decisions made by Parliament are not simply the decisions of the MPs, but rather the decisions of the people:



In passing legislation or in conducting any other activity, members of provincial legislatures and the National Assembly do not act on their own whims but represent the people of this country. To undermine these representatives is to undermine the political will of the people and to negate their choice at free and fair elections. Provincial representatives on the NCOP are mandated by the provincial legislatures in their capacities as representatives of the people. They are therefore mandated by the people in the same way as the President is elected by the people when the National Assembly elects him. Constitutionally speaking, it is the people of our country who, through their elected representatives pass laws.<sup>92</sup>

Apart from the correctness of the various technical arguments raised by Justice Yacoob in favour of his interpretation of the Constitution, a broader question arises about the role of voters in the law-making process. This question is whether the view taken by Ngcobo J (for the majority) or that of Yacoob J (for the minority) would produce a more effective and more democratically accountable and responsive Parliament. On the one hand, it may be argued that MPs who belong to political parties, especially where the party has a majority that is not immediately threatened, may well be unresponsive to the views of the electorate and may not, in fact, pass laws supported by the electorate. On the other hand, it may be argued that voters have the right to vote for a different party if they disagree with the support of their preferred party for a specific law. Voters only lend their vote to a political party for five years at a time and can always vote for a different party if the MPs representing their former choice disappoint them. In this view, political parties play a pivotal role in our democracy and should not be undermined by placing constitutional obligations on their representatives to consult incessantly with voters between elections.

### 4.3 The National Assembly

#### 4.3.1 The composition of the National Assembly

As noted above, the Constitution establishes a bicameral Parliament.<sup>93</sup> In terms of section 42(1) of the Constitution, Parliament consists of two Houses, namely the National Assembly (NA) and the National Council of Provinces (NCOP). The NA consists of between 350 and 400 members elected through an electoral system based on a national common voters roll that is designed to produce, in general, proportional representation.<sup>94</sup> Since the exact size of the NA has to be determined by an Act of Parliament,<sup>95</sup> Schedule 3 of the Electoral Act <sup>96</sup> has fixed this number at 400. Members of the NA are elected on the basis of ‘universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government to ensure accountability, responsiveness and openness’.<sup>97</sup>

As we have seen, political parties play an important role in decisions about who serve as legislators in the NA. The manner in which decisions are made about how the millions of votes cast by voters are translated into seats for each political party in the legislature (and the role played by political parties in this process) is closely related to the electoral system adopted in a country. There are various forms of potential electoral systems through which citizens of a country can exercise their right to vote for political representatives.<sup>98</sup> According to Currie and De Waal:

[a]n electoral system sets out the rules for electing the political representatives. It consists of a body of rules concerning such matters as the franchise, the method of voting, the frequency of elections, the manner in which the number of votes is translated into the number of

representatives [or seats] in the legislature, the qualification and nomination of candidates, and the determination and declaration of the results of an election.<sup>99</sup>

Members of the NA are elected in terms of a closed list proportional representation electoral system.<sup>100</sup> This system requires each political party before an election to nominate a list of candidates, ranking them in order of preference. Parties submit their lists to the Electoral Commission when they register to take part in the election. Voters vote for a political party and not for individual candidates.<sup>101</sup> A political party will then be allocated the number of seats in the NA equal to the percentage of votes it received in the election. For example, if a party obtained 50% of the votes, it will be allocated 200 of the 400 seats in the NA and the first 200 names on the party's electoral list will become members of the NA. This means that the higher up on a political party's electoral list a person is ranked, the more likely it is that he or she will be elected to the NA.

Decisions on who is ranked where on a political party's electoral list can be made democratically or party leaders can decide on this in an undemocratic manner.<sup>102</sup> Political parties have some discretion in making decisions about internal decision making and processes as political parties 'are best placed to determine how members would participate in internal activities'.<sup>103</sup> The constitution of each political party regulates how such decisions are taken. However, political parties may not adopt constitutions which are inconsistent with section 19 of the Constitution.<sup>104</sup> If the constitution of a political party fails to provide for the free participation of members in its activities, that constitution could be declared invalid.<sup>105</sup> Regardless of how political parties compile their electoral lists, it would be surprising if ambitious members of a political party do not manoeuvre to ensure placement high up on such an electoral list.

The closed list proportional representation electoral system has both advantages and disadvantages.<sup>106</sup> Advantages include the fact that it reflects the wishes of the voters more accurately than most other electoral systems. This is because the percentage of seats allocated to each party is proportional to the percentage of the votes cast for it and there are very few wasted votes.<sup>107</sup> This makes it much easier for smaller parties to be represented in the NA. In the 2009 general election, for example, a party needed to gain 44 092 votes or 0,25% of the total number of votes cast to obtain a seat in the NA. In addition, the proportional representation electoral system also eliminates the possibility of the artificial drawing of boundaries – so-called gerrymandering<sup>108</sup> – to dilute political support in certain constituencies.

Apart from the advantages set out above, closed list proportional representation systems usually produce more inclusive legislatures and ensure a relatively high representation for marginalised or previously discriminated groups such as women as well as for minorities. For example, after the 2009 election, more than 42% of the members of the NA were women, placing South Africa in the top 10 countries in the world as far as the representation of women is concerned.<sup>109</sup> A further advantage is the fact that the system limits 'pork-barrel' politics. Pork-barrel politics is a system of politics in which members of the legislature attempt to buy the support of voters in their constituencies by pressuring the legislature and the executive to spend public money in their constituencies on projects such as clinics, roads, schools and so on irrespective of whether their constituents actually need these goods and services or not. In a closed list proportional representation system, the members of the legislature do not have constituencies and, consequently, will be less tempted to engage in pork-barrel politics. Finally, the system is also said to be simple and easy to administer.

Table 4.1 Representation of women in the NA<sup>110</sup>

Election year	Total seats	Women's seats	% women
2009	400	172	43,00
2004	400	131	32,75
1999	400	120	30,00
1994	400	111	27,74

However, there are also major disadvantages associated with the system:

- First, a closed list proportional representation electoral system does not create a strong link between voters and their elected representatives. This has the potential to lead to a lack of responsiveness to the concerns of voters by elected MPs. In this system the political party as a whole rather than individual MPs has to account to voters at the next election. Individual MPs do not lose their seats because of the anger of voters but because they have lost the support of the leaders of the political party they serve.<sup>111</sup>
- Second, the closed list proportional representation system potentially gives much power to the leaders of a party who may be able to determine who appears on electoral lists and where on those lists they are ranked. This means that the leaders of political parties may have disproportionate influence over the way in which individual MPs behave.
- Third, the system potentially produces a less effective and stable government, especially where one political party is not dominant. This is because a single party may not gain an overall majority in Parliament and will then have to form a coalition government with other parties. A coalition government may find it difficult to agree on all aspects of a joint programme of action.<sup>112</sup>

#### PAUSE FOR REFLECTION

The closed list proportional representation system versus the first-past-the-post system

The closed list proportional representation system that operates in South Africa in relation to the election of NA members is often contrasted with the first-past-the-post system, also known as the winner-take-all system or the plurality system.<sup>113</sup> This latter system is followed in the United Kingdom, the USA and was followed in South Africa prior to 1994 during the colonial and apartheid eras. The aim of the system is to create a 'manufactured majority', that is, to exaggerate the share of seats for the leading party in order to produce an effective working parliamentary majority for the government. It simultaneously penalises minor parties, especially those whose support is spread out across the country and not concentrated in a specific area.

In the first-past-the-post system, the country is divided into geographical single-member constituencies.<sup>114</sup> Voters in each constituency cast a single ballot for the candidate of their choice. The candidate with the largest share of the vote in each constituency is returned to Parliament. All the other candidates of all the other political parties standing in that constituency are not elected, leading to the 'wasting' of all the votes cast for the non-winning candidates.<sup>115</sup>

The party with an overall majority of seats in the legislature forms the government. In this winner-takes-all model, the leading party receives a disproportionate number of seats in the legislature, often gaining large majorities even where far less than 50% of voters voted for that party. Smaller parties get meagre rewards. The focus is on effective governance, not representation of all minority views.[116](#)

For example, in constituencies where the vote splits almost equally three ways, the winning candidate may have only 35% of the vote, while the other contestants get 34% and 31% respectively. In such an election, 64% of the votes cast in that constituency would have been 'wasted'. Although two-thirds of voters supported other candidates, the plurality of votes is decisive. This makes this system less fair than the proportional representation system. Another potential problem with this system is the danger that the artificial drawing of constituency boundaries would lead to gerrymandering, or dilution or imbalance of political power or support in constituencies.[117](#)

However, because an individual may be voted into the legislature only because he or she is more popular than the party he or she represents, there is an incentive for individual members of the legislature to be responsive to the needs of voters in their constituency. They are thus – in theory at least – more accountable to voters than to the leadership of the political party they represent. Voters will be more likely to know the member of the legislature representing them and will be able to approach that person with their problems and concerns.

It is often contended that South Africa should change from the closed list proportional representation system and use the first-past-the-post system. Others argue that South Africa should move to a system that mixes the first-past-the-post and the proportional representation system. This could be done by allocating a large number of seats in the NA – say 300 of the 400 – based on a first-past-the-post model. The remaining 100 seats could be allocated from party lists to 'top up' the NA membership to achieve proportional representation of political parties in Parliament based on the percentage of votes received by each party. This, it is argued, will ensure a closer link between members of the NA and the voters they represent. It will also weaken the power of party leaders over individual MPs who will become more independent. However, it is unclear whether this will be the case in South Africa, especially if political party leaders retain the power to decide who would represent the party in an individual constituency. Because of the current dominance of one political party and because of the concentration of support for the main opposition party in certain geographical areas, most MPs elected in constituencies would have 'safe' seats and may well pay more attention to keeping the leaders of their political party happy than attending to the concerns of voters.[118](#)

Section 19(3) of the Constitution guarantees the right of every citizen to vote. Children are not allowed to vote and in terms of the Constitution only citizens who are above the age of 18 years qualify to vote.[119](#) In giving effect to the essence of the right to vote, the Constitution established the Electoral Commission (also colloquially called the Independent Electoral Commission) in terms of section 181(1)(f). The Commission is responsible for managing 'elections of national, provincial and municipal legislative bodies in accordance with national legislation', must 'ensure that those elections are free and fair', and must, in as short a time as is reasonably possible, 'declare the results of those elections within a period that must be prescribed by national legislation'.[120](#)

The independence of the Electoral Commission is explicitly guaranteed in the Constitution.<sup>121</sup> The Constitutional Court pointed out in *Independent Electoral Commission v Langeberg Municipality*<sup>122</sup> that although the Electoral Commission is an organ of state as defined in section 239 of the Constitution, the requirement that it be independent from the government means that it cannot be said to be a department or an administration within the national sphere of government over which Cabinet exercises authority. The Electoral Commission – while a state institution – is not part of the government as independence of the institution refers to independence from the government.<sup>123</sup>

The independence of the Electoral Commission requires, first, financial independence. As the Constitutional Court stated in *New National Party v Government of the Republic of South Africa and Others*, ‘This implies the ability to have access to funds reasonably required to enable the Commission to discharge the functions it is obliged to perform under the Constitution and the Electoral Commission Act.’<sup>124</sup> This requires Parliament to consider what is reasonably required by the Commission and deal with requests for funding rationally in the light of other national interests. Second, the Commission needs to enjoy administrative independence. This implies that there will be no control over those matters directly connected with the functions which the Commission has to perform under the Constitution and the Electoral Act. This means that the Department of Home Affairs cannot tell the Commission how to conduct registration and whom to employ. In short, the Commission cannot be part of the national government in any manner.<sup>125</sup>

In *August and Another v Electoral Commission and Others*,<sup>126</sup> the Constitutional Court pointed out that the right to vote in section 19(2) of the Constitution is unqualified. It therefore cannot be taken away from any citizen arbitrarily or in a way that is not reasonable and justifiable in an open and democratic society.<sup>127</sup> Sachs J declared that the vote of each and every citizen is a ‘badge of dignity and personhood. Quite literally, it says that everybody counts’.<sup>128</sup> The Court held that the right to vote ‘by its very nature imposes positive obligations upon the legislature and the executive... [and] ... [t]his clearly imposes an affirmative obligation on the Commission to take reasonable steps to ensure that eligible voters are registered’.<sup>129</sup> In the August case, the Court held that by omitting to take appropriate steps to ensure that prisoners were able to register and vote in the national election, the Commission had failed to comply with its obligations. The importance of the right to vote was reaffirmed in *New National Party* where Yacoob J stressed that the right to vote is fundamental to democracy and requires proper arrangements to be made for its effective exercise.<sup>130</sup>

## CRITICAL THINKING

### Limitations on the constitutional right to vote

As a result of the judgment in August, and shortly prior to the 2004 national elections, Parliament amended the Electoral Act. As a result of these amendments, prisoners who were serving a sentence of imprisonment without the option of a fine were prevented from registering as voters and from voting while in prison.<sup>131</sup> In other words, they were effectively disenfranchised.

The constitutionality of this amendment was questioned in *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders (NICRO) and Others*.<sup>132</sup> The main issue in this case was whether the amendments to the Electoral Act

constituted a justifiable limitation of the right to vote in terms of section 36 of the Constitution. Government argued that its rationale for the limitation of the right was to preserve the integrity of the voting process.<sup>133</sup> It was argued that voting at a polling station entailed the use of mobile voting facilities or special votes, both of which involved risks to the integrity of the vote and required special measures to counter these risks. The provision of these special arrangements, it was argued, placed a strain on the logistical and financial resources available to the Electoral Commission.<sup>134</sup> However, the Constitutional Court disposed of the logistics and costs leg of this argument on the basis that the state had failed to discharge its evidentiary burden in this regard.<sup>135</sup> In this regard, the Court indicated that:

[i]n the present case, however, it is not necessary to take this issue further for the factual basis for the justification based on cost and the lack of resources has not been established. Arrangements for registering voters were made at all prisons to accommodate unsentenced prisoners and those serving sentences because they had not paid the fines imposed on them. Mobile voting stations are to be provided on election day for these prisoners to vote. There is nothing to suggest that expanding these arrangements to include prisoners sentenced without the option of a fine will in fact place an undue burden on the resources of the Commission. Apart from asserting that it would be costly to do so, no information as to the logistical problems or estimates of the costs involved were provided by Mr Gilder. The Commission abided by the decision of the Court. It lodged affidavits to explain its attitude to the Court, and was represented by counsel at the hearing. It did not place any information before the Court in regard to costs and logistics and did not suggest that it would be unable to make the arrangements necessary to enable all prisoners to vote.<sup>136</sup>

This judgment affirmed that while there may conceivably be situations in which a person could be deprived of his or her right to vote, such a limitation on the right to vote would have to be justified by the state. The state would have to show that the limitation was narrowly tailored to achieve an important purpose.

The Constitutional Court also considered whether South Africans living abroad have a right to vote. This was considered in *Richter v The Minister for Home Affairs and Others*<sup>137</sup> and *AParty and Another v The Minister for Home Affairs and Others, Moloko and Others v The Minister for Home Affairs and Another*.<sup>138</sup> The Court decided unanimously that South Africans living abroad have a right to vote if they are registered. The Court held that section 33 of the Electoral Act unfairly restricted the right to cast special votes while abroad to a very narrow class of citizens. This section was therefore declared unconstitutional and invalid.

The implication of this judgment for the elections which were to be held in April 2009 was that all citizens who were at that time registered voters, and who would be out of the country on the date of the elections, would be allowed to vote in the national, but not provincial, elections. This was 'provided they give notice of their intention to do so, in terms of the Election Regulations, on or before 27 March 2009 to the Chief Electoral Officer and identify the embassy, high commission or consulate where they intend to apply for the special vote'.<sup>139</sup>

Handing down the first of two separate judgments, O'Regan J held that the right to vote had a symbolic and democratic value and those who were registered should not be limited by unconstitutional and invalid limitations in the Electoral Act.<sup>140</sup> However, a second judgment by Ngcobo J found that unregistered voters who were overseas could not vote.<sup>141</sup> This was

due to the fact that the limitations of the right to vote of South Africans living abroad, who did not fall within certain categories, had been in effect since 2003 and the applicants had not explained why they had challenged these limitations so late. According to Ngcobo J:

... the applicants are the authors of their own misfortune; they created the urgency. The registration provisions of the Electoral Act have been in place since 2003. Voting by South African voters abroad in the 2004 elections was regulated by the amendment which was introduced in 2003. The applicants have known since then that they cannot vote. Their explanation for not approaching a court much earlier is utterly unsatisfactory.[142](#)

The cases discussed above are an indication of the values of the new dispensation in ensuring the role of the electorate in relation to the corresponding responsibility of the state to create an environment that is conducive for everyone to ensure the advancement of the ideals of the new democratic order.

#### 4.3.2 Eligibility for election to the National Assembly

Once elected, a member of the NA will normally serve for a full term of five years until the next election.[143](#) However, a person may lose membership of the NA if that person is no longer eligible to be a member of the NA. In terms of section 47 of the Constitution, a citizen who is qualified to vote for the NA is eligible to be a member of the NA, except for those citizens who are appointed by, or are in the service of, the state and receive remuneration for that appointment or service, other than:

- the President, Deputy President, Ministers and Deputy Ministers
- other office-bearers whose functions are compatible with the functions of a member of the NA and have been declared compatible with those functions by national legislation.

The following people are also not eligible to become or remain members of the NA:

- permanent delegates to the NCOP or members of a provincial legislature or a municipal council [144](#)
- unrehabilitated insolvents [145](#)
- anyone declared to be of unsound mind by a court of the Republic [146](#)
- anyone who, after the Constitution took effect, is convicted of an offence and sentenced to more than 12 months' imprisonment without the option of a fine, either in the Republic, or outside the Republic if the conduct constituting the offence would have been an offence in the Republic.[147](#)

Moreover, a member of the NA who is absent from the NA without permission in contravention of the rules of the NA (presumably more than 15 days),[148](#) or ceases to be a member of the party that nominated him or her,[149](#) will also automatically lose his or her seat in the NA.

#### 4.3.3 Duration of the National Assembly, sittings and its dissolution

The NA is elected for a term of five years.[150](#) It will usually serve out this five-year term, but there are at least two situations in which an election could be held before the five-year term has elapsed:

- First, in terms of section 50(1) of the Constitution, the President ‘must dissolve the NA if the Assembly has adopted a resolution to dissolve with a supporting vote of a majority of its members; and three years have passed since the Assembly was elected’. If this is done, ‘the President, by proclamation, must call and set dates for an election, which must be held within 90 days of the date the Assembly was dissolved’.<sup>151</sup> This means that a majority party in Parliament may strategically adopt such a resolution to force a new national election to be held (without having to impose a vote of no confidence in the government) in the last two years of the life of the NA. They may wish to do so to ensure a political advantage for their party by timing the election to fall around a time when the party is particularly popular, say, after the national soccer team has won the African Cup of Nations tournament or after the successful staging of the Soccer World Cup.
- Second, in terms of section 50(2), where there is a vacancy in the Office of President because the President passed away, resigned or was removed from office by the NA in terms of section 89 or 102, and the NA then fails to elect a new President within 30 days after the vacancy occurred, the Acting President must dissolve the NA and new election must be called within 90 days.<sup>152</sup> This will occur in cases where no one party commands a majority of seats in the NA, the coalition of parties disintegrates and the parties cannot agree on forming a new coalition. Where one party commands more than 50% of the seats in the NA, it will be able to enforce party discipline to ensure that the majority party elects a new President before the 30-day period stipulated by the Constitution elapses.

After an election, the first sitting of the NA must take place not more than 14 days after the election results are finalised on a date determined by the Chief Justice.<sup>153</sup> The President will be elected from among the members elected to the NA at this sitting.<sup>154</sup> At the same sitting, the NA will also elect a Speaker and a Deputy Speaker from among its members.<sup>155</sup> The NA may otherwise determine the time and duration of its other sittings and its recess periods.<sup>156</sup> An exception is that the President may summons the NA to an extraordinary sitting at any time to conduct special business.<sup>157</sup> Sittings of the NA are permitted at places other than the seat of Parliament, which is currently in Cape Town, only ‘on the grounds of public interest, security or convenience, and if provided for in the rules and orders of the Assembly’.<sup>158</sup> NA Rule 24 requires the Speaker to consult the Leader of the Assembly and the Chief Whip of each party represented in the NA before directing that the Assembly sit somewhere other than in Cape Town.<sup>159</sup>

#### 4.3.4 Powers and functioning of the National Assembly

The NA – unlike the NCOP representing the interests of separate provinces – is elected to represent the people of South Africa as a whole. According to section 42(3) of the Constitution, the NA has four main tasks:

- The NA elects the President.
- It serves as a national forum for public consideration of issues.
- It considers and passes legislation (along with the NCOP).
- It scrutinises and oversees executive action, holding the executive accountable.

In exercising its legislative power, the NA may consider, pass, amend or reject any legislation before the Assembly, and initiate or prepare legislation, except money Bills.<sup>160</sup> The NA must provide for mechanisms to ensure that all executive organs of state in the national



sphere of government are accountable to it. The NA must also maintain oversight of the exercise of national executive authority, including the implementation of legislation, and any organ of state.[161](#) We shall return to the exercise of these powers below.[162](#)

Unless the Constitution specifically requires otherwise, section 59 of the Constitution controls quorum requirements for when the NA takes decisions. It distinguishes between Bills or amendments to Bills and ‘any other question[s]’ which may come before the NA for a vote. The NA may proceed with its business irrespective of the number of members present.[163](#) However, when the NA takes a vote on a Bill (that is, a piece of draft legislation), a majority of the members (at least 201 members) of the NA must be present.[164](#) At least one-third of the members (134 members) must be present before a vote may be taken on any other question before the NA.[165](#) If there is no prescribed quorum when a question is put for decision and if after an interval of five minutes, during which time the bells must be rung, there is still no quorum, the presiding officer (the Speaker or Deputy Speaker) may suspend the proceedings or postpone the decision of the question.[166](#)

Most questions before the NA are determined ‘by a majority of the votes cast’ by the members present.[167](#) In certain circumstances, however, the quorum and voting requirements are set at a higher threshold. For example, the NA can only remove the President from office (impeachment) or amend provisions of the Constitution (other than section 1) with a ‘supporting vote of at least two-thirds of its members’.[168](#) An amendment to section 1 of the Constitution requires a ‘supporting vote of at least 75 per cent’ of the members of the NA.[169](#)

The member of the NA presiding at a meeting of the NA, usually the Speaker or Deputy Speaker, has no deliberative vote, but is required to cast a deciding vote ‘when there is an equal number of votes on each side of a question’.[170](#) The presiding member may cast a deliberative vote when a matter requiring a two-thirds majority to pass is before the NA.[171](#) Under section 54 of the Constitution, ‘[t]he President, and any member of the Cabinet or any Deputy Minister who is not a member of the National Assembly, may, subject to the rules and orders of the Assembly, attend and speak in the Assembly, but may not vote’.[172](#) The Constitution further requires the NA to provide for ‘mechanisms to ensure that all executive organs of state in the national sphere of government are accountable to it; and to maintain oversight of the exercise of national executive authority, including the implementation of legislation; and any organ of state’.[173](#)

As far as the practical functioning of the NA is concerned, three important issues arise:

- First, under section 57(1)(a) and (b) of the Constitution, the NA ‘may determine and control its internal arrangements, proceedings and procedures; and may make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement’. These powers of the NA are limited in the ways discussed above.
- Second, the Speaker or, in his or her absence, the Deputy Speaker, presides over the NA. The primary public role of the Speaker is to preside over debates in the NA. The Speaker is expected to be above party politics and to fulfil his or her role impartially, demonstrating the kind of impartiality expected of a judge.[174](#) The Speaker is required to keep discipline in the NA and must rule on any objections lodged by members against the conduct of other members. The Speaker is also (jointly with the Chair of the NCOP) the administrative head of Parliament. As the custodian of the rights and privileges of its members, the Speaker furthermore acts as the

representative and spokesperson for the legislature and has the power to give an undertaking on behalf of the NA.<sup>175</sup>

- Third, members of the NA take part in public meetings of the NA where they may ask questions of members of the Cabinet. The NA also provides a platform for the President, members of Cabinet, party leaders and MPs to make speeches. In addition, it is an arena where the political parties debate the issues of the day. Finally, of course, members of the NA vote formally to pass legislation. However, most of the serious work of the NA is done in committees.

The establishment of committees is contemplated in section 57(2)(a) and (b) of the Constitution and their number, jurisdiction, membership and other details are fleshed out in the Rules of the Assembly.<sup>176</sup> The most important committees – the respective portfolio committees – are those set up to process legislation emanating from each Cabinet portfolio and to oversee the work done by the executive in each of these portfolios.<sup>177</sup>

Section 57(2)(b) of the Constitution requires that the Rules of the Assembly provide for ‘the participation in the proceedings of the Assembly and its committees of minority parties represented in the Assembly, in a manner consistent with democracy’. The Constitutional Court has not yet given clear guidance on what this might entail. However, a practice has developed in the NA that political parties are entitled to be represented in committees in substantially the same proportion as the proportion in which they are represented in the NA.<sup>178</sup> The majority party in the NA will therefore usually have a majority on each of the committees and will be able to outvote minority parties if disagreements arise about the handling of a particular matter or support for specific legislative provisions.

Political parties appoint the members of a committee to which they are entitled and advise the Speaker accordingly.<sup>179</sup> A committee must elect one of its members as the chairperson of the committee. With the exception of the Committee on Public Accounts, which has traditionally been chaired by a member of one of the opposition parties, the chairperson will be a member of the majority party earmarked for the position by the party leadership in the NA. The chairperson of a committee can also be removed as chairperson if the party to which he or she belongs deems it fit to do so. Members of a committee representing a specific political party can also be removed or changed by the political party that nominated the member. This means that the leadership of a political party has considerable influence over individual members of their party in the NA. Serving on some committees is deemed to be more desirable than serving on others. As the chairperson of a committee holds considerable power to arrange the affairs of a committee, members may act in a manner that would not detract from their chances of being allocated to desirable committees or – in the case of a majority party – being appointed as chairperson of a committee. As we shall see, committees of the NA have wide-ranging powers to assist them in fulfilling their various tasks, including the power to summons any person to appear before them.

#### 4.4 The National Council of Provinces

##### 4.4.1 The composition and functioning of the National Council of Provinces

The National Council of Provinces (NCOP) is the second chamber of the bicameral national Parliament. It was created to represent the provinces and ‘to ensure that provincial interests are taken into account in the national sphere of government. It does this mainly by participating in the national legislative process and by providing a national forum for public consideration of issues affecting the provinces’.<sup>180</sup> Note that the NCOP should not be

confused with the nine provincial legislatures that pass legislation for each province in the functional areas exclusively or concurrently reserved for the provinces (see chapter 8).<sup>181</sup> The NCOP is the second chamber in the national Parliament, and thus not one of the provincial legislatures although it retains links with the respective provincial legislatures because of the way it is composed and operates. Naledi Pandor, then Chairperson of the NCOP, described the NCOP thus:

The NCOP acts at the national level of government in South Africa. It represents provincial and local government. It functions as a bridge between these three spheres of government. The NCOP is a linking mechanism that acts simultaneously to involve the provinces in national purposes and to ensure the responsiveness of national government to provincial interests. Through the NCOP, national government is sensitised to provincial interests and its processes are enriched accordingly. Equally, by engaging the provinces and provincial legislatures in the formulation of national policy, it avoids their becoming parochial.<sup>182</sup>

In *Doctors for Life* the Constitutional Court stated:

The NCOP performs functions similar to the National Assembly but from the distinct vantage point of the provinces. Its role is both unique and fundamental to the basic structure of the government as it reflects one of the fundamental premises of the South African government, which sees national, provincial and local governments as ‘spheres within a single whole’, which are distinctive yet interdependent and interrelated. The NCOP ensures that national government is responsive to provincial interests while simultaneously engaging the provinces and provincial legislatures in the consideration of national policy. From this perspective, the NCOP plays a pivotal role ‘as a linking mechanism that acts simultaneously to involve the provinces in national purposes and to ensure the responsiveness of national government to provincial interests’.<sup>183</sup>

The NCOP is carefully designed as a key institution for ensuring co-operative government in law making and in overseeing the executive intergovernmental process. It plays a role both in the passage of national laws (both laws dealing with ‘national’ issues and laws that fall under the list of concurrent functions) and in overseeing the use of the extensive intervention powers vested in the national government and provinces.<sup>184</sup> As Murray and Simeon point out:

The NCOP is the quintessential institution of co-operative government, providing a forum for the representation of provincial interests in the national Parliament. Its role is to ensure that the institutional integrity and policy concerns of provinces are fully taken into account in the national legislative process. As a part of the national Parliament and as an (indirectly) elected body, it is designed to operate as an intergovernmental institution without the ‘democratic deficit’ which so often is part of intergovernmental relations.<sup>185</sup>

#### PAUSE FOR REFLECTION

The NCOP resembles the German Bundesrat

In *Doctors for Life*, the Constitutional Court noted that the NCOP shares many of its structural characteristics with the German body known as the Bundesrat or Council of State Governments on which the NCOP was modelled.<sup>186</sup> Like the NCOP, the Bundesrat represents the interests of the Länder (the states) which, in the South African context, are

equivalent to the nine provincial governments. The NA is similar to the second parliamentary body in Germany known as the Bundestag as the NA is elected to represent the interests of all the people of South Africa, not merely the interests of the citizens of an individual province. The members of the Bundesrat are members of the state governments and are appointed and subject to recall by the states – just like the members of the NCOP. They serve in the council as representatives of the Länder. Germany’s Basic Law or Constitution [187](#) provides that the Länder shall participate, through the Bundesrat, in the national legislative process.[188](#) ‘As constitutional partners, both the Bund or national government and the Länder have an obligation to consult, cooperate and communicate with each other, consistent with the principle of Bundestreue’ [189](#) – this is how the Federal Constitutional Court of Germany [190](#) explained the constitutional obligation of trust and friendship that the Bund (national government) and the Länder (states) have towards each other.[191](#)

The NCOP consists of 90 members made up from delegations of 10 members from each of the nine provinces.[192](#) The nine provincial legislatures appoint the nine provincial delegations, one for each province. The individual delegation slots are allocated proportionally to the various parties in each provincial legislature in accordance with the relative strength of parties in each of the respective legislatures.[193](#) For example, if the ANC received 60% of the seats in the Gauteng legislature and the Democratic Alliance (DA) 30%, then the ANC would be entitled to six and the DA to three of the 10 delegates representing Gauteng in the NCOP.

In addition, the members of each provincial delegation are classified as either special or permanent delegates.[194](#) There are four special delegates and six permanent delegates in each provincial delegation.[195](#) The four special delegates are composed of the Premier of a province together with three other delegates selected from among the members of that provincial legislature.[196](#) If the Premier is not available, he or she may delegate someone else to represent him or her.[197](#) The Premier or his or her delegate heads the delegation.[198](#) These four special delegates remain members of the provincial legislature: they are simultaneously members of the provincial Parliament and members of the national Parliament acting as special delegates to the NCOP. They are not appointed for a fixed term and the provincial legislature can change the composition of its special delegates ‘from time to time’.[199](#) This means that a provincial legislature can send different members to the NCOP as special delegates to deal with different issues, for example on the basis that a delegate has special knowledge of a matter being considered by the NCOP.

#### Figure 4.2 Composition of the National Council of Provinces

The provincial legislatures appoint the six permanent delegates of each provincial delegation on the basis of party affiliation to ensure the accurate proportional representation of each political party represented in the provincial legislature in the NCOP delegation. Permanent delegates cannot simultaneously be members of the provincial legislature and act as permanent delegates to the NCOP. They are either selected from among party members not elected to the provincial legislature or they are selected from among the members of the provincial legislature, in which case they automatically lose their seat in that House.[200](#) The permanent delegates perform an important function: they provide continuity and stability to the NCOP by providing a continuous political presence at the NCOP, ensuring that at least

six of the 10 members of each provincial delegation to the NCOP are permanently stationed at Parliament in Cape Town.[201](#)

The provincial legislature may recall a permanent delegate if the delegate ‘has lost the confidence of the provincial legislature and is recalled by the party that nominated that person’.[202](#) This will occur when the NCOP passes a vote of no confidence in the delegate, at which point the political party that nominated him or her acquires a right to recall that member.[203](#) The composition of the NCOP – with equal representation for small and large provinces – means that it is not a foregone conclusion that the political party who garners a majority in the NA will also do so in the NCOP.

## PAUSE FOR REFLECTION

### Factors influencing the operation of the NCOP

Although the NCOP perhaps has fewer powers than its predecessor, the Senate,[204](#) it seems to be a better collective representative of provincial interests. However, it may be wise to keep in mind that constitutional engineering is an imprecise science. The larger political context, the traditions and culture of political parties and the relative support of each political party in the system all influence the manner in which constitutional structures like the NCOP operate and whether they will fulfil their mandate. This also means that as the political landscape changes and as elections become more competitive, for example if one party were to win the election in five provinces and a coalition of other parties were to win a majority in the other four provinces, the dynamics around the functioning of the NCOP may well change. The NCOP may then come into its own as a true representative of the various provincial interests. The Constitutional Court reached the following conclusion in *Certification of the Constitution of The Republic Of South Africa, 1996*:

Although we are satisfied that the structure and the functioning of the NCOP as provided for in the [new Constitution] are better suited to the representation of provincial interests than the structure and functioning of the Senate, we are unable to say that the collective interest of the provinces will necessarily be enhanced by the changes that have been made. We have found it extremely difficult to evaluate the overall impact of these changes. A number of variable and uncertain factors have to be taken into account. These include not only the differences in the powers of the two Houses which have been referred to, but also the method of appointing the members of the Houses, the contrast between direct and indirect representation, the different methods of voting, the different procedures to be followed, the influence of parties on voting patterns, and the possible impact of the anti-defection provisions on voting.[205](#)

The powers of the NCOP vary according to the impact of the legislation in question on provincial concerns and the nature of the legislation being considered. If the legislation does not directly affect the provinces, NCOP members usually each have an individual vote which they cast in accordance with the wishes of their respective political parties.[206](#) In all other cases – including when amending the Constitution or dealing with Bills affecting the provinces – each provincial delegation casts a single vote.[207](#) It does so under instruction, also called a mandate, from the provincial legislature of the province represented by the delegation.[208](#) As the Constitutional Court has explained in *Certification of the Amended Text of the Constitution of The Republic Of South Africa, 1996*, the NCOP ‘is a council of provinces and not a chamber composed of elected representatives. Voting by delegation reflects accurately the support of the different provincial legislatures for a measure under

consideration'.<sup>209</sup> 'In this manner the provincial legislatures are given a direct say in the national law-making process through the NCOP.'<sup>210</sup>

The various NCOP delegations have found it difficult to operate effectively, especially to obtain the requisite mandate from their respective provincial legislatures in the short time often provided for this task. There are a number of reasons for this. Because provincial legislative attention is so taken up with carrying out mandates imposed on them from above, and because they are far removed from the centre of political power in Parliament, they are ill equipped in terms of information and expertise to pass judgment on national legislation and to provide informed mandates to the respective NCOP delegations. This problem is exacerbated by poor communications between the NA and the NCOP and between NCOP delegations and their provincial legislatures. Draft Bills are often provided to the NCOP with little time for provinces to respond.<sup>211</sup>

In addition, NCOP members are supposed to provide a bridge between the national legislature and provincial legislatures, but their political links with both are often weak and ineffective. The technical and human resources for close communication are often lacking. Individual NCOP members, shuttling between Parliament in Cape Town and remote provincial capitals, are placed under enormous strain. It is highly unrealistic, and probably unnecessary, for provincial legislatures to pay the same attention to national legislation as does the NA. It is far more important for them to come to grips with local issues and problems. However, it is critical that provinces are able to voice their opinions when legislation directly affects the economic or social interests of their region, and that they can ensure that national legislation they will be required to implement is workable. Another problem is that there is little linkage between the exchange of information and ideas that goes on within the processes of executive intergovernmental relations and exchanges at the parliamentary level through the NCOP. Indeed, provincial executives take little interest in NCOP matters. This differs greatly from the operation of the German Bundesrat, the members of which are themselves provincial executives, thus integrating legislative and executive intergovernmental relations.<sup>212</sup>

Because of these practical difficulties as well as the limited powers and functions formally bestowed on the NCOP, the NCOP, as the second House of the national Parliament, is often viewed as the less powerful and influential of the two chambers of the bicameral South African Parliament. This is so because almost all Cabinet Ministers will be members of the NA while NCOP members cannot serve as Cabinet Ministers. Although Cabinet Ministers and Deputy Ministers may attend and may speak in the NCOP, they may not vote in that chamber.<sup>213</sup> Moreover, unlike the NA, the NCOP is not given a clear mandate to hold members of the Cabinet accountable or to maintain oversight over the executive although the NCOP plays an important role in the passing of legislation.

Nevertheless, the NCOP and its committees are, under section 69 of the Constitution, given broad powers. They may 'summon any person to appear before it to give evidence on oath or affirmation or to produce documents; require any institution or person to report to it; compel, in terms of national legislation or the rules and orders, any person or institution to comply with a summons; and receive petitions, representations or submissions from any interested persons or institutions.'

## CRITICAL THINKING

## The role of strict party discipline in the effectiveness of the NCOP

The events which led to the Constitutional Court judgment in *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* [214](#) illustrate the difficulties faced by NCOP delegations required to receive electoral mandates from their respective provinces. In this case the Gauteng legislature adopted a ‘negotiating mandate’ regarding proposed amendments to the Constitution to eradicate cross-border municipalities.[215](#) Its NCOP delegation would support the amendments on condition that the Merafong area would be retained in the Gauteng Province and would not be moved to the North West Province as the legislation proposed. It thus appeared to agree with the view expressed by the majority of the Merafong community at the public hearing that the phasing-out of cross-boundary municipalities had to be supported, but that the entire municipality of Merafong had to be located in Gauteng.

However, for technical reasons, the proposed constitutional amendment could not be changed and the NCOP had either to support the Bill, in which case it would be passed, or to reject the entire constitutional amendment, in which case it would not be adopted. Realising this, the NCOP delegation from Gauteng then changed its mind and voted in support of the Bill and it was passed. Challenging this decision, the applicants argued that the National Executive Committee (NEC) of the ANC had decided earlier that Merafong would go to North West and had instructed the NCOP to support the amendment. The majority of the Constitutional Court found that ‘[o]n the available evidence, it is not possible to determine whether and to what extent the final voting mandate and the debate in the NCOP [delegation] were directly or indirectly influenced by previously formulated policies of the ruling party’.[216](#)

Although there was not sufficient evidence to determine that the NCOP delegation changed its mandate because of instructions by the ANC NEC, the case demonstrates the potential problems of the system. Given the culture of political parties of strictly adhering to the discipline imposed by their leaders, and the fact that the governing party has the power to discipline the members of the provincial legislature as well as the NCOP delegation if they disobey leadership instructions, it is not far-fetched to imagine that provincial legislatures will provide NCOP delegations with mandates that align with the decisions of the party leadership and not necessarily with the interests of the province. In other words, the single factor most likely to determine to what extent the NCOP is able to represent the interest of the provinces in an effective manner is the degree to which political parties demand adherence to strict party discipline from their delegates. Where the majority party in the national Parliament is also in control of a majority of provincial legislatures, adherence to strict party discipline will mean that those provincial delegations controlled by the majority party will be reluctant to challenge the political consensus which emerges from the representatives of the majority party in the NA. This will be particularly true where a sensitive political issue is at stake. However, in more technical and politically less sensitive areas, strict party discipline will not necessarily emasculate the provincial delegations of the majority party in the NA.

### 4.4.2 Procedures, internal arrangements and committees of the National Council of Provinces

The Constitution requires the election of a Chairperson and two Deputy Chairpersons of the NCOP,[217](#) and provides for the NCOP to make its own internal arrangements and

procedures.<sup>218</sup> The NCOP is also required to establish committees to oversee its work, which is done in terms of its rules.<sup>219</sup>

Because the NCOP is composed of a single delegation from each province, each province usually has one vote which must be cast on behalf of the province by the head of the delegation.<sup>220</sup> A majority is achieved when five delegations support a decision. However, when the NCOP has to pass legislation not affecting the provinces, each delegate in the NCOP has one vote and a majority of votes of delegates is required to pass a Bill.<sup>221</sup> An Act of Parliament ‘must provide for a uniform procedure in terms of which provincial legislatures confer authority on their delegations to cast votes on their behalf’.<sup>222</sup> Pursuant to this, Parliament enacted the Mandating Procedures of Provinces Act.<sup>223</sup> However, despite the mechanisms that could be created for consensus building and consultation across party lines, in effect the majority party in the provincial legislature has the power to decide how the vote of the provincial delegation will be exercised. Except where the Constitution provides otherwise, questions before the NCOP are agreed when five of the nine provinces vote in favour of it.<sup>224</sup> In other words, an absolute majority is normally required.<sup>225</sup> These provisions recognise that the single delegation of a province in the NCOP normally acts as representative of the province.

However, as was noted above, sometimes the NCOP does not act in this capacity as representative of the province. For example, when Bills are considered which do not affect the provinces, in other words non-Schedule 4 and 5 Bills, the NCOP does not represent the provinces and the voting procedures described above do not apply. In respect of such matters, the Constitution provides that the delegates in the Council vote individually. A quorum of one-third of the delegates must be present and a decision must then be taken by a majority of those present.<sup>226</sup>

The Constitution further provides, consistent with this distinction, that when the NCOP acts as representative of the provinces, all the provinces must be allowed to participate in the ‘proceedings in a manner consistent with democracy’.<sup>227</sup> However, when it comes to law making that does not affect the provinces, minority parties must be allowed to participate in law making.<sup>228</sup>

The NCOP may not be dissolved. In principle, it is a perpetual body without a fixed term. The tenure of the members of the NCOP is, however, far less secure. The terms of the permanent delegates are linked to the provincial legislature they represent and, as we stated above, they may be recalled. The position of the special delegates is even less secure. Because they are appointed from time to time, they will generally serve for short periods of time on the NCOP.

## 4.5 Functions of Parliament

### 4.5.1 Introduction

The main function of Parliament is to enact national legislation for the Republic of South Africa. However, the enactment of legislation is not the only function bestowed on Parliament by the Constitution. On a more symbolic level, Parliament also provides a national forum for public debate on issues of national importance. In this sense, Parliament provides a platform for representatives of political parties to present their views and debate each other.



While both Houses of Parliament play an integral role in the adoption of legislation, and while both provide platforms for debate about important issues, the Constitution confers additional powers on the NA that enable it to fulfil a special role as a ‘check’ on the executive authority. This special task is bestowed on the NA because of the fact that it appoints and can dismiss the President. It follows that the President and his or her Cabinet need to retain the confidence and hence the support of the NA to continue doing their job. Although the tasks of the two Houses are therefore not identical, the two Houses of Parliament can be said to fulfil four main functions. They must:

- • provide a forum for debate on important issues [229](#)
- • hold the executive organs of state in the national sphere of government accountable to Parliament [230](#)
- • exercise an oversight function over the exercise of national authority and over other organs of state [231](#)
- • pass national legislation. [232](#)

#### 4.5.2 National forum for public consideration of issues

One of Parliament’s most important functions may be described as fulfilling the role of ‘national talk shop’.[233](#) Currie and De Waal argue that Parliament fulfils this role in two ways:

- • First, Parliament is required to operate in a transparent and accountable manner.[234](#) The public, including the media, may not be excluded from a sitting of a committee unless it is reasonable and justifiable to do so in an open and democratic society.[235](#)
- • Second, as we have seen, Parliament is required to operate in such a way as to give ordinary persons and affected individuals and institutions the opportunity to have access to its proceedings and to present their views on issues considered by Parliament in writing or by oral presentations.[236](#)

However, we contend that the two Houses of Parliament also fulfil this task by providing a platform for elected political representatives to deliver speeches and to engage in debates with one another and with the President about policy questions as well as issues of political importance. Because events in Parliament are relatively well reported by the print and electronic media, Parliament provides an important platform for the floating of new ideas and for elected politicians to ‘perform’ democracy by illustrating their willingness to debate important and often emotional issues with members from other political parties in a relatively rational and calm manner. Parliament, at its best, can therefore act as a body that educates citizens about the importance of embracing a participatory notion of democracy and the requirement to respect differences without having to agree with those who differ from oneself.

The Rules of the NA and the NCOP provide various mechanisms to achieve these goals.[237](#) For example, a member of the NA may propose a subject for discussion or a draft resolution for approval as a resolution of this House.[238](#) The Rules of the NA provide for an MP to request the Speaker to place a matter of public importance on the Order Paper for discussion.[239](#) The Rules also allow an MP to request the Speaker on any day the NA sits to allow a matter of urgent public importance to be discussed by the NA.[240](#)

The Rules of the NCOP allow its members too to request the Chairperson of the NCOP in writing to allow a matter of public importance to be discussed by the Council, but this request will only be granted if the matter affects the provinces or one or more of them.[241](#)

#### 4.5.3 Holding the executive accountable to Parliament

As we have seen in the discussion about the separation of powers doctrine, the 1996 Constitution retains a form of parliamentary government which is similar but not identical to the Westminster model of government. The South African Constitution thus states that members of Cabinet are accountable to Parliament and must report to Parliament regularly.[242](#) Accountability is the hallmark of modern democratic governance and implies that members of the executive have to explain their actions to Parliament and its committees so that Parliament can play a role in checking the exercise of power by members of the executive. This power of Parliament to hold the executive accountable will only be effectively exercised where Parliament ultimately has the ability to sanction members of the executive who abuse their power or fail to fulfil their respective mandates. The power of Parliament to hold the executive accountable therefore, in essence, entails two distinct but interrelated aspects:

- First, it entails the powers of Parliament to call members of the executive and the public administration to account for their activities. This is aimed at enhancing the integrity of public governance to safeguard government against corruption, nepotism, abuse of power and other forms of inappropriate behaviour, and to assist in improving the performance of the Cabinet as well as the public administration. This kind of accountability also reflects a culture of transparency, responsiveness and answerability which is necessary to assure public confidence in government, to bridge the gap between the governed and the government, and to ensure public confidence in government. If used wisely and effectively, these accountability mechanisms enable the public to judge the performance of the government by the government giving account in public.[243](#)
- Second, accountability will arguably not be effective if it does not include the power of Parliament to take remedial action and even to dismiss members of the executive who fail to account properly for their actions. As such, accountability requires the establishment of institutional arrangements to effect democratic control over the executive as members of the executive, unlike the MPs, are not directly democratically elected.

As far as the first aspect is concerned, sections 56 and 69 of the Constitution respectively provide that the NA and the NCOP as well as any of their committees may ‘summon any person to appear before it to give evidence on oath or affirmation, or to produce documents’. It may also require ‘any person or institution to report to it’. Where anyone refuses to appear before Parliament or any of its committees, it can summons that person or institution and can compel such a person or institution to comply with the summons. The Rules of Parliament further provide for the powers of its committees to enable these committees to hold members of the executive accountable.[244](#) The Rules of the NA and the NCOP also provide for members of the NA to pose questions and receive oral answers from Ministers,[245](#) the Deputy President [246](#) and the President.[247](#)

As far as the second aspect is concerned, the NA has distinct powers (not given to the NCOP) to ensure democratic control over the executive. Although the Cabinet is accountable to both

the NA and the NCOP, the Constitution clearly envisages a special role for the NA in this regard. Section 102(2) of the Constitution empowers the NA to pass a motion of no confidence in the President as long as such a motion is supported by a majority of its members. In this event, the President and the other members of the Cabinet and any Deputy Ministers must resign.<sup>248</sup> This power is a political power and the removal can thus be effected for purely political reasons. This provision means that the President and his or her Cabinet have a strong political incentive to retain the support of the majority party in the NA. In the South African political landscape, this means they also have a strong political incentive to retain the support of the leadership of the majority party outside Parliament. If a President loses the support of the majority party, he or she will have to resign. If he or she refuses to do so, he or she will be removed by a vote of no confidence in the NA as the majority party in the NA will instruct its members to support such a vote. If members of the NA refuse to support such a vote, the political party they represent will then be able to remove them from the NA.

Neither the majority party in the NA nor any of the minority parties are constitutionally allowed to block the tabling, discussion, consideration and voting on a motion of no confidence. In *Mazibuko v Sisulu and Another*,<sup>249</sup> the Constitutional Court confirmed this, declaring invalid Chapter 12 of the Rules of the NA that purported to do just that. The case arose after the Leader of the Opposition in the NA gave notice of a motion of no confidence in the President. The programme committee of the NA <sup>250</sup> met to consider the proposed motion of no confidence. However, its deliberations on the motion were deadlocked. Because there was an absence of consensus between the parties, the Speaker concluded that the motion could not be scheduled and could therefore not be debated or voted on.<sup>251</sup> The majority judgment (authored by Deputy Chief Justice Moseneke) found that the Constitution required the Rules of the NA to permit its members to deliberate and vote on a motion of no confidence in the President:

A motion of no confidence in the President is a vital tool to advance our democratic hygiene. It affords the Assembly a vital power and duty to scrutinise and oversee executive action ... The ever-present possibility of a motion of no confidence against the President and the Cabinet is meant to keep the President accountable to the Assembly which elects her or him. If a motion of no confidence in the President were to succeed, he or she and the incumbent Cabinet must resign. In effect, the people through their elected representatives in the Assembly would end the mandate they bestowed on an incumbent President.<sup>252</sup>

This right to have a motion of no confidence considered and voted on is central to the 'deliberative, multiparty democracy envisioned in the Constitution'.<sup>253</sup> The Court pointed out that it 'implicates the values of democracy, transparency, accountability and openness'.<sup>254</sup> It is for this reason that a 'motion of this kind is perhaps the most important mechanism that may be employed by Parliament to hold the executive to account, and to interrogate executive performance'.<sup>255</sup> The Rules of the NA may not 'deny, frustrate, unreasonably delay or postpone the exercise of the right'.<sup>256</sup> This means a decision whether a vote of no confidence is tabled, debated and voted on:

cannot be left to the whim of the majority or minority in the programme committee or any other committee of the Assembly. It would be inimical to the vital purpose of section 102(2) to accept that a motion of no confidence in the President may never reach the Assembly except with the generosity and concurrence of the majority in that committee. It is equally

unacceptable that a minority within the Committee may render the motion stillborn when consensus is the decision-making norm.[257](#)

Although the NA has the constitutional authority to ‘determine and control its internal arrangements, proceedings and procedures’,[258](#) such authority must be exercised in conformity with the Constitution. When a motion of no confidence is tabled, it ‘must be accorded priority over other motions and business by being scheduled, debated and voted on within a reasonable time’.[259](#) The NA is therefore required to ‘take prompt and reasonable steps to ensure that the motion is scheduled, debated and voted on without undue delay’.[260](#) This does not mean that when such a motion is tabled it will be passed. As long as the majority party in the NA retains confidence in the President and his or her Cabinet, there is little chance of the NA passing such a vote of no confidence. However, where the majority of members of the NA lose confidence in the President, such a vote will lead to the removal of the President. It is therefore not surprising that former President Thabo Mbeki resigned as President of the Republic after losing a leadership battle with his successor in the governing party and was consequently ‘recalled’ by the leadership of the party. If he had refused to resign, the ANC would in all likelihood have instructed its members in the NA to support a vote of no confidence in the President, something which would arguably have resulted in his removal.[261](#)

Section 89(1) of the Constitution also allows the NA to impeach the President by adopting a resolution with a supporting vote of at least two-thirds of its members to remove the President on the grounds of a serious violation of the Constitution or the law, serious misconduct or inability to perform the functions of office. This is not a purely political power, but a power to remove the President for objective reasons unrelated to the political support enjoyed by the President. Moreover, section 55(2)(a) of the Constitution commands the NA to devise mechanisms that will enable it to hold the executive organs of state accountable to Parliament. These provisions reiterate one of the fundamental principles of a traditional system of parliamentary government, namely that the President and his or her Cabinet must remain accountable to the democratically elected NA.[262](#)

The extent to which the NA, and to a lesser extent the NCOP, are able to hold the executive accountable to Parliament depends on the traditions and practices that are developed in Parliament over time. This, in turn, depends on the attitude of the members of the majority party in Parliament, especially its leaders who serve in the government, towards the need for accountable government. It also depends on the way in which members of opposition parties fulfil their role in holding the executive to account. In this regard, the role of the portfolio committees discussed above is crucial. One of the most important ways in which Parliament holds the executive accountable is through the regular question-and-answer sessions in Parliament. During such question times, MPs have the opportunity to pose probing questions about the activities of the President, Deputy President and the Cabinet Ministers. Ministers are then obliged to provide statistics about different aspects of their departments, details of the expenditure on various items and to defend the policies they have adopted.[263](#)

## CRITICAL THINKING

How accountable is the executive to Parliament?

Nash is critical of the notion of accountability built into the South African Constitution with its emphasis on the democratically elected Parliament and its role of holding the executive

accountable. He argues that effective accountability practice – widely employed in the South African labour movement in the 1970s and 80s – does not ‘depend on lawyers, bureaucrats or accountability experts or even a handbook. It depends on active participation in political life, informed by a shared ethical standard’.<sup>264</sup> This process of accountability, Nash argues, is important because it strengthens the capacity of oppressed and marginalised people to act collectively and consciously to take responsibility for their actions and those of their leaders. Where there is little or no active participation in the decision-making processes of Parliament or the executive by the electorate, and no real prospect of them recalling their leaders or changing their mandate, as happened in the earlier labour movement, the accountability remains no more than paper accountability with no or little practical effect for the oppressed.<sup>265</sup> This ‘neoliberal’ model of accountability ‘can be understood largely as a way of providing the façade of democracy without the substance, ensuring that issues around which “factions of the majority” might unite against the interests of the propertied are taken out of the political arena and made the subject of bureaucratic procedure instead’.<sup>266</sup>

Nash’s view is based on a more ‘grassroots’ understanding of democracy and accountability. It displays a scepticism towards the notion of representative democracy and the formal mechanisms put in place by the Constitution to ensure accountability. At its heart this view seems to be sceptical about the ability of the MPs – indirectly elected because of their standing in a political party and not directly accountable to any constituency – to hold the executive to account.

#### 4.5.4 Maintaining oversight of the national executive authority and other organs of state

Oversight resembles, but is nevertheless to be distinguished from, accountability. It ‘entails the informal and formal, watchful, strategic and structured scrutiny exercised by legislatures in respect of the implementation of laws, the application of the budget, and the strict observance of statutes and the Constitution’.<sup>267</sup> It requires the NA to oversee the day-to-day exercise of authority by the national executive and to oversee the actions of other organs of state. This task includes the task of overseeing the implementation of legislation.<sup>268</sup> ‘In addition, and most importantly, it entails overseeing the effective management of government departments by individual members of Cabinet in pursuit of improved service delivery for the achievement of a better quality of life for all citizens. In terms of the provisions of the Constitution and the Joint Rules of Parliament, Parliament has the power to conduct oversight over all organs of state, including those at provincial and local government level.’<sup>269</sup> Organs of state are defined broadly in section 239 of the Constitution to include:

any department of state or administration in the national, provincial or local sphere of government; or any other functionary or institution exercising a power or performing a function in terms of the Constitution or a provincial constitution; or exercising a public power or performing a public function in terms of any legislation ...

Parliament is therefore entitled to oversee the work of the more than 1 000 organs of state which include a wide array of institutions such as all public universities in South Africa, the Johannesburg Fresh Produce Market, the Public Protector, the Human Rights Commission, the Medical Research Council of South Africa, the National Gambling Board, the National Lotteries Board and the Natal Sharks Board, to name but a few. However, this does not include a court or a judicial officer, which means Parliament cannot fulfil an oversight role over the judiciary.<sup>270</sup>

The appropriate mechanism for Parliament to conduct oversight of these organs of state is through the various parliamentary committees, mostly the portfolio committees discussed above. 'In conducting oversight, the committee would either request a briefing from the organ of state [or Cabinet Minister] or visit the organ of state for fact-finding, depending on the purpose of the oversight ... One of the most important aspects of the oversight function is the consideration by committees of annual reports of organs of state and the Auditor-General's reports.' [271](#) The more independent, knowledgeable, hard-working and politically powerful the members of the committees are, the more rigorous the NA's oversight of the executive and other organs of state will be. Committees have the power to investigate and make recommendations on any matter relating to government departments, including budgets, rationalisation, restructuring, organisation, structure, function, personnel and policy formulation.[272](#)

The oversight role of the NCOP is more defined. The NCOP must review the intervention of the national executive in a province and the provincial executive in a municipality.[273](#) Both the NA and the NCOP must approve a decision by the Treasury to stop the transfer of funds to a province [274](#) or a decision by the President to declare a state of national defence.[275](#) Additionally, the NCOP resolves disputes concerning the administrative capacity of a province.[276](#)

## CRITICAL THINKING

The relationship between the members of the executive and the ordinary members of parliamentary committees

Taljaard, speaking from a different ideological position than Nash quoted above, was intimately involved in overseeing the executive as a member of the NA's Public Accounts Committee (Scopa) during the so-called arms deal scandal. She provides the following perspective on the manner in which oversight occurred (or did not occur) in Parliament in the case of the arms deal:

At the start of 2001 a concerted assault by the executive on the standing committee on public accounts (Scopa) and the auditor-general was about to commence with battle-like precision. I would look on with fascination, without realising that my party leader was about to hurl me right into the middle of the gladiatorial arena. On January 13, ministers Alec Erwin, Mosiuoa Lekota and Trevor Manuel opened with a salvo attacking Scopa's 'incompetence' and strongly defending the integrity of the arms acquisition process. Each minister defended his corner: Lekota, the procurement process itself; Manuel, the cost of the deal and its financing; and Erwin, the benefits of the offset or countertrade obligations for job creation. Despite this aggressive attack the ministers did commit themselves to full co-operation with the investigations, even though they complained bitterly that Scopa had not given them the opportunity to explain themselves before calling for a full probe – echoing the words of a cabinet statement the year before.

... The executive unleashed its strategy on Friday, January 19. This would bring half the cabinet, including the president, deputy president, minister of finance, minister of trade and industry, minister of public enterprises, minister of defence and minister of justice, into the fight between Parliament and the executive. But it was the president's turn to launch a broadside on the institution in the form of a public televised address. We knew that [then President Thabo] Mbeki was going to speak on the SABC on that day about the arms deal

probe, and eagerly awaited his address. ... As we awaited his public broadcast, I was sitting in my office in the Marks Building when a fax came through from the office of Deputy President Jacob Zuma – in his capacity as leader of government business. It contained an explosive letter, attacking the integrity of Scopa and its chairman and calling into question its intentions in drafting the 14th report and in seeking a full-scale forensic probe of the arms deal (which the letter referred to as a ‘fishing expedition’). I had never read such intemperate language – certainly not from a senior figure – and was amazed by the deputy president’s opinions about the committee in view of his own attempts to enhance Parliament’s oversight role in his capacity as leader of government business.

This was bad enough, but more was in store. As President Thabo Mbeki began his address on television I had the uncomfortable sensation of watching a concerted effort to frighten Scopa and the auditor-general by a sheer show of executive force. In his address Mbeki emphasised the government’s efforts to fight corruption and its support for any probe, committed the government to upholding the rule of law, and emphasised that it would not break any contracts it had legally entered into. He complained bitterly about the fact that Scopa and the auditor-general had not communicated with the cabinet and cabinet subcommittees before coming to its conclusions about their decisions. This would be a recurring theme in the government’s defence.[277](#)

Regardless of a person’s ideological point of view, and whether he or she is broadly speaking a supporter of the governing party or an opposition party, and regardless of whether we agree with Taljaart’s rendition of events, she does raise questions about the relationship between the members of the executive (who are usually also the leaders of the majority party in Parliament) and the ordinary members of parliamentary committees and the ability of such ordinary members to oversee the work done by more senior members of their party in government. It will indeed be very difficult for a member of a portfolio committee to hold the President and other members of the executive accountable and oversee their work in a vigorous manner for at least two reasons:

- First, it may well embarrass the government of the day if a member of the NA reveals damaging information about corruption or maladministration in the department of a Cabinet Minister. If this member embarrasses the government of the day, it would indirectly embarrass the political party of which this person may be a member. This may influence the electoral prospects of the member’s party at the next election and may also endanger the member’s political career as the member may lose his or her seat at the next election.
- Second, members of the NA are elected because they appear sufficiently high up on their political party’s electoral list. If a member angers the party leadership, this member may well not be placed high enough on the electoral list to be re-elected to the NA, bringing an abrupt end to the member’s political career.

#### 4.5.5 Passing of legislation

The notion of co-operative government, enshrined in Chapter 3 of the Constitution, lies at the heart of the law-making process in the national Parliament. This is because the procedure for enacting legislation under the Constitution requires institutional co-operation and communication between national and provincial legislatures as well as between the executive and Parliament. However, the Constitution does not clearly define how this should occur. Such co-operation is necessary to implement the national legislative programme. It is

important to note that this need for co-operation is intimately linked with the fact that the legislative process is based on the assumption that provincial interests (as defined in the Constitution) will be taken into account in the national law-making process whenever such interests arise. As such, the NCOP plays an important role in institutionalising the principle of co-operation and communication by involving the nine provinces directly in the national legislative process and other national matters. As the Constitutional Court pointed out in *Doctors for Life*:

The local government is also involved indirectly in that local government may designate up to ten part-time, non-voting representatives to participate in the NCOP proceedings. Thus the NCOP represents the concerns and interests of the provinces and as well as those of local government in the formulation of national legislation.<sup>278</sup>

The Court proceeded to note:

the principle of institutional co-operation and communication finds expression in the principle of co-operative government to which Chapter 3 of the Constitution is devoted. The role of the NCOP should be understood in the light of the constitutional principle of co-operative government, which shares similarities with the principle of *Bundestreue*. The basic structure of our government consists of a partnership between the national, provincial and local spheres of government which are distinctive, interdependent and interrelated. The principle of co-operative government requires each of the three spheres to perform their functions in a spirit of consultation and co-ordination with the other spheres.<sup>279</sup>

It is important to note from the outset that the national Parliament (as opposed to the nine provincial legislatures) has the power to pass legislation on any topic, even those not explicitly listed in the Constitution, unless the Constitution provides otherwise. Thus Parliament may usually not pass legislation on the small number of topics reserved in Schedule 5 of the Constitution as areas for exclusive provincial legislative activity.<sup>280</sup> Parliament may pass legislation on any topic listed in Schedule 4 of the Constitution as this section sets out the concurrent powers on which both the national Parliament and the provincial Parliaments can legislate. However, where a conflict occurs between national legislation and provincial legislation dealing with a topic listed in Schedule 4, the provincial legislation will usually prevail over the national legislation unless one of the criteria listed in section 146 is present.<sup>281</sup> Section 44 of the Constitution further confers power on Parliament to amend the Constitution <sup>282</sup> while it also confers powers on the NA specifically ‘to assign any of its legislative powers, except the power to amend the Constitution, to any legislative body in another sphere of government’.<sup>283</sup>

As indicated earlier, there is no absolute separation of the functions performed by the legislative and the executive branches of government. This is evident when we focus on the passing of legislation by Parliament, which is arguably the most important function of that body. Because of the political influence (we may even say dominance) of the executive in our system of government, draft legislation usually originates in the executive and is then tabled in and passed by Parliament. Individual members of the NA may initiate legislation <sup>284</sup> in the form of Bills called private members’ Bills.<sup>285</sup> Committees of the NA may also initiate Bills.<sup>286</sup>

Section 73(2) of the Constitution allows any member of the NA to introduce a Bill in the NA if that member is not a Cabinet Minister and even if that member belongs to an opposition



party. However, the previous Rules of the NA made it difficult for non-Cabinet members, especially from opposition parties, to initiate Bills. Until recently, the Rules of the NA stated that a member of the NA could only initiate and introduce a Bill into the NA if a majority of members of the NA had given 'permission' to an MP to initiate such legislation.<sup>287</sup> Members of opposition parties could attempt to initiate legislation by submitting legislative proposals to the Speaker. These proposals would set out the particulars of the proposed legislation, explain the objects of the proposed legislation and state whether the proposed legislation would have financial implications for the State.<sup>288</sup> The Speaker would then refer the member's memorandum to the Committee on Private Members' Legislative Proposals and Special Petitions. This Committee would then decide whether the proposal should proceed or not. In doing so, the Committee had to confine its consideration of the legislative proposal to whether it:

goes against the spirit, purport and object of the Constitution; seeks to initiate legislation beyond the legislative competence of the Assembly; duplicates existing legislation or legislation awaiting consideration by the Assembly or Council; pre-empts similar legislation soon to be introduced by the national executive; will result in a money bill; or is frivolous or vexatious.<sup>289</sup>

Even if the Committee gave permission for the Bill to proceed, the majority party in the NA could still decide not to support the initiation of the Bill which meant that it would not be passed. In practice, this meant that members of the opposition could never introduce any Bills in the NA unless they were given permission by the majority party to do so. In *Oriani-Ambrosini, MP v Sisulu, MP Speaker of the National Assembly*,<sup>290</sup> the Constitutional Court invalidated the Rules of the NA which required a member of the NA to obtain permission from the NA to initiate and introduce Bills. The Court stated that South Africa's constitutional democracy 'is designed to ensure that the voiceless are heard', and is one in which the 'views of the marginalised or the powerless minorities cannot be suppressed'.<sup>291</sup> The Court approvingly quoted a passage from its earlier judgment in *Democratic Alliance and Another v Maseko NO and Another* to illustrate the principle that must apply to the evaluation of NA Rules giving effect to the constitutional provisions that empower members of the NA to take certain actions:

[T]he Constitution does not envisage a mathematical form of democracy, where the winner takes all until the next vote-counting exercise occurs. Rather, it contemplates a pluralistic democracy where continuous respect is given to the rights of all to be heard and have their views considered ... The open and deliberative nature of the process goes further than providing a dignified and meaningful role for all participants. It is calculated to produce better outcomes through subjecting laws and governmental action to the test of critical debate, rather than basing them on unilateral decision-making.<sup>292</sup>

The provisions in the Constitution that allow individual MPs to initiate legislation and introduce Bills in the NA are important as these provide members of the NA with an opportunity 'to promote their legislative proposals so that they could be considered properly'.<sup>293</sup> The members of both the majority and minority parties in the NA will then be required 'to deliberate critically and seriously on legislative proposals and other matters of national importance'.<sup>294</sup> These deliberations take place in the relevant portfolio committee before the Bill is submitted to the NA for a vote. These provisions therefore allow for the accommodation of different views in a structured and formal manner during the consideration of legislative proposals. As the Constitutional Court pointed out:

South Africa's shameful history is one marked by authoritarianism, not only of the legal and physical kind, but also of an intellectual, ideological and philosophical nature. The apartheid regime sought to dominate all facets of human life. It was determined to suppress dissenting views, with the aim of imposing hegemonic control over thoughts and conduct, for the preservation of institutionalised injustice. It is this unjust system that South Africans, through their Constitution, so decisively seek to reverse by ensuring that this country fully belongs to all those who live in it.[295](#)

This does not mean that the will of the majority party in the NA can ultimately be overridden. Once a legislative proposal has been initiated and tabled, the majority party can always vote against a Bill. This can only happen after the Bill initiated by an ordinary MP has been discussed and debated by the relevant portfolio committee. Some may say the right of opposition MPs to introduce their own Bills would therefore be of little more than ceremonial significance. However, as the Constitutional Court pointed out, this is not so as it will give opposition MPs the opportunity to go beyond an obstructionist oppositional role, allowing them to submit constructive proposals of their own about how to solve a particular legislative problem and allowing these proposals to be discussed seriously by the members of the NA.[296](#)

Despite the changes brought about by the Oriani-Ambrosini judgment, the large majority of Bills are still initiated and introduced by Cabinet members who are tasked with leading the legislative agenda of the elected government of the day. Ordinary members of the NA from the majority party usually defer to the legislative agenda set by Cabinet. This means a member of the executive, an individual Cabinet Minister, usually initiates legislation dealing with issues related to his or her portfolio before a Bill is introduced and adopted by Parliament. A Bill is the request submitted to Parliament for the approval of particular legislation in relation to a particular matter.

#### PAUSE FOR REFLECTION

One small step for Parliament, one giant leap for Oriani-Ambrosini

One commentator welcomed the Oriani-Ambrosini judgment on the basis that it must be viewed in the context of the South African electoral system which disempowers voters and weakens the links between voters and the elected representatives in the NA. Writing on his blog, De Vos stated:

Our electoral system – which requires us to vote for political parties and not for individual MPs – renders it difficult for voters to hold individual MPs accountable. Unless we join a political party and unless we actively take part in the election processes for the leadership of that party, we have little or no say in who represents us in Parliament and who is elected as our President. This diminishes transparency and accountability in the governance and law-making processes.

Given these limitations, rules of the National Assembly which would make it impossible for individual MPs to have their alternative legislative proposals tabled and discussed by the Assembly diminishes our democracy and robs voters of the opportunity to judge whether they support the legislative proposals of the governing party or of any given opposition party.

Chief Justice Mogoeng emphasised that providing such alternatives ‘allows for a legislative proposal to be debated properly and in a manner that is open to the public, before its fate is decided’.[297](#) Furthermore:

public participation, so as to cultivate an ‘active, informed and engaged citizenry’, is also facilitated by rules that allow even minority party members, who are not ordinarily represented in Cabinet, to initiate or prepare legislation and introduce a Bill. This is because the public can only properly hold their elected representatives accountable if they are sufficiently informed of the relative merits of issues before the Assembly.[298](#)

Of course, this does not mean, for example, that the majority party would have changed course and ditched the Secrecy Bill in favour of an alternative Bill proposed by Lindiwe Mazibuko. The majority party would remain entitled to make the final decision on which Bill to pass into law – no matter how unpopular that Bill might be with the electorate.

But in the long run its MPs would have been forced to engage seriously with an alternative Bill proposed by the opposition. A failure to do so in a serious and competent manner would have run the risk of turning away more informed voters and would have eroded the voting majority of the dominant party. On the other hand, if the MPs of the majority party had managed to show up the Bill proposed by the opposition as frivolous, unworkable or unpopular, the party would have been able to gain more support from voters currently supporting an opposition party or not supporting any party at all. The judgment will not cure all the ills that beset our democratic Parliament. The culture within political parties, which requires strict party discipline and control of individual MPs by party leaders, is too strong for this. But it is a first small step towards making our democratic Parliament relevant once more.[299](#)

There are important structural and contextual reasons why legislation is usually initiated and prepared by the responsible Cabinet member and not by individual members of the NA or by a committee of the NA: [300](#)

- First, South Africa has been a one-party dominant political system since the dawn of democracy in 1994. Many of the leaders of the dominant party serve in Cabinet which, in turn, initiates legislation in accordance with the mandate of the majority party.[301](#)
- Second, members of the NA are elected via the closed list proportional representation system. They depend on their party’s support to retain their seats, making it unlikely that members of the majority party will take an initiative not approved by the party leadership.[302](#)
- Third, the current governing party, the ANC, ‘is a highly centralized organisation where power has become increasingly concentrated in the hands of the President ... and the party leadership’.[303](#)
- Fourth, the Speaker plays an important role in deciding which Bills are introduced and the Speaker is a member of the majority party in the NA.[304](#)
- Last, the political culture of the governing ANC is one in which internal debate flourishes but once a decision is taken, ordinary members tend to defer to the leadership who serve in Cabinet.[305](#)

Apart from these contextual reasons, there is also a practical reason for the dominance of the executive in the preparation and introduction of legislation. Legislation is usually introduced

to give legislative effect to the political programme of action of the majority party which forms the government. In theory, the voters endorse this programme in an election. The party then has a democratic mandate to implement the policies for which it was elected as the governing party. However, no party can foresee all eventualities and therefore does not place its entire legislative programme before the electorate during an election. This is why – as we have seen – the Constitution requires Parliament to facilitate public involvement in the law-making process. Be that as it may, voters elected a party to lead the government and expect the leadership of the party to take the initiative and to formulate policies and eventually legislation to give effect to such policies.

The process of law making through the initiative of the executive, the normal way in which laws are passed, can be simplified as follows:

- Policy is formulated via various channels, including through Nedlac, through internal party discussions and Cabinet discussions which finally results in a draft Bill which is eventually approved by Cabinet.
- After Cabinet has approved the draft Bill, the Cabinet Minister responsible for the policy in question usually first introduces the Bill in the NA or, in some cases, the NCOP. This is referred to as the first reading.
- The Bill is then referred to the appropriate portfolio committee for review and amendment after facilitation of public involvement as discussed above. This is referred to as the second reading and the Bill is considered ready for passing.
- If the NA passes the Bill, it is forwarded to the upper House, the NCOP, for its assent. If the Bill was introduced in the NCOP and approved there, it is forwarded to the NA for its assent.[306](#)
- Once both Houses of Parliament have passed the Bill, it is presented to the President for signature. The President does not have a general right to veto Bills duly passed by Parliament but may refuse to sign the Bill if he or she has reservations about its constitutionality. In this case, the President must refer the Bill back to the NA for reconsideration.[307](#)

#### Figure 4.3 The law-making process

The Constitution regulates the manner in which Bills may be introduced in Parliament during the law-making process. The Constitution prescribes different procedures for Bills amending the Constitution,[308](#) ordinary Bills not affecting provinces,[309](#) ordinary Bills affecting provinces [310](#) and money Bills.[311](#) In *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others*, the Constitutional Court stated that it is therefore important that a Bill must first be classified into or tagged as one of these four categories to determine which procedure should be followed in enacting the Bill.[312](#) Tagging is important because the procedures for the passing of the various kinds of Bills differ with some procedures being more onerous than others. The Joint Rules of Parliament establish the Joint Tagging Mechanism (JTM) which consists of the Speaker and Deputy Speaker of the NA and the Chairperson and Deputy Chairperson of the NCOP.[313](#) The function of the JTM is, among other things, to make final rulings as to the classification of Bills.[314](#)

The Constitutional Court clarified the test for tagging a Bill in *Tongoane*.<sup>315</sup> It is important to note that a distinction is drawn between the characterisation of a Bill for purposes of deciding whether the Bill affects the provinces or not (something we deal with in chapter 8 of this book) and its tagging. As the Constitutional Court pointed out, for the purposes of tagging, we do not enquire into the substance or the true purpose and effect of the Bill. Rather, what matters is whether the provisions of the Bill ‘in substantial measure fall within a functional area’ which the Constitution empowers provinces to legislate on. The test to be adopted when tagging Bills is therefore called the ‘substantial measures test.’<sup>316</sup> This test for classification or tagging is therefore different from that used by the Court to characterise a Bill in order to determine whether either the national or the provincial legislature has the legislative competence to enact the law (with which we deal in chapter 8 of this book). The latter test ‘involves the determination of the subject-matter or the substance of the legislation, its essence, or true purpose and effect, that is, what the [legislation] is about’.<sup>317</sup> As the Court pointed out in *Tongoane*:

There is an important difference between the ‘pith and substance’ test and the ‘substantial measure’ test. Under the former, provisions of the legislation that fall outside of its substance are treated as incidental. By contrast, the tagging test is distinct from the question of legislative competence. It focuses on all the provisions of the Bill in order to determine the extent to which they substantially affect functional areas listed in Schedule 4 and not on whether any of its provisions are incidental to its substance. The test for tagging must be informed by its purpose. Tagging is not concerned with determining the sphere of government that has the competence to legislate on a matter. Nor is the process concerned with preventing interference in the legislative competence of another sphere of government. The process is concerned with the question of how the Bill should be considered by the provinces and in the NCOP, and how a Bill must be considered by the provincial legislatures depends on whether it affects the provinces. The more it affects the interests, concerns and capacities of the provinces, the more say the provinces should have on its content.<sup>318</sup>

The purpose of tagging is therefore to determine the nature and extent of the input of provinces (through the NCOP) on the contents of legislation affecting them. Tagging also determines whether the Bill should be passed with a simple majority or according to special procedures with super majority. Because the Constitution attaches considerable importance to the voice of the provinces in legislation affecting them, tagging is therefore pivotal. This is because – as we show elsewhere – depending how a Bill is tagged, the NCOP will either have more or less power in the passing of the Bill.

Tagging also reflects the fact that government under our Constitution ‘is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated’.<sup>319</sup> As we shall see in chapter 8 of this book, legislative functions between the national and provincial spheres of government are not rigidly assigned to each sphere and many important functions are shared. This requires co-operation between the various spheres of government which ‘include the requirement that each sphere of government must “respect the constitutional status, institutions, powers and functions of government in the other spheres” and “co-operate with one another in mutual trust and good faith by ... co-ordinating their actions and legislation with one another”.’<sup>320</sup> As the NCOP helps to facilitate co-operative government in the law-making process, it should be accorded the requisite respect by ensuring that Bills are tagged in the correct manner.

As mentioned above, Bills can be tagged in at least four different ways after which different requirements apply to the passing of the Bill depending on how it was tagged.

First, a Bill can be tagged as a section 74 Bill because it is a Bill amending the Constitution. Section 74 Bills require special procedures to be adhered to. Special majorities are also required to pass the Bill to protect the Constitution from being amended too easily.

Section 1 – which contains the founding provisions of the Constitution – can only be changed with the support of 75% of the members of the NA and the support of at least six of the nine provincial delegations to the NCOP.[321](#)

Bills amending the Bill of Rights can only be changed with the support of two-thirds of the members of the NA and six of the nine provincial delegations in the NCOP.[322](#)

Any other provision of the Constitution may be amended by a Bill passed by the NA with a supporting vote of at least two-thirds of its members. The support of six of the provincial delegations to the NCOP is not required for these ordinary amendments to the Constitution unless the proposed amendment ‘relates to a matter that affects the [NCOP]; or alters provincial boundaries, powers, functions or institutions; or amends a provision that deals specifically with a provincial matter’.[323](#)

To protect the powers and functions of individual provinces in the case of a Bill that concerns only a specific province or provinces, the NCOP may not pass the Bill or the relevant part unless it has been approved by the legislature or legislatures of the province or provinces concerned.[324](#) This means that a Bill that would amend the provincial boundary between, for example, Limpopo Province and Mpumalanga can only be passed with the approval of both the legislatures of Limpopo and Mpumalanga and only if, in addition to this, six of the nine provincial delegations support the amendment.

Second, Bills can be tagged as section 75 Bills or ordinary Bills that do not affect the Provinces. When a Bill is tagged as a section 75 Bill it can only be introduced in the NA (not in the NCOP).[325](#) Once passed by the NA, the NCOP must vote on the Bill, but in this case, members of the NCOP do not vote by delegation. Instead, in terms of section 75(2) of the Constitution, each delegate in a provincial delegation has one vote and the question is decided by a majority of votes cast subject to a quorum of one-third of the delegates being present.

The NCOP can pass the Bill, pass the Bill subject to amendments proposed by it or reject the Bill.[326](#) If the NCOP passes the Bill without proposing amendments, the Bill must be submitted to the President for assent.

If the NCOP rejects the Bill or passes it subject to amendments, the NA must reconsider the Bill, taking into account any amendment proposed by the NCOP. Because it is a section 75 Bill that does not affect the provinces, the NA has the power to override the NCOP amendments by passing the original Bill in the normal manner. In this case, the amendments made by the NCOP will fall away and the original Bill passed by the NA will be sent to the President for assent.

However, the NA may decide to endorse the amendments made by the NCOP by passing the same version passed by the NCOP. In this case, the Bill with the NCOP amendments will be

sent to the President. Alternatively, the NA may decide not to proceed with the Bill at all. In this case, the Bill will lapse and will not become law.[327](#)

When considering these procedures it is important to note the differences between the legislative process to be followed when a Bill is tagged as a section 75 Bill and when it is tagged as a section 76 Bill and the relatively powerful role of the NA in the passing of the former compared to the latter. The most important difference is that a section 75 Bill can, in effect, be passed by the NA without support by the NCOP. This would become important if the majority party in the NA does not enjoy a majority in the NCOP, for example when less than 45 of the delegates in the NCOP are from the majority party. The second House could then conceivably try to obstruct the legislative programme of the majority party in the NA, something – as we shall see – that it may be able to do with section 76 Bills but not with section 75 Bills. This is because the NCOP represents the interest of the provinces in Parliament and will play a much more powerful role in the passing of legislation in cases where the draft legislation affects the provinces.

Third, Bills can be tagged as section 76 Bills or ordinary Bills affecting the provinces. A Bill will be tagged in this way if it falls within a functional area listed in Schedule 4 of the Constitution or provides for legislation envisaged in particular sections of the Constitution.[328](#) It will also be tagged as a section 76 Bill if it purports to intervene in Schedule 5 matters (in terms of section 44(2)) and other financial matters affecting the Provinces.[329](#) A Bill dealing with the seat of Parliament must be similarly tagged.[330](#) If the provisions of a Bill in substantial measure fall within the functional area listed in Schedule 4, it will be dealt with under section 76.[331](#)

Tagging a Bill as a section 76 Bill is important as this gives more weight to the position of the NCOP in the passing of the Bill. Unlike with a section 75 Bill, the Bill can be introduced in either the NA or the NCOP. Once the Bill has been passed in the House in which it was introduced, either the NA or the NCOP (the first House), it is sent to the other House (the second House) to pass, amend or reject it. If the second House passes the Bill without amendment, the Bill must be submitted to the President for assent. If the Bill is passed by the second House with amendments, it must be referred back to the first House which passed it. If that House passes the amended Bill, it must be submitted to the President for assent. However, if the second House which considers the Bill rejects the Bill, or if the first House which passed the Bill refuses to pass an amended Bill referred back to it, the Bill and, where applicable, also the amended Bill, must be referred to a Mediation Committee.[332](#)

The Mediation Committee is designed as a mechanism to try to reconcile differences between the two Houses of Parliament in line with the principle of co-operative government. It consists, first, of nine members of the NA elected by the NA. Each political party with seats in the Assembly is proportionally represented on the Committee. Second, there are another nine delegates – one from each provincial delegation in the NCOP. In effect, these delegates are from the political party with a majority of delegates in the NCOP delegation.[333](#)

The Mediation Committee can only make a decision if at least five of the representatives of the NA and at least five of the representatives of the NCOP agree to support it.[334](#) The Mediation Committee can agree to support the Bill as passed by the NA, the amended Bill as passed by the NCOP or its own version of the Bill.[335](#) If the Mediation Committee is unable to agree on any of these options within 30 days of the Bill's referral to it, the Bill will lapse unless the Bill was first passed by the NA and the NA again passes the original Bill, but with

a supporting vote of at least two-thirds of its members.<sup>336</sup> This means that it is important whether the Bill was first introduced in the NA or the NCOP. Bills first introduced in the NCOP cannot ever be passed over the objections of the NCOP with a two-thirds majority in the NA as would be the case if a Bill was first introduced and passed in the NA.

If the Mediation Committee approves a version of the Bill first passed by the NA, it must be referred to the NCOP for approval. If it approves a version of the Bill first passed by the NCOP, it must be referred to the NA for approval. However, if the Mediation Committee agrees on its own version of the Bill, that version of the Bill must be referred to both the NA and the NCOP. If it is passed a second time by the NA and/or the NCOP in accordance with the procedure set out above, it must be submitted to the President for assent. Once again, the NA has an override power if it supports a Bill with a two-thirds majority in the event that the Bill was introduced in the NA and the NCOP has not supported the decision of the Mediation Committee. The NCOP does not have the same override power. In practice, it would be unlikely that the NA would be able to achieve a two-thirds majority to override the opposition of such a Bill in the NCOP. This means that as far as section 76 Bills are concerned, the NCOP is in a far more powerful position to influence or even block legislation supported by the NA than is the case with section 75 Bills. This is because the NCOP represents the interest of the provinces in the national Parliament.

These rather complicated mechanisms are aimed at facilitating co-operation and seeking consensus between the two Houses of Parliament in line with the principle of co-operative government. They also ensure that the NA, with its 400 members representing the various political parties proportionally to their electoral strength, would not be able to ride roughshod over the NCOP whose delegates are equally divided between all provinces. In essence, this means that provincial delegations with fewer voters have the same power as provincial delegations of large provinces.

#### PAUSE FOR REFLECTION

What happens when the NA and NCOP are controlled by different majority parties?

The section 76 mechanism for passing ordinary legislation affecting the provinces will probably only become important in a case where one political party or a coalition of parties controls the NA while that party or coalition does not control the NCOP. This may happen if the majority party gains a substantial proportion of the votes in large provinces but loses its majority support in at least five provinces, which will then be governed by another political party or a coalition of political parties.

For example, the governing party could win 53% of the vote nationally. This will entitle it to 53% of the seats in the NA and its leader will be elected President. This President will appoint a Cabinet, usually from among the members of the winning party. However, if an opposition party wins 40% of the vote nationally, it will be entitled to only 40% of the seats in the NA. It may nevertheless have garnered a majority of support in five provinces, giving it control of five of the nine delegations to the NCOP. If a section 76 Bill is now proposed by the Cabinet and supported by the 53% of members of the majority party in the NA, it will not be passed into law unless the opposition party agrees to it as it would control five of the nine provincial delegation votes and would, in effect, be able to veto the Bill.



Fourth, section 77 or money Bills require different procedures for their passing. These Bills deal with the imposition of taxes, levies, duties and surcharges to raise money for the state and with the allocation of the money raised in this way for a particular purpose, such as spending it on education, policing or health care.<sup>337</sup> The most important money Bill is the annual budget introduced by the Minister of Finance in the NA. Such a Bill will then be passed in accordance with the procedure laid down in section 75, as discussed above.

However, special procedures apply to the amendment of a money Bill by Parliament. As the Constitution stipulates,<sup>338</sup> these procedures are set down in the Money Bills Amendment Procedure and Related Matters Act.<sup>339</sup> The special procedures are necessary because the budget is a highly technical and complex Bill prepared in conjunction with the technical experts of the Treasury and it could create financial uncertainty and unintended consequences if Parliament were allowed to amend the budget in the same way as it is allowed to amend other pieces of legislation.

Once a Bill has been passed in the prescribed manner, either in terms of sections 74, 75, 76 or 77, the Bill must be sent to the President for his or her assent as envisaged in section 79 of the Constitution. In terms of section 79(1) of the Constitution, the President may refer a Bill back to the NA for reconsideration if he or she has reservations about its constitutionality. If the President has reservations about the constitutionality of the Bill, he or she must specify what these reservations are when he refers a Bill back to Parliament.<sup>340</sup> However, the President cannot refuse to sign the Bill because he or she does not support any aspect of the Bill for political reasons. In other words, the President does not have a general power to veto a Bill duly passed by Parliament because he or she does not agree politically with any provisions in the Bill or because his or her conscience would require him or her not to sign the Bill into law. As all constitutional obligations must be performed diligently and without delay,<sup>341</sup> the President is required to sign a Bill duly passed by Parliament within a reasonable time. If the President refers the Bill back to Parliament owing to concerns about its constitutionality, Parliament can address the President's concerns. If the reconsidered Bill fully accommodates the President's reservations, then he or she must sign it. If not, the President may, pursuant to section 79(4) of the Constitution, refer the Bill to the Constitutional Court for a decision on its constitutionality. The President is empowered to refer a matter to the Constitutional Court in terms of section 79 only if his or her reservations concerning the constitutionality of the Bill are not fully accommodated by Parliament. If the President has no reservations concerning the constitutionality of the Bill, or if his reservations have been fully accommodated by Parliament, the referral would be incompetent.<sup>342</sup> If the Constitutional Court decides that the Bill is constitutional, the President must assent to and sign it as envisaged in section 79(5).

In *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill*,<sup>343</sup> the Constitutional Court spelled out, first, the circumstances under which the President is allowed to refer a Bill to the Constitutional Court, and, second, the scope of the Court's power to consider the constitutionality of the Bill. There were three main questions that the Constitutional Court had to consider in this judgment, namely:

- whether the Court was required to consider only the reservations that the President had expressed, or whether it can and should direct its attention more widely
- whether the Court, in determining the Bill's 'constitutionality', should examine every provision of the Bill so as to certify conclusively that in every part it accords with the Constitution

- whether the Court’s finding regarding the Bill’s constitutionality or otherwise precludes or restricts later constitutional adjudication regarding its provisions once enacted.[344](#)

The Constitutional Court found that it need only consider the reservation that the President has expressed when he or she refers to Bill to the Constitutional Court. Since the Constitutional Court need only consider reservations expressly specified by the President regarding the Bill’s constitutionality, it does not have to consider the Bill in its entirety to determine its constitutionality by examining each and every provision. The Court also found that the decision regarding the constitutionality of the Bill does not preclude future constitutional adjudication regarding its provisions once enacted, except those provisions already determined during the consideration of the President’s reservation.[345](#) The Court left open whether it could in such proceedings consider the constitutionality of provisions not referred to by the President which are in obvious conflict with the Constitution.[346](#)

Even after a Bill has been duly passed by Parliament and signed into law by the President, after which the Bill becomes known as an Act of Parliament, the constitutionality of the Act can be challenged if a sufficient number of MPs applies to the Constitutional Court for an order declaring that all or part of an Act of Parliament is unconstitutional.[347](#) Such application can only be launched if it is supported by at least one-third of the members of the NA and if it is made within 30 days of the date on which the President assented to and signed the Act.[348](#) The Constitutional Court is given the power to stall the implementation of the Act referred to it in this manner and can order that all or part of an Act that is the subject of an application has no force until the Court has decided the application, but only if the interests of justice require this and the application has a reasonable prospect of success.[349](#)

Table 4.2 Bills passed by Parliament in 1999 and 2000 [350](#)

Type of Bill	1999	2000
Section 76(1) Bills affecting provinces, introduced in the NA	05	08
Section 76(2) Bills affecting the provinces, introduced in the NCOP	14	12
Section 77 money Bills	06	06
Section 75 Bills not affecting provinces	33	44
Section 74(3) Bills amending the Constitution	02	00
Total	60	70

#### 4.5.6 Delegation of legislative powers to executive or other legislatures

According to section 44(1)(a)(iii) of the Constitution, Parliament may assign its legislative authority, except the power to amend the Constitution, to any legislative body in another sphere of government. This power relates to the assignment of power to other legislative spheres of government. It is therefore explicitly provided in the Constitution that Parliament is allowed to assign its law-making power, except the power to amend the Constitution, to provincial legislative and municipal councils. Where the national Parliament is of the view that a certain issue may be better dealt with by provincial legislatures, it may therefore explicitly empower such legislatures to enact legislation on that topic even if the topic falls outside the exclusive or concurrent functional areas in which provincial legislatures have the competence to legislate.

A more difficult question arises where Parliament delegates its law-making powers to the executive. This kind of delegation is not unusual as Parliament is not always well equipped to formulate detailed provisions regarding the implementation and regulation of laws. In *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others*, the Constitutional Court stated that in a modern state, Parliament cannot be expected to deal with all such matters itself and it is therefore necessary for effective law making to read this power delegating such legislative functions to other bodies into the Constitution.<sup>351</sup>

However, there are limits to what kind of law-making powers can be delegated and to whom.<sup>352</sup> In *Executive Council of the Western Cape Legislature*, the Constitutional Court stated that although there is nothing in the Constitution which prohibits Parliament from delegating subordinate regulatory authority to other bodies, there is ‘a difference between delegating authority to make subordinate legislation within the framework of a statute under which the delegation is made, and assigning plenary legislative power to another body ...’<sup>353</sup> The question in each case would be whether, given the structure of the Constitution and the relevant empowering text, the Constitution permits a delegation of such law-making power or not. The Constitution uses a range of expressions when it confers legislative power on Parliament and the wording used will often give an indication of whether delegations would be permissible. As Ngcobo stated in *Executive Council of the Province of the Western Cape v Minister for Provincial Affairs and Constitutional Development and Another*, *Executive Council of KwaZulu-Natal v President of the Republic of South Africa and Others*:

Sometimes [the Constitution] states that ‘national legislation must’; at other times it states that something will be dealt with ‘as determined by national legislation’; and at other times it uses the formulation ‘national legislation may’. Where one of the first two formulations is used, it seems to me to be a strong indication that the legislative power may not be delegated by the Legislature, although this will of course also depend upon context.<sup>354</sup>

The text of the relevant empowering provision of the Constitution must be read in context and we should consider factors that flow from the nature of the Constitution, its structure and scheme. To this end, as stated by the Constitutional Court in *Justice Alliance of South Africa v President of Republic of South Africa and Others*, *Freedom Under Law v President of Republic of South Africa and Others*, *Centre for Applied Legal Studies and Another v President of Republic of South Africa and Others*, we must consider ‘the nature and extent of the delegation’.<sup>355</sup>

We must keep in mind that the primary reason for delegation is to ensure that the legislature is not overwhelmed by the need to determine minor regulatory details. Delegation relieves Parliament from dealing with detailed provisions that are often required for the purpose of implementing and regulating laws and is necessary for effective law making. However, we must draw a distinction between delegation to make subordinate legislation within the framework of an empowering statute and ‘assigning plenary legislative powers to another body’.<sup>356</sup> Where the doctrine of parliamentary sovereignty governs, Parliament may delegate as much power as it chooses. In a constitutional democracy, however, such as that operating in South Africa, Parliament may not ordinarily delegate its ‘essential legislative functions’ to the executive.<sup>357</sup> This means that Parliament can delegate some of its powers to the executive, most notably through delegating the power to make regulations in terms of legislation passed by Parliament to individual Ministers or to the President. However, Parliament may not delegate its plenary legislative power, that is, the power to make original

legislation, to an executive authority such as the President or a Cabinet Minister as such a delegation will breach the separation of powers doctrine.<sup>358</sup> It may only delegate the power to make subordinate legislation such as proclamations and regulations.<sup>359</sup> This distinction between original and subordinate legislation is drawn from the fact that when Parliament makes legislation, it does so in accordance with the 'original' legislative powers conferred on it by the Constitution. However, the development of legislation, such as proclamations, by the executive refers to the law that is made by virtue of the power granted from a lawful source, such as the Constitution.<sup>360</sup> Thus, although the separation of powers doctrine does not allow one branch of government to exercise a power exclusively allocated to another branch of government, it can exercise powers delegated to it by another branch as long as this power is not exclusively reserved for the other branch of government.

The question whether Parliament can assign its law-making power to the executive was first answered in the case of Executive Council of the Western Cape Legislature. This case involved section 16A(1) of the Local Government Transition Act <sup>361</sup> that aimed to transform local government in line with the new constitutional dispensation. This section provided that 'the President may amend this Act and any schedule thereto by proclamation in the gazette'. This section therefore effectively conferred on the President, the head of the executive branch of government in the national sphere of government, the power to amend the Act by proclamation. The President used this power to transfer certain functions provided for in the Act from the provincial to the national sphere of government. The Executive Council of the Western Cape Legislature challenged the constitutionality of this section and the relevant proclamation on the basis that Parliament cannot delegate its law-making function to the executive. Chaskalson P, as he then was, held:

[t]he legislative authority vested in Parliament under section 37 of this [interim] Constitution is expressed in wide terms – 'to make laws for the Republic in accordance with this Constitution'. In a modern state, detailed provisions are often required for the purpose of implementing and regulating laws, and Parliament cannot be expected to deal with all such matters itself. There is nothing in the Constitution which prohibits Parliament from delegating subordinate regulatory authority to other bodies. The power to do so is necessary for effective law-making. It is implicit in the power to make law for the country and I have no doubt that under our Constitution Parliament can pass legislation delegating such legislative functions to other bodies. There is, however, a difference between delegating authority to make subordinate legislation within the framework of a statute under which the delegation is made, and assigning plenary legislative power to another body, including, as section 16A does, the power to amend the Act under which the assignment is made.<sup>362</sup>

The Court then decided in this case that it was inconsistent with the doctrine of separation of powers for Parliament to delegate the power to amend its laws to the President as head of the executive.<sup>363</sup> It argued that although the need for assignment of subordinate legislative authority cannot be overemphasised, the assignment of plenary legislative powers is a different matter all together. This is not allowed under the new constitutional dispensation as it could give rise to a constitutional crisis. The Court indicated that the relevant constitutional provision which deals with legislative authority is not merely directive but is peremptory. It therefore cannot be said that the power to delegate primary legislative power is implied in the Constitution. Therefore, Parliament cannot delegate its original law-making power to the executive. It can only delegate the making of subordinate legislation such as presidential proclamations and ministerial regulations. The position is the same under the 1996 Constitution.<sup>364</sup>

## PAUSE FOR REFLECTION

Parliament cannot delegate its plenary law-making power to the President

In *Justice Alliance*, the Constitutional Court confirmed the view that Parliament cannot delegate its plenary law-making power to the President. The Court stated that one should look at both textual and contextual indicators to determine whether such a drastic delegation would be permitted in terms of the separation of powers doctrine.

Section 176(1) of the Constitution states that the term of office for a Constitutional Court judge is normally 12 years 'except where an Act of Parliament extends the term of office of a Constitutional Court judge'. Parliament had passed section 8(a) of the Judges Remuneration and Condition of Employment Act [365](#) which permitted the further extension of the term of office of the Chief Justice if requested to do so by the President. The President had then relied on this section in an attempt to extend the term of office of the former Chief Justice, Sandile Ngcobo. The section on which the President relied was then challenged in Court which declared it unconstitutional. The Court confirmed that where the doctrine of parliamentary sovereignty governs, Parliament may delegate as much power as it chooses. However, in a constitutional democracy, Parliament may not ordinarily delegate its essential legislative functions, one of which would be to delegate the power to extend the term of office of the Chief Justice to the President.

The Court provided several reasons for this view. In this case, the power to extend the term of a Constitutional Court judge goes to the core of the tenure of the judicial office, judicial independence and the separation of powers. It was therefore deemed to be an essential legislative function that could not be delegated.[366](#) The independence of its judges is given vigorous protection by means of detailed and specific provisions regulating their appointment. The Chief Justice is at the pinnacle of the judiciary and thus the protection of his or her independence is just as important.[367](#) Section 8(a) thus violated the requirement for judicial independence as well as violating the principle of separation of powers. This does not mean that the term of office of judges of the Constitutional Court could not be extended by Parliament in accordance with section 176(1). However, if Parliament wished to do so, it would have to pass legislation providing for such an extension that applied to all judges of the Constitutional Court.[368](#)

Apart from the legal point about the limits of the power of Parliament to delegate its legislative powers to the executive, this case also illustrates the need of members of the legislature and the executive to follow the correct legal route when they take action in terms of the Constitution and the law. Had Parliament passed a law extending the term of office of all Constitutional Court judges to 15 years, there would not have been a successful challenge to the move and the then Chief Justice would have been able to serve as Chief Justice for another three years.

### 4.6 National House of Traditional Leaders

The 1996 Constitution provides for the recognition of the 'institution, status and role of traditional leadership' in South Africa, provided that this is done subject to the other provisions in the Constitution.[369](#) It further provides for the establishment of a House of Traditional Leaders by the passing of national legislation. The Constitution envisages that this House of Traditional Leaders will deal with matters relating to traditional leadership, the

role of traditional leaders, customary law and the customs of communities observing a system of customary law.<sup>370</sup> To this end, Parliament passed the National House of Traditional Leaders Act (NHTLA) <sup>371</sup> which establishes a House of Traditional Leaders who serve for a term of five years.<sup>372</sup>

The House is not democratically elected. Instead, the Act provides for the election of senior traditional leaders or headmen or women by the various provincial Houses of Traditional Leaders. If such Houses have not been established, leaders serving on traditional councils would serve in the National House of Traditional Leaders.<sup>373</sup> At least a third of the members of the House must normally consist of women. However, if the Minister is satisfied that there is an insufficient number of women to participate in the House, the Minister must, after consultation with the Premier of the province in question and the provincial House concerned, determine a lower threshold.<sup>374</sup>

Because the Constitution explicitly states that traditional leadership can only be recognised in a manner that complies with the other provisions of the Constitution, including the founding values of a democratic state that embody the values of ‘universal adult suffrage ... regular elections and a multi-party system of government’,<sup>375</sup> the role of the House of Traditional Leaders is advisory in nature. It does not have the power to veto legislation or to take part in a non-advisory role in the formal law-making processes prescribed in sections 74 to 77 of the Constitution. Instead, it is empowered to consider Parliamentary Bills referred to it by the Secretary to Parliament in terms of section 18 of the Traditional Leadership and Governance Framework Act (TLGFA).<sup>376</sup> These Bills are any Bills ‘pertaining to customary law or customs of traditional communities’.<sup>377</sup> The National House of Traditional Leaders is then required, within 30 days, to make any comments about the Bill.<sup>378</sup>

The House of Traditional Leaders is also empowered to ‘advise the national government’ and to ‘make recommendations’ relating to policy and legislation regarding traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law.<sup>379</sup> The House of Traditional Leaders must also be consulted on ‘national government development programmes that affect traditional communities’.<sup>380</sup>

The other powers bestowed on the House of Traditional Leaders are vague and of no binding consequence to the work of the national legislature. These include the powers and duties to co-operate with the provincial Houses of Traditional Leaders and to promote:

- the role of traditional leadership within a democratic constitutional dispensation
- nation building
- peace, stability and cohesiveness of communities
- the preservation of the moral fibre and regeneration of society
- the preservation of the culture and traditions of communities
- socio-economic development and service delivery
- the social well-being and welfare of communities
- the transformation and adaptation of customary law and custom so as to comply with the provisions of the Bill of Rights in the Constitution.<sup>381</sup>

The House of Traditional Leaders therefore does not have any direct legislative powers and cannot veto legislation passed by Parliament. It is, in essence, an advisory body aimed at ensuring that the interests of traditional leaders and the communities represented by traditional leaders are considered in the law-making process. Although the House of

Traditional Leaders must therefore be consulted on issues affecting traditional communities, including the passing of legislation affecting traditional communities, the consultation process does not afford traditional leaders any powers to slow down or thwart the legislative programme of Parliament.

## SUMMARY

The Constitution establishes a bicameral Parliament consisting of two Houses. The National Assembly (NA) is the directly elected House of Parliament representing the interests of all the people, to which MPs are elected in terms of a pure proportional representation electoral system. The National Council of Provinces (NCOP) is the indirectly selected House of Parliament representing the interests of the various provinces in the national Parliament. The NCOP comprises provincial delegations consisting of six permanent delegates appointed by each of the provincial legislatures and four special delegates nominated from among the members of each of the provincial legislatures.

The two Houses of Parliament together provide a forum for debate on important issues; hold the executive organs of state in the national sphere of government accountable to Parliament; exercise an oversight function over the exercise of national authority and over other organs of state; and pass national legislation. The NA is the more prominent and powerful of the two Houses because it is directly elected and because it elects and can also dismiss the President and the other members of the executive. The NA therefore has more power to hold the executive accountable than the NCOP.

Members of Parliament (MPs) enjoy important rights and privileges to protect their ability to take part in the various functions of Parliament without fear of legal sanction. MPs enjoy the right to freedom of expression in Parliament and in the various committees of Parliament and are insulated from the law of defamation.

The various committees of Parliament – especially the various portfolio committees that focus on the work associated with a specific government department – are seen as the engine room of Parliament. Although members of the NA and the NCOP can ask questions of members of the Executive and have a right to have their questions answered, either orally in each of the Houses or in written form, portfolio committees can call members of the executive and departmental officials to testify before them to oversee the work of the individual departments and to hold the members of the executive accountable.

Legislation is normally formulated by the relevant government department on the initiative of the Minister involved and then submitted to Parliament for consideration. MPs can also formulate Bills, but in the past this seldom happened. Even where members of opposition parties formulate and table Bills, such Bills have only a small chance of being adopted by Parliament because the majority party in Parliament will normally only support legislation in accordance with its own programme and policies. Without support from the majority party, Bills cannot be passed.

Once legislation is tabled in Parliament (after being approved by the Cabinet), discussions on the details of such Bills tabled in Parliament occur in portfolio committees who have the power to amend the draft legislation before it is sent to the NA and the NCOP for approval. During this process, members of the public have an important right to participate in the law-

making process and can make written and sometimes oral submissions to the various portfolio committees about draft legislation.

Arguably, the most important power of Parliament is the power to pass legislation. Bills must be tagged by a Joint Tagging Mechanism to determine how Parliament will procedurally deal with the passing of the draft legislation. Once portfolio committees have processed Bills, each of the Houses of Parliament must consider and vote on a Bill. The Constitution prescribes different procedures to be followed for the passing of Bills that have been tagged as section 74, 75, 76 and 77 Bills. The Constitution also requires that Bills amending the Constitution can only be passed by enhanced majorities. Once both Houses of Parliament have passed the same version of a Bill, it is sent to the President for signature. The President can refer a Bill back to Parliament if he or she has reservations about the constitutionality of aspects of the Bill. If the reservations are not dealt with, the President can also refer the Bill to the Constitutional Court to determine whether the reservations about the constitutionality of the Bill are valid or not.

1.

[1](#)Ss 55 and 68 read with Schedules 4 and 5 of the Constitution.

[2](#)See s 42(1) of the Constitution.

[3](#)Currie, I and De Waal, J (2001) *The New Constitutional and Administrative Law*, Vol 1 Constitutional Law 133.

[4](#)Rautenbach, IM and Malherbe, EFJ (2009) *Constitutional Law* 5th ed 122.

[5](#)Currie and De Waal (2001) 133. See generally Ackerman, B (2000) *The new separation of powers* *Harvard Law Review* 113(3):633–729 at 682. According to Ackerman, the second House ‘may enhance the deliberative character of political life’.

[6](#)S 42(3) of the Constitution.

[7](#)S 42(4) of the Constitution.

[8](#)S 86 of the Constitution.

[9](#)Ss 89 and 102 of the Constitution.

[10](#)S 91(3) of the Constitution.

[11](#)S 55(2) of the Constitution.

[12](#)S 193(4) of the Constitution.

[13](#)S 42(6) of the Constitution.



14In terms of s 76(5) of the Constitution, an absolute majority of members of the NA – that is 200 or more of its members – is required to pass such legislation.

15S 51(3) of the Constitution.

16S 63(3) of the Constitution.

17Currie and de Waal (2001) 131.

18See Basson, DA and Viljoen, HP (1988) South African Constitutional Law 86–7.

19It is true that s 1(d) of the Constitution states that the Republic of South Africa is a democratic state founded on, inter alia, a multiparty system of government and that several other provisions in the Constitution recognise the role of political parties in the legislative and executive process. However, the exact relationship between the representatives of political parties in the legislature and the executive on the one hand and the party leadership on the other hand is never defined. S 19 guarantees for everyone the rights to form a political party; to participate in the activities of, or recruit members for, a political party; and to campaign for a political party or cause. S 57(2)(c) states that the rules of the NA must provide for financial and administrative assistance to each party represented in the Assembly in proportion to its representation to enable the party and its leader to perform their functions in the NA effectively. S 57(2)(d) requires that the NA rules must recognise the leader of the largest opposition party in the Assembly as the Leader of the Opposition.

20(CCT 109/12) [2012] ZACC 31; 2013 (2) BCLR 202 (CC) (18 December 2012).

21Ramakatsa para 16.

22S 46(1)(d) of the Constitution.

23See ss 86, 89 and especially 102 of the Constitution.

24Hiebert, JL ‘Constitutional experimentation: Rethinking how a Bill of Rights functions’ in Ginsburg, T and Dixon, R (eds) (2011) Comparative Constitutional Law 307.

25The disciplinary case lodged against former ANC Youth League leader, Julius Malema, and his ultimate expulsion from the ANC illustrates the governing party’s insistence on party discipline. See Mthembu, J (2012, 4 February) ANC statement on the National Disciplinary Committee of appeal today available at <http://www.anc.org.za/show.php?id=9363>.

26Requiring members to toe the party line on a particular vote on pain of sanction or disciplinary proceedings is often referred to as a ‘three line whip’.

27African National Congress Constitution, as amended and adopted at the 52nd National Conference, Polokwane, 2007 available at <http://www.anc.org.za/show.php?id=207>.

28S 25.3 of the African National Congress Constitution.

29See Malefane, M (2012, 1 April) Turok going juju route? Sunday World available at <http://www.sundayworld.co.za/news/2012/04/01/turok-going-juju-route>.

30Friedman, S (2012, 6 August) State secrecy is the real threat to our security Business Day Live available at <http://www.businessday.co.za/articles/Content.aspx?id=128285>.

31Ss 57(1) and 70(1) of the Constitution.

32S 45.

33Ss 57 and 70.

34Ss 57(2) and 70(2).

35See generally Oriani-Ambrosini, MP v Sisulu, MP Speaker of the National Assembly (CCT 16/12) [2012] ZACC 27; 2012 (6) SA 588 (CC); 2013 (1) BCLR 14 (CC) (9 October 2012) and also Mazibuko v Sisulu and Another (CCT 115/12) [2013] ZACC 28; 2013 (6) SA 249 (CC); 2013 (11) BCLR 1297 (CC) (27 August 2013).

36Ss 56 and 69 of the Constitution.

37Parliament of the Republic of South Africa (2011, June) Rules of the National Assembly 7th ed available at <http://www.pmg.org.za/files/doc/2012/NA%20Rules%207th%20edition-1.pdf>.

38NA Rule 325(1). The Rules of the National Council of Provinces 9th ed (2008, March), available at <http://www.pmg.org.za/parlinfo/ncoprules>, do not contain a similar provision and merely state in Rule 103 that:

1. (1) For the purposes of performing its functions a committee may, subject to the Constitution, legislation, the other provisions of these Rules and resolutions of the Council –
2. (a) summon any person to appear before it to give evidence on oath or affirmation, or to produce documents;
3. (b) receive petitions, representations or submissions from interested persons or institutions;
4. (c) conduct public hearings;
5. (d) permit oral evidence, representations and submissions;
6. (e) determine its own procedure;
7. (f) meet at a venue determined by it, which may be a venue beyond the seat of Parliament if the Council is not in session.

39Ss 59(1)(b) and 72(1)(b).

40Ss 59(1)(b) and 72(1)(b) of the Constitution.

41Ss 59(2) and 72(2) of the Constitution.

42The Rules of the NCOP also allow for certain limitations of public access to its committees. Rule 110(1) affirms that:

[m]eetings of committees and subcommittees are open to the public, including the media, and the member presiding may not exclude the public, including the media, from the meeting, except when:

1. (a) legislation, these Rules or resolutions of the Council provide for the committee or subcommittee to meet in closed session; or
2. (b) the committee or subcommittee is considering a matter which is –
3. (i) of a private nature that is prejudicial to a particular person;
4. (ii) protected under parliamentary privilege, or for any other reason privileged in terms of the law;
5. (iii) confidential in terms of legislation; or
6. (iv) of such a nature that its confidential treatment is for any other reason reasonable and justifiable in an open and democratic society.

[43](#)(CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) (17 August 2006) para 300 (per Yacoob J dissenting) speaking not about the ‘public involvement’ requirements common to ss 59, 72 and 118 of the Constitution and which were central to the matter before the court (at least in so far as s 118 was concerned), but rather about the ‘public access’ requirements common to the same sections.

[44](#)Mbete, S and February, J (2011, 5 April) Access to Parliament is a right not a privilege Business Day Live available at <http://www.bdlive.co.za/articles/2011/04/05/sthembile-mbete-and-judith-february-access-to-parliament-is-a-right-not-a-privilege;jsessionid=8485BDB17C0C6F9F61B042C08A00C41E.present1.bdfm>.

[45](#)Mazibuko v Sisulu and Another (CCT 115/12) [2013] ZACC 28; 2013 (6) SA 249 (CC); 2013 (11) BCLR 1297 (CC) (27 August 2013).

[46](#)See Rautenbach and Malherbe (2009) 147.

[47](#)Griffith, JAG and Ryle, M (1989) Parliament: Functions, Practice and Procedures 85.

[48](#)(CCT62/05) [2006] ZACC 10; 2006 (6) SA 235 (CC); 2007 (1) BCLR 1 (CC) (3 August 2006).

[49](#)Act 117 of 1998. S 28(1) of the Municipal Structures Act provides that:

[pr]ovincial legislation in terms of section 161 of the Constitution must provide at least –

1. (a) that councillors have freedom of speech in a municipal council and in its committees, subject to the relevant council’s rules and orders as envisaged in section 160(6) of the Constitution; and
2. (b) that councillors are not liable to civil or criminal proceedings, arrest, imprisonment or damages for –
3. (i) anything that they have said in, produced before or submitted to the council or any of its committees; or
4. (ii) anything revealed as a result of anything that they have said in, produced before or submitted to the council or any of its committees’.

S 28(2) goes on to provide that ‘[u]ntil provincial legislation contemplated in subsection (1) has been enacted the privileges referred to in paragraphs (a) and (b) of subsection (1) will apply to all municipal councils in the province concerned’.

[50](#)Dikoko para 39.

[51](#)Hatsell, J (1818) Precedents of Proceedings in the House of Commons Vol 1 2.

[52](#)R v Paty (Case of the Men of Aylesbury) (1704) 2 Lord Raym 1105, 91 ER 817.

[53](#)Ss 58(1)(a) and 71(1)(a) of the Constitution. See also NA Rule 44 and NCOP Rule 30.

[54](#)Ss 58(1)(b) and 71(1)(b) of the Constitution read with NA Rule 44(2) and NCOP Rule 30(b).

[55](#)(297/98) [1999] ZASCA 50; [1999] 4 All SA 241 (A) (26 August 1999).

[56](#)De Lille (SCA) paras 2–3.

[57](#)De Lille (SCA) para 8.

[58](#)De Lille (SCA) para 9.

[59](#)De Lille and Another v Speaker of the National Assembly 1998 (3) SA 430 (C).

[60](#)Act 91 of 1963. This Act has been repealed and replaced with the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004.

[61](#)De Lille (HC) para 25.

[62](#)De Lille (HC) para 33.

[63](#)De Lille (HC) paras 37–8.

[64](#)De Lille SCA. See also O’Regan, K (2005) Checks and balances: Reflections on the development of the doctrine of separation of powers under the South African Constitution PER 8(1):120–50 at 132–3.

[65](#)De Lille (SCA) para 20.

[66](#)A similar provision regarding the NCOP can be found in s 71(2).

[67](#)De Lille (SCA) para 17.

[68](#)De Lille (SCA) para 29.

[69](#)De Lille (SCA) para 29–30.

[70](#)NA Rules 52–4.

[71](#) Ss 59(1)(a) and 72(1)(a) of the Constitution.

[72](#) Houston, G, Liebenberg, I and Dichaba, W ‘The social dynamics of public participation in legislative processes in South Africa’ in Houston, G (ed) (2001) *Public Participation in Democratic Governance in South Africa* 142.

[73](#) See generally Hassen, E (1998) *The Soul of a Nation: Constitution-Making in South Africa* ch 7 on the inclusive and participatory process involved in the drafting of the 1996 Constitution. The process leading up to the adoption of the 1993 Constitution can hardly be said to have been inclusive and there was little attempt to ensure the participation of the general public in the constitutional negotiations at CODESA. See also Du Plessis, L and Corder, H (1994) *Understanding South Africa’s Transitional Bill of Rights*.

[74](#) Report of the Independent Panel Assessment of Parliament (Govender Report) 53 available at <http://www.info.gov.za/view/DownloadFileAction?id=94365>.

[75](#) See Currie and De Waal (2001) 15 and Roux, T ‘Democracy’ in Woolman, S and Bishop, M (eds) (2013) *Constitutional Law of South Africa* 2nd ed rev service 5 10.14.

[76](#) Houston et al (2001) 142.

[77](#) Houston et al (2001) 149.

[78](#) *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* (CCT 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC) (13 June 2008); *Matatiele Municipality and Others v President of the Republic of South Africa and Others* (1) (CCT73/05) [2006] ZACC 2; 2006 (5) BCLR 622 (CC); 2006 (5) SA 47 (CC) (27 February 2006); *Matatiele Municipality and Others v President of the Republic of South Africa and Others* (2) (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC) (18 August 2006).

[79](#) A similar provision in s 118(1)(a) of the Constitution deals with the need of provincial legislatures to facilitate public involvement in the law-making process.

[80](#) See *Doctors for Life* para 209 where Ngcobo J for the majority held that ‘[t]he obligation to facilitate public involvement is a material part of the law-making process. It is a requirement of manner and form. Failure to comply with this obligation renders the resulting legislation invalid’.

[81](#) *Doctors for Life* para 209.

[82](#) *Doctors for Life* para 115.

[83](#) *Doctors for Life* para 116 and para 227 where Sachs J (concurring) stated: ‘Public involvement in our country has ancient origins and continues to be a strongly creative characteristic of our democracy. We have developed a rich culture of imbizo, lekgotla, bosberaad, and indaba. Hardly a day goes by without the holding of consultations and public participation involving all “stakeholders”, “role-players” and “interested parties”, whether in the public sector or the private sphere. The principle of consultation and involvement has

become a distinctive part of our national ethos. It is this ethos that informs a well-defined normative constitutional structure in terms of which the present matter falls to be decided.’

[84](#)Doctors for Life para 122.

[85](#)Doctors for Life para 122.

[86](#)Doctors for Life para 125.

[87](#)Doctors for Life para 127. See also *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* (CCT 13/03, CCT 12/03) [2004] ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) (4 March 2004) para 49 where the Court stated that ‘[i]n dealing with the issue of reasonableness, context is all important’.

[88](#)Doctors for Life para 128.

[89](#)Doctors for Life para 129.

[90](#)Doctors for Life para 131.

[91](#)Doctors for Life para 278.

[92](#)Doctors for Life para 292.

[93](#)S 42(1). See also Devenish, GE (2005) *The South African Constitution* 219 and Currie and De Waal (2001) 133.

[94](#)S 46(1) of the Constitution.

[95](#)S 46(1) and (2) of the Constitution.

[96](#)Act 73 of 1998.

[97](#)S 1(d) of the Constitution.

[98](#)See Rautenbach and Malherbe (2009) 126. For a detailed look at electoral systems and choices, see generally Reynolds A (1999) *Electoral Systems and Democratisation in Southern Africa*.

[99](#)Currie and De Waal (2001) 134.

[100](#)For a brief history of why proportional representation was the electoral system of choice, see Klug, H (2010) *The Constitution of South Africa: A Contextual Analysis* 156–8. In particular, Klug notes at 158 that ‘the option of proportional representation became a means to avoid the contentious task of immediate demarcation [into respective constituencies] and a way to guarantee the effective participation of small parties, including those with minority ethnic or racially based constituencies’.

[101](#)See Rautenbach and Malherbe (2009) 127.

102For example, the Democratic Alliance (DA) provides for a complex selection process for members who stand for public office through an Electoral College, which is not necessarily a representative body. See Democratic Alliance (2010) Regulations for the Nomination of Candidates available at <http://www.da.org.za/about.htm?action=view-page&category=469>.

103Ramakatsa para 73.

104Ramakatsa para 74. S 19 of the Constitution states:

1. (1) Every citizen is free to make political choices, which includes the right –
2. (a) to form a political party;
3. (b) to participate in the activities of, or recruit members for, a political party; and
4. (c) to campaign for a political party or cause.

105Ramakatsa para 74.

106See generally Norris, P (1997) Choosing electoral systems: Proportional, majoritarian and mixed systems *International Political Science Review* 18(3):297–312 at 302–4.

107To gain a seat in the NA, a party has to obtain a minimum number of votes. The minimum number of votes per seat is determined by dividing the total number of votes cast by the number of seats plus one. The result plus one, disregarding fractions, then becomes the minimum number of votes per seat. In the 2009 elections, the minimum numbers of votes per seat was 44 092 votes (0,25%). An important consequence of the fact that a party had to obtain a minimum number of votes is that the votes cast for any party that does not obtain this minimum will be ‘wasted’. The wastage, however, is far less than in a constituency-based system.

108On the dangers of gerrymandering, see generally Issacharoff, S (2002) Gerrymandering and political cartels *Harvard Law Review* 116(2):593–648 at 593.

109See the data compiled by the Inter-Parliamentary Union (2013) Women in national parliaments available at <http://www.ipu.org/wmn-e/classif.htm>.

110Hendricks, C ‘Party strategy not popular prejudice: Electoral politics in South Africa’ in Piper, L (ed) (2005) *South Africa’s 2004 Election: The Quest for Democratic Consolidation*, EISA Research Report No 12, 66 at 82; Lowe Morna, C, Rama, K and Mtonga, L (2009, 15 July) Gender in the 2009 South African elections, Gender links for equality and justice, available at <http://www.genderlinks.org.za/article/gender-in-the-2009-south-african-elections-2009-07-15>.

111De Vos, P ‘South Africa’s experience with proportional representation’ in De Ville, J and Steytler, N (1996) Voting in 1999: Choosing an Electoral System 29–43.

112Norris (1997) 306. See generally Matlosa, K (2004) Electoral systems, constitutionalism and conflict management in Southern Africa *African Journal on Conflict Resolution* 4(2):11–53 at 34.

113See Currie and De Waal (2001) 134.

[114](#)Currie and De Waal (2001) 134.

[115](#)Currie and De Waal (2001) 134.

[116](#)Matlosa (2004) 27.

[117](#)Matlosa (2004) 27. See also Currie and De Waal (2001) 135. Gerrymandering is a practice that attempts to establish a political advantage for a particular party or group by manipulating geographical boundaries to create partisan or incumbent-protected districts. See Britannica Academic Edition available at <http://www.britannica.com/EBchecked/topic/231865/gerrymandering>.

[118](#)See De Vos, P (2012, 14 August) Towards a parliament for the people Constitutionally Speaking available at <http://constitutionallyspeaking.co.za/towards-a-parliament-for-the-people/>.

[119](#)See s 46(1)(c).

[120](#)S 190(1)(a)–(c) of the Constitution. See also the relevant provisions of the Electoral Act 73 of 1998 and the Local Government: Municipal Electoral Act 27 of 2000.

[121](#)S 181(2).

[122](#)(CCT 49/00) [2001] ZACC 23; 2001 (3) SA 925 (CC); 2001 (9) BCLR 883 (CC) (7 June 2001).

[123](#)Langeberg Municipality para 27.

[124](#)(CCT9/99) [1999] ZACC 5; 1999 (3) SA 191; 1999 (5) BCLR 489 (13 April 1999) para 98.

[125](#)New National Party paras 99–100.

[126](#)(CCT8/99) [1999] ZACC 3; 1999 (3) SA 1; 1999 (4) BCLR 363 (1 April 1999).

[127](#)August paras 3 and 20.

[128](#)August para 17.

[129](#)August para 16.

[130](#)New National Party para 11.

[131](#)The changes brought about by the amendment included ss 8(2)(f), and 24B(1) and (2) which read as follows:

1. 8(2) The chief electoral officer may not register a person as a voter if that person–

...



1. (f) is serving a sentence of imprisonment without the option of a fine.

...

1. 24B(1) In an election for the National Assembly or a provincial legislature, a person who on election day is in prison and not serving a sentence of imprisonment without the option of a fine and whose name appears on the voters' roll for another voting district, is deemed for that election day to have been registered by his or her name having been entered on the voters' roll for the voting district in which he or she is in prison.
2. 24B(2) A person who is in prison on election day may only vote if he or she is not serving a sentence of imprisonment without the option of a fine.

[132](#)(CCT 03/04) [2004] ZACC 10; 2005 (3) SA 280 (CC); 2004 (5) BCLR 445 (CC) (3 March 2004).

[133](#)NICRO paras 39–46.

[134](#)NICRO paras 39–46.

[135](#)NICRO paras 47–51.

[136](#)NICRO para 49.

[137](#)(CCT03/09, CCT 09/09) [2009] ZACC 3; 2009 (3) SA 615 (CC); 2009 (5) BCLR 448 (CC) (12 March 2009).

[138](#)(CCT 06/09, CCT 10/09) [2009] ZACC 4; 2009 (3) SA 649 (CC); 2009 (6) BCLR 611 (CC) (12 March 2009).

[139](#)Richter para 108.

[140](#)Richter paras 52–4.

[141](#)AParty paras 56–8.

[142](#)AParty para 59.

[143](#)S 49(1) of the Constitution.

[144](#)S 47(1)(b) of the Constitution.

[145](#)S 47(1)(c) of the Constitution.

[146](#)S 47(1)(d) of the Constitution.

[147](#)S 47(1)(e) of the Constitution.

[148](#)S 47(3)(b) of the Constitution read with NA Rule 20 which states: 'A member who wishes to absent himself or herself from sittings of this House, or of any other Parliamentary

forum of which he or she is a member, for 15 or more consecutive days on which this House or such forum sits, shall, before so absenting himself or herself, obtain the leave of this House or of a committee of this House authorised to grant such leave.’ A note states that this rule will have to be adapted in accordance with s 47(3)(b) of the Constitution, but this has not yet been done, leaving doubt about what consequences will follow if a person is absent for longer than 15 days without permission.

[149](#) See s 47(3)(c) of the Constitution as amended by s 2 of the Constitution Fifteenth Amendment Act of 2008.

[150](#) S 49(1) of the Constitution.

[151](#) S 49(2) of the Constitution.

[152](#) S 50(2) read with s 49(2) of the Constitution.

[153](#) S 51(1) of the Constitution.

[154](#) S 86(1) and (2) of the Constitution read with NA Rule 8.

[155](#) S 52 of the Constitution read with NA Rules 9 and 13.

[156](#) S 51(1) of the Constitution.

[157](#) S 51(2) of the Constitution.

[158](#) S 51(3) of the Constitution. Sittings and recesses of the NA are covered generally in Ch 4 of the NA Rules.

[159](#) NA Rule 24 states: ‘Before directing under section 51(3) of the Constitution that this House shall sit at a place other than the Houses of Parliament in Cape Town, the Speaker shall consult the Leader of the House and the Chief Whip of each party represented in this House.’

[160](#) In modern parliamentary systems, however, ‘legislatures have limited responsibility for making laws. Instead, laws are usually prepared and drafted by the executive and presented to the legislature for approval. This inevitably means that relatively few laws will emanate from the legislature itself.’ This is true of South Africa. See Nijzink, L and Murray, C (2002) *Building Representative Democracy: South Africa’s Legislatures and the Constitution* 73. See also Klug (2010) 169.

[161](#) S 55 of the Constitution.

[162](#) See 4.5 below.

[163](#) NA Rule 25(1).

[164](#) S 53(1)(a) of the Constitution read with NA Rule 25(2)(a).

[165](#) S 53(1)(b) of the Constitution read with NA Rule 25(2)(b).

[166](#)NA Rule 26.

[167](#)S 53(1)(c) of the Constitution.

[168](#)Ss 74(2)(a) and 89(1) of the Constitution.

[169](#)S 74(1)(a) of the Constitution.

[170](#)S 53(2)(a) of the Constitution.

[171](#)S 53(2)(b) of the Constitution.

[172](#)This is confirmed by NA Rule 89(2).

[173](#)S 55(2).

[174](#)Currie and De Waal (2001) 142. See also *Gauteng Provincial Legislature v Killian and 29 Others* [562/98] [2000] ZASCA 75; 2001 (2) SA 68 (SCA); [2001] 1 All SA 463 (A) (29 Nov 2000) para 30.

[175](#)See Killian para 26.

[176](#)See NA Rules Ch 12.

[177](#)NA Rule 121.

[178](#)NA Rule 125.

[179](#)NA Rule 126.

[180](#)S 42(4) of the Constitution.

[181](#)S 104 of the Constitution.

[182](#)Extract from a presentation at the Meeting of the World's Senates, 14 March 2000, Paris, cited in Nijzink and Murray (2002) 41.

[183](#)Doctors for Life para 79. See generally Murray, C and Simeon, R (1999) From paper to practice: The National Council of Provinces after its first year SA Public Law 14(1):96–141 at 98–101 for a discussion on the role of the NCOP.

[184](#)Murray, C and Simeon, R (2006) Tagging Bills in Parliament: Section 75 or section 76? SALJ 123(2):232–63 at 236.

[185](#)Murray and Simeon (2006) 236.

[186](#)Doctors for Life para 80. See also *Certification of the Constitution of the Republic of South Africa*, 1996 (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996) para 227; Malherbe, EFJ (1998) *The South African National Council of Provinces: Trojan horse or white elephant?* TSAR 1:77–96 at 82; Venter, F (2000)

Constitutional Comparison: Japan, Germany, Canada and South Africa as Constitutional States 248.

[187](#)Germany's Basic Law was drafted in 1949 and the drafters refrained from using the term 'constitution' because the Basic Law was drafted to govern a part of Germany for a transitional period that would last until reunification. On reunification, the Basic Law would cease to exist and a constitution for all German people would be adopted. On 3 October 1990, German unity was achieved within the framework of the Basic Law. The Basic Law is now thought of as an all-German Constitution despite the fact that it continues to go by the name of Basic Law and has come to 'assume the character of a document framed to last in perpetuity'. See Kommers, DP (1997) *The Constitutional Jurisprudence of the Federal Republic of Germany* 30 and Kommers, DP 'The Basic Law of the Federal Republic of Germany: An assessment after forty years' in Merkel, PH (ed) (1989) *The Federal Republic of Germany at Forty* 133 referring to the Basic Law as having taken on 'the status of a genuine Constitution'.

[188](#)Art 50 of the Basic Law for the Federal Republic of Germany provides: 'The Länder participates through the Bundesrat in the legislation and administration of the Federation.'

[189](#)Doctors for Life para 80 fn 61.

[190](#)BVerfGE 1, 300.

[191](#)See also De Villiers, B (1994) *Intergovernmental relations: The duty to co-operate – A German perspective SA Public Law* 9(1–2):430–7 at 432–3.

[192](#)S 60 of the Constitution.

[193](#)Each province is represented by a single delegation appointed in terms of a formula prescribed by the Determination of Delegates (National Council of Provinces) Act 69 of 1998 with the aim of ensuring the inclusion of all parties represented in a provincial legislature on the basis of proportional representation.

[194](#)S 60(2)(a) and (b) of the Constitution.

[195](#)S 60(2)(a) and (b) of the Constitution.

[196](#)S 60(2)(a)(i) and (ii) of the Constitution.

[197](#)S 60(2)(a)(i) of the Constitution.

[198](#)S 60(3) of the Constitution.

[199](#)S 61(4) of the Constitution.

[200](#)S 62(2) and (4) of the Constitution.

[201](#)Bishop, M and Raboshakga, N 'National legislative authority' in Woolman and Bishop (2013) 17.5.

[202](#)S 62(4)(c) of the Constitution. In *Van Zyl v New National Party and Others* (2000/002) [2003] ZAWCHC 17; [2003] 3 All SA 737 (C) (22 May 2003) para 75, the Cape High Court found that the exercising of the authority to recall a permanent delegate to the NCOP in terms of s 62(4)(c) of the Constitution constitutes the exercising of a public power because such a decision has an influence on how the NCOP, the delegations of the respective provinces and the joint committees on which delegates may serve are constituted. Such a decision may affect the manner in which those bodies perform their functions and duties and this, in turn, may affect the interests of the community at provincial and national levels. Accordingly, the exercising of this authority has a strong public component.

[203](#)Van Zyl para 90.

[204](#)In *First Certification* para 328, the Constitutional Court held that in some respects the Senate has greater power than the Council; in other respects it has less. We disagree. While the collective power of the provinces may be enhanced by the new provisions relating to the appointment, structure and functioning of the Council, the Senate certainly had more constitutional power in the national legislative process than the Council.

[205](#)(CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996) paras 331–2.

[206](#)S 75(2) of the Constitution.

[207](#)S 75(1) of the Constitution.

[208](#)S 65(2) of the Constitution. How such mandates are obtained is regulated by the Mandating Procedures of Provinces Act 52 of 2008.

[209](#)(CCT37/96) [1996] ZACC 24; 1997 (1) BCLR 1; 1997 (2) SA 97 (4 December 1996) para 62. See also *Doctors for Life* para 84.

[210](#)*Doctors for Life* para 84.

[211](#)Simeon, R and Murray, C (2001) Multi-sphere governance in South Africa: An interim assessment *Publius: The Journal of Federalism* 31(4):65–92 at 78.

[212](#)Simeon and Murray (2001) 78.

[213](#)S 66(1) of the Constitution.

[214](#)(CCT 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC) (13 June 2008).

[215](#)See s 5 of Schedule 1 of the Mandating Procedures of Provinces Act.

[216](#)*Merafong* para 50.

[217](#)S 64(1) of the Constitution. While the Chairperson and one of the Deputy Chairpersons are elected from the permanent delegates for a term of five years unless their terms as delegates expire earlier (s 64(2)), the other Deputy Chairperson is elected for a term of one

year and ‘must be succeeded by a delegate from another province, so that every province is represented in turn’ (s 64(3)).

[218](#)S 70(1) of the Constitution. This provision mirrors the provision applicable to the NA – s 57(1).

[219](#)S 70(2)(a) of the Constitution. S 57(2) contains identical provisions regarding the NA.

[220](#)S 65(1) of the Constitution.

[221](#)S 75(2) of the Constitution.

[222](#)S 65(2) of the Constitution.

[223](#)Act 52 of 2008.

[224](#)S 65(1) of the Constitution.

[225](#)Since the whole delegation has only one vote, all the delegates do not have to be present and no quorum requirement is necessary.

[226](#)S 75(2) of the Constitution.

[227](#)S 70(2)(b).

[228](#)S 70(2)(c) of the Constitution refers to s 75 Bills.

[229](#)S 42(3) of the Constitution states that the NA is able to represent the people and ensure democratic government by, among others, ‘providing a national forum for public consideration of issues’. Similarly, under s 42(4), the NCOP does so by ‘providing a national forum for public consideration of issues affecting the provinces’.

[230](#)S 55(2)(a) read with s 92(2) of the Constitution.

[231](#)S 55(2)(b) of the Constitution. The Constitution does not provide for similar powers for the NCOP. However, s 92 states that members of Cabinet are accountable to Parliament, which suggests that they are accountable to both Houses of Parliament.

[232](#)S 42(3) read with ss 55(1) and 68 of the Constitution.

[233](#)Currie and De Waal (2001) 159. See NA Rules 103–4 and NCOP Rules 83–5.

[234](#)S 59(1)(b) of the Constitution for the NA and s 72(1)(b) for the NCOP. Business must be conducted in an open manner and sittings must be held in public, but reasonable measures may be taken to regulate public access, including access of the media, and to provide for the searching of any person and where appropriate, the refusal of entry to, or the removal of, any person.

[235](#)S 59(2) of the Constitution for the NA and s 72(2) for the NCOP.

[236](#)S 59(1)(a) of the Constitution for the NA and s 72(1)(a) for the NCOP.

[237](#)NA Rules 58–72 determine the rules of debate.

[238](#)NA Rule 94.

[239](#)NA Rule 103(1).

[240](#)NA Rule 104(1).

[241](#)NCOP Rule 84(1) and (2).

[242](#)S 92(2).

[243](#)See Parliament of the Republic of South Africa (2009) Oversight and Accountability Model: Asserting Parliament’s Oversight Role in Enhancing Democracy 2.2.1 available at [http://www.parliament.gov.za/content/Microsoft%20Word%20-%20OVAC%20Model%20-%20edited%20Word%20version%20-%20Replaced%20Diagrams,Chapter%20Upper%20case\\_27-Jan-09~1~1.pdf](http://www.parliament.gov.za/content/Microsoft%20Word%20-%20OVAC%20Model%20-%20edited%20Word%20version%20-%20Replaced%20Diagrams,Chapter%20Upper%20case_27-Jan-09~1~1.pdf).

[244](#)NA Rule 138 and NCOP Rule 103.

[245](#)NA Rule 109 and NCOP Rules 240–4.

[246](#)NA Rule 110 and NCOP Rules 240–4.

[247](#)NA Rule 111 and NCOP Rules 240–4.

[248](#)See *Mazibuko v Sisulu and Another* (CCT 115/12) [2013] ZACC 28; 2013 (6) SA 249 (CC); 2013 (11) BCLR 1297 (CC) (27 August 2013).

[249](#)(CCT 115/12) [2013] ZACC 28; 2013 (6) SA 249 (CC); 2013 (11) BCLR 1297 (CC) (27 August 2013).

[250](#)NA Rules 187–90.

[251](#)Mazibuko para 10.

[252](#)Mazibuko para 43.

[253](#)Mazibuko para 44.

[254](#)Mazibuko para 44.

[255](#)Mazibuko para 44.

[256](#)Mazibuko para 47.

[257](#)Mazibuko para 57.

[258](#)S 57(1)(a) of the Constitution.

[259](#)Mazibuko para 66.

[260](#)Mazibuko para 66.

[261](#)S 102(2) of the Constitution.

[262](#)See Currie and De Waal (2001) 160.

[263](#)Kotzé, H (1997) Take Us To Our Leaders: The South African National Assembly and Its Members 18. See also Nijzink and Murray (2002) 91 where the authors argue that despite the important oversight functions of committees, we should not lose sight of the fact that the role of committees has often been at the expense of plenary sessions where committee reports could be more publicly aired and debated, the implementation of policy showcased and scrutinised, and question time be given more of a profile.

[264](#)Nash, A 'Post-apartheid accountability: The transformation of a political idea' in Chirwa, DM and Nijzink, L (2012) *Accountable Government in Africa: Perspectives from Public Law and Political Studies* 21.

[265](#)Nash (2012) 18–20.

[266](#)Nash (2012) 24.

[267](#)Parliament of South Africa 'Oversight and Accountability Model' 2.1.

[268](#)S 55(2)(b) of the Constitution.

[269](#)Parliament of South Africa 'Oversight and Accountability Model' 2.1.

[270](#)S 239 of the Constitution.

[271](#)Parliament of South Africa 'Oversight and Accountability Model' 2.1.

[272](#)Kotzé (1997) 18.

[273](#)Ss 100(1)(b) and 139(1)(b) of the Constitution respectively read with NCOP Rules 243–4.

[274](#)S 216(3)(b) of the Constitution.

[275](#)S 203 of the Constitution.

[276](#)S 125(4) of the Constitution.

[277](#)Taljaard, R (2012, 20 March) The day my idealism was extinguished The Star available at <http://www.iol.co.za/the-star/the-day-my-idealism-was-extinguished-1.1260059#.UGxEGjkWHzl>.

[278](#)Doctors for Life para 81.



[279](#)Doctors for Life para 82.

[280](#)S 44(1)(a)(ii) and 44(1)(b)(ii) of the Constitution. As we shall see, in certain very limited circumstances set out in s 44(2), Parliament may even legislate on those powers exclusively allocated to provincial legislatures.

[281](#)The question of how to deal with conflicts between provincial and national legislation will be dealt with more fully in ch 5. On conflicts, see generally Bronstein, V ‘Conflicts’ in Woolman and Bishop (2013) 16.1–16.31.

[282](#)S 44(1)(a)(i) and 44(1)(b)(i).

[283](#)S 44(1)(a)(iii).

[284](#)S 55(2) read with s 73(2) of the Constitution.

[285](#)Until the Constitutional Court handed down judgment in Oriani-Ambrosini, MP v Sisulu, MP Speaker of the National Assembly (CCT 16/12) [2012] ZACC 27; 2012 (6) SA 588 (CC); 2013 (1) BCLR 14 (CC) (9 October 2012), the private members’ Bills were regulated by the NA Rules 209–13 and 234–7.

[286](#)NA Rules 238–40.

[287](#)NA Rule 230 states: ‘(1) The Assembly initiates legislation through its committees and members acting with the permission of the Assembly in terms of these Rules. (2) Any committee or member of the Assembly may in terms of section 73(2) of the Constitution introduce a Bill in the Assembly that has been initiated in terms of Subrule (1).’

[288](#)NA Rule 234.

[289](#)NA Rule 235A.

[290](#)(CCT 16/12) [2012] ZACC 27; 2012 (6) SA 588 (CC); 2013 (1) BCLR 14 (CC) (9 October 2012).

[291](#)Oriani-Ambrosini para 43. See also South African Transport and Allied Workers Union and Another v Garvas and Others (CCT 112/11) [2012] ZACC 13; 2012 (8) BCLR 840 (CC); [2012] 10 BLLR 959 (CC); (2012) 33 ILJ 1593 (CC); 2013 (1) SA 83 (CC) (13 June 2012) para 61.

[292](#)(CCT29/02) [2002] ZACC 28; 2003 (2) BCLR 128; 2003 (2) SA 413 (CC) (12 December 2002) paras 42–3. See Oriani-Ambrosini para 47.

[293](#)Oriani-Ambrosini para 48.

[294](#)Oriani-Ambrosini para 48.

[295](#)Oriani-Ambrosini para 49.

[296](#)Oriani-Ambrosini para 57.

[297](#)Oriani-Ambrosini para 64.

[298](#)Oriani-Ambrosini para 64.

[299](#)See De Vos, P (2012, 10 October) One small step for Parliament, one giant leap for Ambrosini Constitutionally Speaking available at <http://constitutionallyspeaking.co.za/once-small-step-for-parliament-one-giant-leap-for-ambrosini/>.

[300](#)Barkan, J (2005) Emerging legislature or rubber stamp? The South African National Assembly after ten years of democracy Working paper No 134, Centre for Social Science Research: Democracy in Africa Research Unit, University of Cape Town at 9–11, available at <http://www.cssr.uct.ac.za/sites/cssr.uct.ac.za/files/pubs/wp134.pdf>. A version of this paper has now been published in Barkan, JD (ed) (2009) Legislative Power in Emerging African Democracies.

[301](#)Barkan (2005) 6.

[302](#)Barkan (2005) 6.

[303](#)Barkan (2005) 7. It is unclear whether this assertion is still correct. After the ousting of President Thabo Mbeki, power shifted from the Presidency back to the ANC leadership collective as represented by the Secretary General of the party.

[304](#)Barkan (2005) 10.

[305](#)Barkan (2005) 11.

[306](#)Barkan (2005) 13. Barkan notes that Bills may be referred back to the committee for further amendment before a formal vote, including the amendments desired by the Minister. See also Doctors for Life para 40 where Ngcobo J pointed out that the first stage, the deliberative stage, takes place when Parliament is deliberating on a Bill before passing it; the second stage, the Presidential stage, occurs after the Bill has been passed by Parliament but while it is under consideration by the President; and the third stage is the period after the President has signed the Bill into law but before the enacted law comes into force.

[307](#)S 79(1) of the Constitution. See also remarks by O'Regan J in Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others (CCT27/95) [1995] ZACC 8; 1995 (10) BCLR 1289; 1995 (4) SA 877 (22 September 1995) para 7.

[308](#)S 74.

[309](#)S 75.

[310](#)S 76.

[311](#)S 77.

[312](#)(CCT100/09) [2010] ZACC 10; 2010 (6) SA 214 (CC); 2010 (8) BCLR 741 (CC) (11 May 2010) para 45.

[313](#)Joint Rules of Parliament (6th edition) (2011) Rule 151.

[314](#)Joint Rule 151.

[315](#)Tongoane para 45.

[316](#)Tongoane para 58.

[317](#)Tongoane para 58. See also Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill (CCT12/99) [1999] ZACC 15; 2000 (1) SA 732; 2000 (1) BCLR 1 (11 November 1999) paras 63–4; Western Cape Provincial Government and Others In Re: DVB Behuising (Pty) Limited v North West Provincial Government and Another (CCT22/99) [2000] ZACC 2; 2000 (4) BCLR 347; 2001 (1) SA 500 (2 March 2000) para 36; In re: KwaZulu-Natal Amakhosi and Iziphakanyiswa Amendment Bill of 1995, In re: Payment of Salaries, Allowances and Other Privileges to the Ingonyama Bill of 1995 (CCT1/96, CCT6/96) [1996] ZACC 15; 1996 (7) BCLR 903; 1996 (4) SA 653 (5 July 1996) para 19.

[318](#)Tongoane 59–60.

[319](#)S 40(1).

[320](#)Tongoane para 67, quoting from s 41(1)(e) and 41(1)(h)(iv) of the Constitution.

[321](#)S 74(1) of the Constitution.

[322](#)S 74(2) of the Constitution.

[323](#)S 74(3) of the Constitution.

[324](#)S 74(8) of the Constitution.

[325](#)Ss 73(1) and 75(1) of the Constitution.

[326](#)S 75(1) of the Constitution.

[327](#)See s 75(1)(a)–(d) of the Constitution.

[328](#)S 76(3) of the Constitution. These sections are ss 65(2), 163, 182, 195(3) and (4), 196 and 197.

[329](#)S 76(4) of the Constitution.

[330](#)S 76(5) of the Constitution.

[331](#)Tongoane para 56 et seq.

[332](#)S 76(1) and (2) of the Constitution.

[333](#)S 78(1) of the Constitution.

[334](#)S 78(2) of the Constitution.

[335](#)S 76(1)(d) and 76(2)(d) of the Constitution.

[336](#)S 76(1)(e) and 76(2)(e) of the Constitution.

[337](#)S 77(1) read with s 214 of the Constitution.

[338](#)S 77(3).

[339](#)Act 9 of 2009.

[340](#)Liquor Bill para 12.

[341](#)S 237 of the Constitution.

[342](#)Liquor Bill para 13.

[343](#)(CCT12/99) [1999] ZACC 15; 2000 (1) SA 732; 2000 (1) BCLR 1 (11 November 1999).

[344](#)Liquor Bill para 11.

[345](#)Liquor Bill paras 14 to 20.

[346](#)See O'Regan J in Executive Council of the Western Cape Legislature para 151.

[347](#)S 80(1) of the Constitution.

[348](#)S 80(2) of the Constitution.

[349](#)S 80(3) of the Constitution.

[350](#)Annual Report of Parliament 1999 and 2000, available at <http://www.pmg.org.za/minutes/20011018-sita-annual-report-19992000-briefing>.

[351](#)(CCT27/95) [1995] ZACC 8; 1995 (10) BCLR 1289; 1995 (4) SA 877 (22 September 1995) para 51.

[352](#)Executive Council of the Western Cape Legislature para 51. See also AAA Investments (Proprietary) Limited v Micro Finance Regulatory Council and Another (CCT51/05) [2006] ZACC 9; 2006 (11) BCLR 1255 (CC); 2007 (1) SA 343 (CC) (28 July 2006) paras 49, 93 and 122–3; Constitutionality of the Mpumalanga Petitions Bill, 2000 (CCT 11/01) [2001] ZACC 10; 2002 (1) SA 447 (CC); 2001 (11) BCLR 1126 (5 October 2001) para 19; Executive Council of the Province of the Western Cape v Minister for Provincial Affairs and Constitutional Development and Another, Executive Council of KwaZulu-Natal v President of the Republic of South Africa and Others (CCT15/99,CCT18/99) [1999] ZACC 13; 2000 (1) SA 661; 1999 (12) BCLR 1360 (15 October 1999) paras 123–4.

[353](#)Executive Council of the Western Cape Legislature para 51.

[354](#)(CCT15/99,CCT18/99) [1999] ZACC 13; 2000 (1) SA 661; 1999 (12) BCLR 1360 (15 October 1999) para 125.

[355](#)(CCT 53/11, CCT 54/11, CCT 62/11) [2011] ZACC 23; 2011 (5) SA 388 (CC); 2011 (10) BCLR 1017 (CC) (29 July 2011) para 61.

[356](#)Executive Council of the Western Cape Legislature para 51. See also Justice Alliance para 51.

[357](#)Justice Alliance para 55.

[358](#)Justice Alliance para 55.

[359](#)See Executive Council of the Western Cape Legislature para 43.

[360](#)See Hoexter, C (2007) Administrative Law in South Africa 50.

[361](#)Act 209 of 1993.

[362](#)Executive Council of the Western Cape Legislature para 51.

[363](#)Executive Council of the Western Cape Legislature paras 106–13.

[364](#)This basic principle was confirmed in a separate judgment in the same case by Mahommed DP (Executive Council of the Western Cape Legislature para 136), but for slightly different – more substantive – reasons. Mahommed said these things cannot be determined in the abstract but depend, inter alia, on ‘the constitutional instrument in question, the powers of the legislature in terms of that instrument, the nature and ambit of the purported delegation, the subject-matter to which it relates, the degree of delegation, the control and supervision retained or exercisable by the delegator over the delegatee, the circumstances prevailing at the time when the delegation is made and when it is expected to be exercised, the identity of the delegatee and practical necessities generally’.

[365](#)Act 47 of 2001.

[366](#)Justice Alliance para 55.

[367](#)Justice Alliance para 56.

[368](#)Justice Alliance para 77.

[369](#)S 211(1).

[370](#)S 212(2)(a).

[371](#)Act 22 of 2009.

[372](#)S 2 of the NHTLA.

[373](#)S 3(1) and 3(2) of the NHTLA.

[374](#)S 3(4) of the NHTLA.

[375](#)S 1(d) of the Constitution.

[376](#)Act 41 of 2003.

[377](#)S 18(1)(a) of the TLGFA.

[378](#)S 18(2) of the TLGFA read with s 12(2)(a) of the NHTLA.

[379](#)S 11(2)(b) of the NHTLA.

[380](#)S 11(2)(e) of the NHTLA.

[381](#)S 11(1)(a) of the NHTLA.

## **CHAPTER 5**

Separation of powers and the national executive

[5.1 Introduction](#)

[5.2 The President](#)

[5.2.1 Election and term of office](#)

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5.1 Introduction

Figure 5.1 Separation of powers and the national executive

While Parliament is responsible for passing legislation and overseeing the exercise of national executive authority, the national executive is responsible for the day-to-day running of the country. The national executive consists of the President, the Deputy President and the members of the Cabinet. Parliament is made up of members of every political party which received enough votes in a general election to win at least one seat in the National Assembly (NA). The national executive, however, is usually made up only of the members – usually the leaders – of the majority party in the NA (or where no party has obtained a majority, the members of a coalition of parties).

It is important to distinguish between the executive, the public administration, public service and the state. When we refer to the executive, we mean the members who form the government of the day. A government is formed by the majority party (or parties who form a majority coalition <sup>1</sup>) in the NA for the limited duration of the life of the NA. This means governments come and go while the public administration, public service and the state – with all its permanent employees – stay the same even when the governing party loses an election and is replaced by another party. As the electoral fortunes of political parties wax and wane, they may find themselves either in government or in opposition. Although one political party can remain in government for many years because it remains popular and keeps winning elections, as has been the case with the ANC in democratic South Africa, that political party and the government it leads should not be conflated or confused with the public administration, public service and the state.

The public administration consists of the officials who do the core of the government's work and who implement the political decisions taken by the members of the executive.<sup>2</sup> These include all the employees of government departments, as well as the employees of other

organs of state. A slightly narrower group is the members of the public service who are those persons who work for the national and provincial government departments.<sup>3</sup>

The government or the executive must also be distinguished from the state. The state is usually viewed as an organised political community occupying a certain territory and whose members live under the authority of a constitution. The state is therefore a far broader concept than the government: it does not change except in the case of a revolution in which the state itself is overthrown and replaced with a new constitutional order or other set of governing rules, or in which the state is recreated within new geographical boundaries, or both. Even when the governing party is defeated at an election and a new government is formed, the state remains the same.

In this chapter we discuss the executive authority at the national level. The executive authority is also exercised at provincial and local levels of government. At provincial level these structures largely mirror those at the national level: provincial executives consist of the Premier and the Members of the Executive Council (MECs). In chapter 8 we will refer to these institutions with reference to the relationship between the three spheres of government. It is, however, important to note that the discussion in this chapter focuses on the executive at the national level only.

The discussion in this chapter occurs against the larger canvas of the separation of powers doctrine and the system of checks and balances in this doctrine. When discussing the appointment and possible dismissal of the President, it must be understood as a mechanism to give effect to the system of checks and balances in the separation of powers system. The discussion of the exercise of powers by members of the national executive must also be considered with reference to the powers of the NA (discussed in chapter 4) to hold the members of the national executive accountable. It is therefore impossible to study the appointment, powers and the limits placed on the exercise of powers by members of the national executive without having regard to the powers and functions of Parliament. Neither is it possible to understand the way in which the executive's exercise of power is constrained without having regard to the role of the judiciary (discussed in chapter 6).

## 5.2 The President

### 5.2.1 Election and term of office

Unlike the previous 1983 tricameral Constitution, the 1996 Constitution does not provide for the election of a State President – it refers simply to the election of a President. The NA elects the President as both the Head of State and as the head of the national executive from among the members of the NA at its first sitting after a national general election or whenever a vacancy occurs in the office of the President.<sup>4</sup> The President, in turn, appoints the members of the Cabinet who will govern the country for the electoral term of the NA – usually five years. The election of the President must be held at a time and on a date determined by the Chief Justice, but not more than 30 days after a vacancy in the office of the President occurs.<sup>5</sup>

After his or her election, the President ceases to be a member of the NA. Within five days, the newly elected President must assume office by swearing or affirming faithfulness to the Republic and obedience to the Constitution in accordance with the oath of office contained in Schedule 2 of the Constitution.<sup>6</sup>



The President may not serve more than two full terms in office which will normally be 10 years. However, if the President is elected to fill a vacancy which has occurred between elections, the period he or she serves until the next election will not count as part of one of the two terms.<sup>7</sup> This means that a President who takes over the presidency halfway through the term of the NA, and then serves out that half term plus two full terms, could serve more than 10 years as President.

In light of the points set out above, it is clear that the President is not directly elected by the voters, but is indirectly elected by the members of the NA. Usually, the leader of the majority party in the NA, who was elected by representatives of the members of that political party at its national elective congress or conference, will be elected as President.<sup>8</sup> It follows, therefore, that the President is, in effect, elected by the delegates who are selected to attend the elective conference of the political party that wins the next general election and not directly by the voters. However, voters indirectly confirm the majority party's choice of leader, and therefore as President, by voting for that party in the general election that follows on the election of the party leader.

On paper, the NA – the directly elected body – is more powerful than the President or his or her Cabinet as the NA has the power not only to elect the President, but also to remove him or her from office. In practice, the President and the other members of the executive remain the more powerful arm of government until such time as he or she loses the support of the majority party in the NA. This is because as long as the President enjoys the support of the members of the majority political party of which the President would usually be the leader, his or her position as party leader will provide him or her with enormous influence over ordinary members of the party in the NA.

The NA can remove the President from office in one of two ways. First, in terms of section 89(1) of the Constitution, the NA can remove the President from office if it adopts a resolution to that effect with a supporting vote of at least a two-thirds majority if they find that one of the specified grounds for the removal of the President exists. These grounds are a serious violation of the Constitution or the law, serious misconduct or inability to perform the functions of office.<sup>9</sup> These are objective grounds and the NA can only remove the President in this manner on the basis of a finding that one or more of these grounds is present.

The NA cannot remove the President from office in terms of section 89 merely because he or she has lost the support of the majority party in the NA. The power conferred on the NA does not provide a wide political discretion to members of the NA, but confers a power on its members related to safeguarding the nation against the abuse of power by the President. Removing the President in this manner, which is also called the impeachment of the President, has potentially serious consequences. Anyone who has been removed from the office of President because of a serious violation of the Constitution or the law, or for serious misconduct, is prohibited from receiving any benefits of that office, including a pension, and may not serve in any public office again.<sup>10</sup> A President who resigns, who retires after serving two full terms or whose party loses an election and is not re-elected as President is entitled to these benefits.

Second, the President can also be removed from office for purely political reasons in terms of section 102(2) of the Constitution, but only if the NA, by a vote supported by a simple majority of its members, passes a motion of no confidence in the President. Section 102 reflects the essentially parliamentary nature of our system of government as it signals that the

President and his or her Cabinet are required at all times to retain the support of the majority of members of the NA.<sup>11</sup>

Where one political party has obtained more than 50% of the votes in the NA, this will in effect mean that the President is at all times required to retain the support of his or her party both inside and outside the NA. If the President loses the support of his or her party, a vote of no confidence can be instituted against the President after which he or she will have to resign. Following the Constitutional Court's judgment in *Mazibuko v Sisulu and Another*,<sup>12</sup> any member of the NA can now propose a motion of no confidence in the President and have it debated in the NA. It is, however, highly unlikely that such a motion will be passed unless the President has lost the support of his or her party.

South Africa has a closed list proportional representation electoral system in which political party leaders have influence over who represents the party in the NA. The practical effect of this system is that the President must retain the support of the majority party leadership to ensure that he or she is not 'recalled' by that leadership. If members of the majority party in the NA are instructed by the party leadership to support a vote of no confidence in the President, they would probably agree to do so as their failure to obey such an instruction may well lead to their removal from the NA and their replacement with members who will obey such an order. This is because the Constitution provides that a member of the NA ceases to be a member if he or she 'ceases to be a member the party that nominated that person as member of the Assembly'.<sup>13</sup> This means if a member of the NA refuses to follow instructions from party leaders to support a vote of no confidence in the President, he or she can be removed from the party for ill-discipline and replaced with a more docile member.

### CRITICAL THINKING

The legality of the decision by the ANC NEC to 'recall' former President Mbeki from office

In his book, *Eight Days in September: The Removal of Thabo Mbeki*,<sup>14</sup> the Reverend Frank Chikane writes about the dramatic removal of then President Thabo Mbeki from office by the National Executive Committee (NEC) of the ANC. Members of the NEC were elected at Polokwane at the end of 2007 after a bitter struggle between Mbeki and his supporters and President Jacob Zuma and his supporters. Chikane writes as follows:

It was after midnight of Friday, 19 September 2008 – to be precise, just before 1.00 a.m. on Saturday – when the first text messages began to come through: 'the NEC has decided to recall Mbeki as president of the country'. Another said that ANC officials had been appointed to visit Mbeki immediately, that night, to inform him of the NEC decision. Other text messages kept coming from NEC members in Esselen Park celebrating that they had won and that Mbeki was to be removed or else expressing concern over the consequences of the NEC decision ...

Calls also began to come through from Mbeki's advisers asking what they should do. Advocate Mojanku Gumbi, the president's legal adviser, was among the first to call and we discussed what the presidency needed to do. Her second call concerned a message from the staff at Mahlamba Ndlopfu, saying that they had been asked to wake the president as a delegation from the ANC was coming to inform him about the NEC decision. Presumably the thinking was – as a matter of courtesy – that he should learn about the decision from the party, not from the media or third parties, but we believed he should not be woken. Advocate

Gumbi and I would be at Mahlamba Ndlopfu early in the morning to inform him about the impending visit. We instructed the staff accordingly and made arrangements with the ANC to send their delegation at about 9.00 a.m., by which time we thought the president would be ready to start his day. Advocate Gumbi and I agreed that she (together with the legal unit in the presidency) would review all the legal issues related to the decision and advise how the government would handle the matter – a procedure dependent on the nature of the decision, which we would only hear officially from the delegation later that morning.

Questions are asked (but not answered) in the book about the legality of the decision by the ANC NEC to ‘recall’ former President Mbeki from office and whether Mbeki was legally required to obey the ‘recall’ by the NEC. Constitutionally, former President Mbeki had no legal duty to obey the decision of the NEC to ‘recall’ him. He could have refused in the hope of garnering support from among the ANC members serving in the NA. However, if he had refused to heed the instruction by the NEC, serious consequences might have ensued. First, his refusal may have led to disciplinary charges being brought against him and he may eventually have been expelled from the ANC. Second, the ANC members of the NA would have been instructed to rely on section 102 of the Constitution to pass a vote of no confidence in Mbeki after which he would have had to resign. In these circumstances, the President had little choice but to resign, which he did in due course after addressing the nation.

This dramatic event in South Africa’s history alerts us to the sometimes complex relationship between political parties (especially the governing party) and the elected officials in the legislature and the executive. Although the President and the members of the NA are constitutionally required to act in accordance with the Constitution, strict party discipline also requires them to obey the instructions of the political party to which they belong. In this context, the absence of more detailed provisions in the Constitution or legislation regulating the relationship between political parties and elected officials may be viewed as a weakness in our constitutional system.

Because the President fulfils a vital role in running the country as the Head of State and head of the executive, it is important that there should never be a vacancy in this position. Another office-bearer will act as President when:

- the President is absent from the Republic
- when the President is otherwise unable to fulfil the duties of President, for example due to illness
- there is a vacancy in the office of President that arises when the President resigns or dies while in office, a motion of no confidence is passed in the President or the President is removed from office.

The Deputy President will ordinarily fill this temporary vacancy but if he or she is unavailable, the following office-bearers will act as President in the following order:

- a Minister designated by the President, but if the President has not designated such a person
- a Minister designated by the other members of the Cabinet, but if the Cabinet has not designated such a person
- the Speaker of the NA until the NA designates one of its other members as acting President.[15](#)

This means that if the President falls ill, passes away or resigns, the Deputy President will usually act as President until a new President is elected or until the President can resume his or her duties. However, if the Deputy President is also unavailable because he or she has resigned or has also passed away, somebody else, in the order listed above, will be appointed as acting President to ensure that there is no power vacuum at the top of the executive.

An Acting President has all the responsibilities, powers and functions of the President.<sup>16</sup> Before assuming the responsibilities, powers and functions of the President, the Acting President must swear or affirm faithfulness to the Republic and obedience to the Constitution in accordance with the oath of office contained in Schedule 2 of the Constitution.<sup>17</sup> A person who as Acting President has sworn or affirmed faithfulness to the Republic need not repeat the swearing or affirming procedure for any subsequent term as Acting President during the period ending when the person next elected President assumes office.<sup>18</sup>

### 5.2.2 The President as Head of State and as head of the executive

The President is vested with powers that are conferred on him or her by the Constitution in his or her capacity as the Head of State as well as the head of the national executive.<sup>19</sup> The legal significance of this distinction is that as Head of State the President exercises his or her authority alone and usually need not consult the other members of the Cabinet.<sup>20</sup> When the President exercises head of the executive powers, he or she acts in consultation with his or her Cabinet.<sup>21</sup>

When the President acts as Head of State, he or she cannot 'abdicate' the exercise of such a power <sup>22</sup> by:

- • unlawfully delegating that power conferred on him or her as Head of State <sup>23</sup>
- • acting 'under dictation' by merely following the instructions of another without applying his or her mind to the matter at hand <sup>24</sup>
- • 'passing the buck' by referring the decision to somebody else.<sup>25</sup>

This does not mean that when contemplating the exercise of this kind of Head of State power, the President should not (or does not have the right to) consult with and take the advice of Ministers and advisers as long as he or she takes the final decision.<sup>26</sup> The Constitutional Court can check on whether the Head of State powers are exercised in accordance with the Constitution and can confirm that such an exercise of power does not infringe on the Bill of Rights or breach the principle of legality. We deal with this check on the exercise of power by the President in more detail in the following section.

The Head of State powers are usually distinguished from the head of the executive powers by focusing on whether the President is required to exercise a political discretion on behalf of the government, in which case the President acts as the head of the executive, or whether the President is exercising a power as the Head of State, which implies an absence of a clear exercise of a political discretion. As Head of State, the President is representative of all the people, not only of the government formed by the majority party.<sup>27</sup> However, as Currie and De Waal point out, this distinction is difficult to uphold.<sup>28</sup>

A better distinction can be drawn between the exercise of the Head of State power and the head of the executive power by focusing on the historical emergence of the South African office of the President. For a large part of the twentieth century during most of the apartheid

era, a prime minister headed the South African executive. At first, a Governor General and then, after 1961 when South Africa became a Republic, a State President fulfilled the more ceremonial role of Head of State. This mirrored the roles in the United Kingdom (UK) of the Prime Minister and the Queen. In this system, the Head of State (the Queen in the UK, the State President in South Africa) formally exercised the Head of State power but usually on the advice of his or her Prime Minister. Since 1983, the two positions have been joined in South Africa in the position of an executive State President, renamed President in 1994 with the advent of democracy. The former uncodified prerogative powers of the President, derived from the British system, were extinguished and were codified in section 84(2) of the Constitution.<sup>29</sup> In this system, the President therefore fulfils the duties of both the head of the executive, which are similar to the role of the Prime Minister in the UK, and the duties of the more ceremonial role of Head of State which is similar to the role of the Queen in the UK.

The Constitution provides some clarity on the distinction between Head of State and head of the executive powers by listing these powers in two separate sections. Section 84(2) of the Constitution lists the Head of State powers exercised by the President alone and states that the President exercises Head of State powers when he or she:

- • assents to and signs Bills
- • refers a Bill back to the NA for reconsideration of the Bill's constitutionality
- • refers a Bill to the Constitutional Court for a decision on the Bill's constitutionality
- • summons the NA, the NCOP or Parliament to an extraordinary sitting to conduct special business
- • makes any appointments that the Constitution or legislation requires the President to make, other than as head of the national executive
- • appoints commissions of enquiry
- • calls a national referendum in terms of an Act of Parliament
- • receives and recognises foreign diplomatic and consular representatives
- • appoints ambassadors, plenipotentiaries, and diplomatic and consular representatives
- • pardons or reprieves offenders and remits any fines, penalties or forfeitures
- • confers honours.

The President thus has the power to assent to Bills or to refer Bills back to Parliament because he or she 'has reservations about the constitutionality of a Bill'.<sup>30</sup> Unlike the President of the United States of America, the President of South Africa does not have the power to veto legislation merely because he or she opposes the legislation. However, section 79(1) of the Constitution places a duty on the President to refer a Bill back to the NA for reconsideration if the President has reservations about the constitutionality of specific sections of the Bill. In terms of section 79(4), the President must assent to and sign the Bill if, after reconsideration by the NA, a Bill fully accommodates the President's reservations. If it does not, the President must either assent to and sign the Bill or refer it to the Constitutional Court for a decision on its constitutionality. The Joint Rules of Parliament state that when the President refers a Bill back to the NA, the committee tasked with considering the President's constitutional objections 'must confine itself to the President's reservations'.<sup>31</sup> This means Parliament cannot reconsider the Bill in its entirety, but can only reconsider those sections identified by the President as being constitutionally problematic.<sup>32</sup>

Section 85(1) of the Constitution states that the executive authority of the Republic is vested in the President while section 85(2) confirms that the President exercises the executive authority together with the other members of the Cabinet. The President has the sole authority

to appoint the Deputy President, Cabinet Ministers and Deputy Ministers and also has the power to dismiss the Deputy President, Cabinet Ministers and Deputy Ministers.<sup>33</sup> The President also has the sole authority to appoint the leader of government business in the NA from among the members of the NA.<sup>34</sup> The President exercises executive authority, together with the other members of the Cabinet, by:

- • implementing national legislation except where the Constitution or an Act of Parliament provides otherwise
- • developing and implementing national policy
- • co-ordinating the functions of state departments and administrations
- • preparing and initiating legislation
- • performing any other executive function provided for in the Constitution or in national legislation, which includes the appointment of the National Director of Public Prosecutions,<sup>35</sup> the Military Command of the National Defence Force,<sup>36</sup> the National Commissioner of Police Service <sup>37</sup> and the heads of the intelligence services.<sup>38</sup>

### CRITICAL THINKING

How the formal power of the President to appoint and dismiss is constrained by internal party political considerations

Although the President has the constitutional authority to appoint and dismiss the Deputy President and other members of the Cabinet, in practical terms this power is indirectly limited although not by any provision of the Constitution itself. As we have argued above, a close relationship exists in the South African system between political parties on the one hand and the members of the legislature and the executive on the other. The reason for this is that members of the legislature are elected via their respective political parties and political parties insist that elected leaders adhere strictly to party discipline.

This means that when the President considers the appointment or dismissal of the Deputy President, Cabinet Ministers and Deputy Ministers, he or she will usually informally consult the leadership of the governing party before making an appointment or before dismissing a member of the Cabinet. This is despite the fact that constitutionally, the power to make these appointments is that of the President alone. When a President appoints or dismisses a Cabinet member, he or she needs to ensure support from his or her political party to retain the confidence of the political party of which he or she is the leader. The formal power to make these appointments may therefore be informally constrained by the demands of intraparty politics.

In June 2005, former President Thabo Mbeki 'relieved' then Deputy President Jacob Zuma from his position as Deputy President of the country after Zuma's financial adviser was convicted of soliciting a bribe on behalf of the then Deputy President. Mbeki stated that he had 'come to the conclusion that the circumstances dictate that in the interest of the Honourable Deputy President, the Government, our young democratic system, and our country, it would be best to release the Hon Jacob Zuma from his responsibilities as Deputy President of the Republic and Member of the Cabinet'.<sup>39</sup> This decision formed part of a series of events which culminated in the defeat of President Mbeki by Jacob Zuma as leader of the ANC at the ANC elective conference at Polokwane in December 2007. Some commentators – rightly or wrongly – have argued that the dismissal of the Deputy President by Mbeki, while constitutionally authorised and even admirable, contributed to the intensity

of the leadership struggle between the two men and assisted Zuma in his efforts to build support inside the ANC in the run-up to the ANC conference. This illustrates the manner in which the formal power of the President to appoint and dismiss is constrained by internal party political considerations.[40](#)

The role, powers and administrative functions of the South African President have increased since 1994. When Nelson Mandela became President, the office of the President had been scaled down. Given the mammoth task facing the executive of transforming the country, it was important to enhance the capacity of the Presidency. To address this issue, Mr Mandela appointed a Commission of Enquiry Regarding the Transformation and Reform of the Public Service. This Presidential Review Commission aimed to assist with the transformation of the state and its principal executive arm to enable it to consolidate democracy and to ensure accountability, transparency and openness.[41](#) The Report argued that a radical reappraisal of the functions, structures, personnel and management of the Office of the President was required to ensure greater direction and co-ordination of government policy at all levels.[42](#)

Although not all the recommendations of the Review Commission were implemented, it did lead to a bolstering of the administrative capacity of the Office of the President and a greater centralisation of power in this Office. This tendency continued during the term of President Thabo Mbeki with some of his critics questioning what they called the ‘excessive concentration of power’ in the Office of the President.[43](#)

Another way of viewing this increased power of the Office of the President is to focus on the manner in which the executive has implemented the 1996 Constitution’s provisions regarding the President and the national executive. This view argues that it gives effect to the structure intended by the drafters of the Constitution.[44](#) An alternative viewpoint with regard to the increased power of the Office of the President is to argue that the increased power of the Office of the President reflects the balance of political forces between the three branches of government. The power of the Office of the President has further increased under President Jacob Zuma who created two additional Ministries in his office – that of the National Planning Commission and that of the Minister of Performance and Evaluation.[45](#)

## CRITICAL THINKING

Has the power of the Office of the President in fact increased during President Zuma’s tenure?

In his book, *The Zuma Years: South Africa’s Changing Face of Power*, Calland argues that compared to President Thabo Mbeki, President Jacob Zuma’s Presidency is in some ways less influential and powerful. The reason for this is because of President Zuma’s relatively lesser political standing and influence, and perhaps because of a deliberate move to water down the power of the President in relation to the governing party. Calland argues that to prevent a repeat of the ‘imperial Mbeki presidency’ in which the President was able to ‘overcome’ his Ministers through the sheer force of his organisational capacity, the ‘kitchen cabinet’ of influential advisers and Ministers has been smashed as part of the post-Polokwane reorganisation of government and the reassertion of the governing party over government. Calland states that:

The paradox of the Zuma years is this: the Presidency is less powerful because of who he is, but the Presidency is perhaps more so, because of structural changes. However, since so

much of the Presidency's political and institutional heft is drawn directly from the president himself, his individual weaknesses, of which there are many, are exaggerated by the absence of a strong team around him. Zuma is afforded little protection from himself.<sup>46</sup>

However, other commentators like Friedman have pointed out that President Zuma's Presidency must be viewed against the background of the increasing influence of Cabinet Ministers in the security cluster. Friedman claims President Zuma has staffed the security cluster with trusted allies which has led to an increased 'desire to operate in the dark'.<sup>47</sup>

The national Parliament is relatively weak due to the effects of the electoral system and strict party discipline. In addition, the President has so far always been the leader of the dominant party in Parliament. Given these facts, it was inevitable that the powers of the President and the executive would increase as they are mandated to give effect to the policies and programmes of the political party elected by the vast majority of South Africans to lead the country. However, given these practical political realities, it is important to focus on the constitutionally imposed limits of the powers of the President and his or her executive. As the powers of the Office of the President increase and as the electoral dominance of the majority party is extended, it is inevitable that the courts will be required to intervene and to check the exercise of power of the President and other members of the executive where they overstep their constitutionally granted authority.

### 5.2.3 The limits on the exercise of presidential power

As pointed out above, the President act as both Head of State and as head of the national executive and is granted wide powers to fulfil his or her duties in this regard. However, apart from the political constraints under which a President must exercise these powers, the powers of the President are also limited in other ways. It is important to establish the formal limits explicitly placed on the exercise of power by the President as well as the substantive limits placed on the exercise of power by the President. This is because of the requirement that the President must act in accordance with the provisions in the Bill of Rights and according to the principle of legality.

Several constitutional provisions place formal limits on the manner in which the President must exercise some of the Head of State and head of executive powers. For example, when appointing ordinary judges of the High Court, the President has no discretion and must appoint the candidates recommended to him or her by the Judicial Service Commission (JSC).<sup>48</sup> Similarly, when appointing the Public Protector, the Auditor-General and the members of the Human Rights Commission, the Commission for Gender Equality and the Electoral Commission, the President acts 'on the recommendation of the NA'.<sup>49</sup> The President therefore does not exercise an independent discretion but merely formally appoints the candidates selected by the NA. When appointing the head of the National Prosecuting Authority (NPA) in terms of section 179(1)(a) of the Constitution, read with section 9 of the National Prosecuting Authority Act,<sup>50</sup> the President can appoint only a fit and proper South African citizen with due regard for his or her experience, conscientiousness and integrity. Moreover, when appointing the Chief Justice and Deputy Chief Justice the President must first consult with the JSC and the leaders of opposition parties in the NA.<sup>51</sup> He or she must also consult the JSC before appointing the President and Deputy President of the Supreme Court of Appeal (SCA).<sup>52</sup> Failure to adhere to these requirements would render the appointments unlawful.<sup>53</sup>



In addition, a decision by the President must be in writing if it is taken in terms of legislation or has legal consequences.<sup>54</sup> Another Cabinet member must countersign a written decision by the President if that decision concerns a function assigned to that other Cabinet member.<sup>55</sup> For example, the decision by the President to appoint ambassadors would have to be countersigned by the Minister of International Relations.<sup>56</sup>

The Constitution also places more substantive limits on the exercise of power by the President. Courts can review the exercise of power by the President and set aside any decision by the President on certain substantive grounds. This conclusion necessarily flows from the fact that the Constitution is supreme <sup>57</sup> and that the rule of law (and the doctrine of legality that forms part of the rule of law) is a founding value of the Constitution. This means the exercise of the powers by the President must not infringe any provision of the Bill of Rights and, as is implicit in the Constitution, the President must act in good faith and must not misconstrue the powers.<sup>58</sup> These constraints would have no force and effect if they could not be enforced by the courts.

However, this invariably raises questions about the separation of powers doctrine and to what extent judicial officers should intervene in decisions taken by the President. On the one hand, the courts have to balance their duty to enforce the provisions of the Constitution and the principle of legality with, on the other hand, respect for the fact that the decisions of the President and the executive often contain a political component with which the courts should be slow to interfere. We contend that, as a general rule, the more directly political the discretion is that the President (or other members of the executive) exercises, the more hesitant the courts will be to intervene.

As implied above, many of these constraints also apply to other members of the executive exercising public power. This means the discussion below must be seen in a broader context and many of the principles set out below also apply to other members of the Cabinet or to provincial Premiers and MECs. There are at least three ways in which the exercise of power by the President and other members of the executive is constrained by the Constitution.

The exercise of power by the President is constrained in that such an exercise of power is, in principle, subject to the provisions contained in the Bill of Rights.<sup>59</sup> This means that when the President exercises any power, he or she is constitutionally bound by the provisions of the Bill of Rights and may not act (or cannot fail to act) in a manner that would impermissibly infringe on one or more of the rights protected in the Constitution. Thus, in *President of the Republic of South Africa and Another v Hugo*, the Constitutional Court stated:

In respect of most of the [Head of State] powers ... it is not difficult to conceive of cases (extreme and unlikely as they may be) where some provision of the Bill of Rights might be contravened, and especially the equality provisions contained in section 8 [now section 9]. One or another of the powers, for example, could be exercised in a manner which excluded from consideration persons of a particular religion or ethnic group ... the fact that the arbitrary exercise of the power to pardon may be a rarity is no ground for denying constitutional review.<sup>60</sup>

However, as the Constitutional Court has pointed out, it may well be that, because of the nature of the power or the manner in which it is exercised by the President, the provisions of the Bill of Rights would provide no ground for an effective review of a presidential exercise of such a power.<sup>61</sup> (However, the exercise of power by the President can always still be

reviewed under one of the other grounds explained below.) This does not mean the Court would not have the power to review any exercise of power by the President against the provisions of the Bill of Rights – it has the power to do so in each and every case. However, such an exercise may often not lead to an invalidation of the President’s action because the Court could find that specific right cannot be effectively applied to test the President’s exercise of power. For example, when the President exercises a purely political discretion that affects only one individual, and where that exercise of power is unconstrained by any constitutional or other legal requirements, it may not be possible for the Court successfully to review this exercise of power on the basis that it infringes on any of the rights guaranteed in the Bill of Rights. Thus in the Hugo case, the Constitutional Court argued that in cases where the President pardons or reprieves a single prisoner in terms of section 84 of the Constitution, it is difficult to conceive of a case where a constitutional attack could be mounted against such an exercise of the presidential power on the basis that it infringed any of the rights in the Bill of Rights.[62](#)

Another example would be cases where the President exercises his or her power to appoint or dismiss the Deputy President and other members of the Cabinet. The President is given a wide discretion to appoint the Deputy President and the members of the Cabinet.[63](#) He or she has to do so in a manner that complies with the Constitution. However, when he or she exercises this power, it would not often be possible to challenge the exercise of power on the basis that it infringes any of the rights in the Bill of Rights. The power to appoint Cabinet Ministers is a political discretion entrusted to the President to give effect to the mandate of the political party in government. It is thus difficult to see how a court would be able to invoke the right to equality in the Bill of Rights if the President fails to appoint a person to his or her Cabinet and that person is a woman or if the President dismisses a Cabinet Minister and that Cabinet Minister has revealed his HIV positive status or that she is a lesbian. Such a move may be ethically problematic and some voters would refuse to vote for the party to which the President belongs if it is revealed that he or she harbours prejudices against people living with HIV or who are gay or lesbian. While the exercise of this power by the President may be tested on other grounds listed below, it is not easy to see how a court would be able to declare the decision invalid on the basis that it infringes the right not to be discriminated against.

In *Masetlha v President of the Republic of South Africa and Another*,[64](#) the decision of the President to dismiss the head of the National Intelligence Agency (NIA) was challenged. The basis of the challenge, among others, was that it was unfair to do so because the President did not afford Mr Masetlha an opportunity to be heard before the impending dismissal in contravention of the common law administrative law right (now codified in section 33 of the Bill of Rights). The Constitutional Court focused on the nature of the power of the President to appoint and dismiss the head of the NIA as set out in section 209(2) of the Constitution.[65](#) The Court dismissed the challenge, arguing that the dismissal constituted executive action rather than administrative action, particularly in this special category of appointments of members to the NIA. According to the Court, it would not be appropriate to constrain the exercise of executive power in the context of a dismissal of the head of the NIA by enforcing the constitutional requirements for procedural fairness. These powers to appoint and to dismiss are conferred specially on the President for the effective business of government and, in this particular case, for the effective pursuit of national security.[66](#) The Court quoted from its judgment in *Premier, Province of Mpumalanga and Another v Executive Committee of the Association of Governing Bodies of State Aided Schools: Eastern Transvaal* [67](#) where it cautioned that procedural fairness should not be made a requirement for the exercise of every

decision by the executive (despite the fact that section 33 contains a specific administrative justice clause). The Court stated that:

In determining what constitutes procedural fairness in a given case, a court should be slow to impose obligations upon government which will inhibit its ability to make and implement policy effectively (a principle well recognised in our common law and that of other countries). As a young democracy facing immense challenges of transformation, we cannot deny the importance of the need to ensure the ability of the Executive to act efficiently and promptly.<sup>68</sup>

Despite this warning, South African courts have consistently asserted the principle that all decisions by the President are in principle reviewable, if not on the basis that the decision contravenes the provisions of the Bill of Rights, then on other grounds that flow from the fact that the Constitution is supreme and that one of the founding values of the constitutional dispensation is respect for the rule of law.<sup>69</sup> The answer to the question of whether the exercise of power by the President in a particular case could be tested against the provisions of the Bill of Rights will be determined with reference to the nature of the power exercised and the context in which it is exercised. Where the President exercises a discretion in an individual case, affecting only one person, and where the power in terms of which the discretion is exercised is a Head of State power or a power conferred on the President as part of his or her political duties as head of the executive, it would be difficult to challenge that decision on the basis that it infringed one of the rights in the Bill of Rights. However, where the President exercises a general discretion affecting large numbers of people, the situation may well be different.

#### PAUSE FOR REFLECTION

Limits placed by the Constitution on the exercise of Head of State powers

In *President of the Republic of South Africa and Others v South African Rugby Football Union and Others (SARFU III)*,<sup>70</sup> the decision by the President as Head of State to appoint a commission of enquiry to investigate the administration of rugby in South Africa was challenged on several grounds. One ground was that the President, when exercising the power to appoint a commission of enquiry, was obliged to afford those to be investigated with a hearing before appointing the commission.

The Constitutional Court overturned a High Court decision which had found that such a duty did indeed exist. The Constitutional Court pointed out that although the exercise of all public power is regulated by the Constitution, it is done in different ways. The Court further pointed out that the Head of State powers conferred by section 84(2) are original constitutional powers that must be distinguished from head of the executive powers. The Constitution places explicit limits on the exercise of some of these powers.

However, the remaining section 84(2) powers are discretionary powers conferred on the President which are not constrained in any express manner by the provisions of the Constitution. Their scope is narrow: the conferral of honours; the appointment of ambassadors; the reception and recognition of foreign diplomatic representatives; the calling of referenda; the appointment of commissions of enquiry and the pardoning of offenders. They are closely related to policy; none of them is concerned with the implementation of legislation. Several of these decisions result in little or no further action by the government,

for example the conferral of honours, the appointment of ambassadors or the reception of foreign diplomats. When exercising these powers, the requirements of administrative law (enshrined in section 33 of the Constitution) could therefore not be applied to these Head of State powers. The Constitution therefore placed no obligation on the President to afford a hearing to those affected by the appointment of such a commission before he or she made the decision to appoint the commission. The Court then proceeded to remark as follows about the limits placed on the exercise of these Head of State powers by the President:

In the case of the appointment of commissions of inquiry, it is well-established that the functions of a commission of inquiry are to determine facts and to advise the President through the making of recommendations. The President is bound neither to accept the commission's factual findings nor is he or she bound to follow its recommendations. A commission of inquiry is an adjunct to the policy formation responsibility of the President. It is a mechanism whereby he or she can obtain information and advice. When the President appointed the commission of inquiry into rugby he was not implementing legislation; he was exercising an original constitutional power vested in him alone. Neither the subject matter, nor the exercise of that power was administrative in character. The appointment of the commission did not, therefore, constitute administrative action within the meaning of section 33. ... It does not follow, of course, that because the President's conduct in exercising the power conferred upon him by section 84(2)(f) does not constitute administrative action, there are no constraints upon it. The constraints upon the President when exercising powers under section 84(2) are clear: the President is required to exercise the powers personally and any such exercise must be recorded in writing and signed; ... the exercise of the powers must not infringe any provision of the Bill of Rights; the exercise of the powers is also clearly constrained by the principle of legality and, as is implicit in the Constitution, the President must act in good faith and must not misconstrue the powers.<sup>71</sup>

The SARFU III judgment therefore illustrates the fact that although the Constitution places limits on the exercise of the Head of State powers, these limits do not go as far as requiring the President always to consult those affected by a decision when he or she exercises this power or to adhere to the other requirements for just administrative action. As we shall see in the next section, the Constitutional Court later developed this point and added an important qualification to this general statement that the President was free to exercise the unqualified Head of State powers without consulting those affected.<sup>72</sup>

The exercise of power by the President (and other members of the executive) is further constrained by the requirement that such power must be duly authorised by the Constitution or some other constitutionally valid law. This means that whenever the President exercises his or her powers, this power must be sourced from the Constitution or legislation or must implicitly be derived from it. Put differently, the President cannot act lawfully unless he or she is authorised to exercise a specific power by the Constitution or by other valid law. The authority to act can be conferred explicitly or implicitly.

In Masetlha one of the legal questions which arose was whether the President was constitutionally authorised to dismiss the head of the NIA. Section 209 of the Constitution authorises the President, as head of the national executive, to 'appoint a woman or a man as head of each intelligence service'. However, the provision is silent on whether the President has the authority also to dismiss the head of each intelligence service. The Constitutional Court held that the power to dismiss in this case is necessary in order to exercise the power to appoint:

Without the competence to dismiss, the President would not be able to remove the head of the Agency without his or her consent before the end of the term of office, whatever the circumstances might be. That would indeed lead to an absurdity and severely undermine the constitutional pursuit of the security of this country and its people. That is why the power to dismiss is an essential corollary of the power to appoint and the power to dismiss must be read into section 209(2) of the Constitution.<sup>73</sup>

When the President is authorised by an Act of Parliament to exercise a power, that authorisation is required to be constitutionally valid. Parliament cannot delegate a power to the President if that delegation of legislative authority itself is not authorised by the Constitution. For example, Parliament cannot delegate its own plenary legislative power conferred on it by the Constitution to another body or person, including the President. In any given case, the question whether Parliament is entitled to delegate its own powers to the President must depend on whether the Constitution permits the delegation. This is so because the authority of Parliament to make laws, and so too to delegate that function, is subject to the Constitution. Thus, whether Parliament may delegate its law-making power or regulatory authority is a matter of constitutional interpretation dependent, in most part, on the language and context of the empowering constitutional provision.<sup>74</sup>

In *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others*, Chaskalson P stated that our 1993 and 1996 Constitutions represent a clear break from the past as the Constitution is now supreme and the Constitution provides law-making powers for the legislature, not the executive.<sup>75</sup> This does not mean that the power to issue subordinate legislation cannot be delegated to the executive. However, it does mean that usually the power of the legislature to delegate the power to amend or repeal legislation would not be permitted. This is because it would interfere with the ‘manner and form’ requirements in the Constitution which describe how laws are to be made.<sup>76</sup> Thus Parliament cannot delegate to the President an unrestricted power to amend legislation unless it is absolutely necessary, for example in a time of war or another exceptional situation. This is important because otherwise one would allow control over legislation to pass from Parliament to the executive. This could then be used to introduce contentious provisions in an Act, would undermine Parliament and would breach the separation of powers.<sup>77</sup>

As we have already noted in Chapter 4 of this book, in *Justice Alliance of South Africa v President of Republic of South Africa and Others*, *Freedom Under Law v President of Republic of South Africa and Others*, *Centre for Applied Legal Studies and Another v President of Republic of South Africa and Others*,<sup>78</sup> the President purported to extend the term of office of the then Chief Justice by relying on section 8(a) of the Judges’ Remuneration and Conditions of Employment Act.<sup>79</sup> Section 8(a) granted the President the power to extend the term of office of the Chief Justice and reads as follows

A Chief Justice who becomes eligible for discharge from active service in terms of section 3(1)(a) or 4(1) or (2), may, at the request of the President, from the date on which he or she becomes so eligible for discharge from active service, continue to perform active service as Chief Justice of South Africa for a period determined by the President, which shall not extend beyond the date on which such Chief Justice attains the age of 75 years.

However, section 176(1) of the Constitution states:

A Constitutional Court judge holds office for a non-renewable term of 12 years, or until he or she attains the age of 70, whichever occurs first, except where an Act of Parliament extends the term of office of a Constitutional Court judge.

The Constitutional Court found that the power to extend the term of office is explicitly conferred on Parliament and not on the President. The Court stated that section 176(1) contains clear textual indicators that the Constitution does not empower Parliament to delegate the power to extend the term of service of a judge of the Constitutional Court as was purportedly done by section 8(a) of the Judges' Remuneration and Condition of Employment Act. The Court confirmed that where the doctrine of parliamentary sovereignty governs, Parliament may delegate as much power as it chooses. In a constitutional democracy, however, Parliament may not ordinarily delegate its essential legislative functions. In this case, the power to extend the term of a Constitutional Court judge goes to the core of the tenure of the judicial office, judicial independence and the separation of powers and was therefore deemed to be an essential legislative function that could not be delegated. As the Court stated:

The term or extension of the office of the highest judicial officer is a matter of great moment in our constitutional democracy ... . The 2001 amendment requires an Act of Parliament to extend the term of office. It requires Parliament itself to set the term of office. ... Another important consideration in deciding whether section 8(a) is constitutionally compliant is the constitutional imperative of judicial independence. This Court is the highest court in all constitutional matters. The independence of its judges is given vigorous protection by means of detailed and specific provisions regulating their appointment. The Chief Justice is at the pinnacle of the judiciary and thus the protection of his or her independence is just as important. It is so that section 176(1) of the Constitution creates an exception to the requirement that a term of a Constitutional Court judge is fixed. That authority, however, vests in Parliament and nowhere else. It is notable that section 176(1) does not merely bestow a legislative power, but by doing so also marks out Parliament's significant role in the separation of powers and protection of judicial independence. The nature of this power cannot be overlooked, and the Constitution's delegation to Parliament must be restrictively construed to realise that protection. Accordingly, section 8(a) violates the principle of judicial independence. This kind of open-ended discretion may raise a reasonable apprehension or perception that the independence of the Chief Justice and by corollary the judiciary may be undermined by external interference of the Executive. The truth may be different, but it matters not. What matters is that the judiciary must be seen to be free from external interference.<sup>80</sup>

One of the most important ways in which the exercise of power by the President is controlled is through the requirement that when exercising any duly authorised power, the President has to act rationally. This requirement stems from the principle that when the President (or other members of the executive) exercises power, he or she is constrained by the principle of legality in the sense that he or she is required to act rationally and in good faith.<sup>81</sup> The requirement that the President must act rationally when exercising his or her power 'is a minimum threshold requirement applicable to the exercise of all public power by members of the executive and other functionaries'.<sup>82</sup> Action that fails to pass this threshold is inconsistent with the requirements of our Constitution and therefore unlawful.

The rationality test must be distinguished from the test for reasonableness. The reasonableness standard asks whether the decision was one 'that a reasonable decision-maker

could not reach'.<sup>83</sup> Rationality requires something different. In *Albutt v Centre for the Study of Violence and Reconciliation and Others*, the Constitutional Court explained the rationality standard as follows:

The Executive has a wide discretion in selecting the means to achieve its constitutionally permissible objectives. Courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected. But, where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved. And if, objectively speaking, they are not, they fall short of the standard demanded by the Constitution.<sup>84</sup>

In *Democratic Alliance v President of South Africa and Others*, the Constitutional Court further explained that a:

rationality review is really concerned with the evaluation of a relationship between means and ends: the relationship, connection or link (as it is variously referred to) between the means employed to achieve a particular purpose on the one hand and the purpose or end itself. The aim of the evaluation of the relationship is not to determine whether some means will achieve the purpose better than others but only whether the means employed are rationally related to the purpose for which the power was conferred. Once there is a rational relationship, an executive decision of the kind with which we are here concerned is constitutional.<sup>85</sup>

Rationality is a standard that will usually be easy for the President to meet. Where the courts test the actions of the President for rationality, they cannot substitute their opinions as to what is appropriate for the opinions of the President. They also cannot declare invalid an action of the President merely because they disagree with the wisdom of the presidential decision. As long as the purpose the President seeks to achieve by the exercise of public power is within his or her authority, and as long as the President's decision, viewed objectively, is rational, a court cannot interfere with the decision simply because it disagrees with it or considers that the power was exercised inappropriately.<sup>86</sup>

The requirement that the President must act rationally means that there must be a rational relationship between the constitutionally permissible purpose the President seeks to achieve, on the one hand, and the manner in which the President exercises the power or the means used to achieve the purpose on the other hand. The President (and other members of the executive) usually has a wide discretion in selecting the means to achieve his or her constitutionally permissible objectives. Courts may not interfere with the means selected simply because they do not like them or because there are other more appropriate means that the President could have selected.

Furthermore, if the President were to abuse the power vested in him or her, a court would be able to review and set aside this exercise of power. For instance, a decision to grant a pardon in consideration for a bribe could no doubt be set aside by a court. This will also be the case if the President were to misconstrue his or her powers. This is so because the exercise of all public power – including the exercise of power by the President – must comply with the

Constitution, which is the supreme law, and the doctrine of legality, which is part of the rule of law.<sup>87</sup> It follows further that the exercise of a power lawfully granted to the President must be rationally related to the purpose sought to be achieved by the exercise of it.<sup>88</sup>

In *Albutt*, the Constitutional Court affirmed the principle that to determine whether there is a rational connection between a legitimate purpose and the decision of the President, both the process by which the decision is made and the decision itself must be rational.<sup>89</sup> Where the purpose of the exercise of the President's power to pardon is to seek or achieve reconciliation, the means used to achieve this legitimate purpose will not be rationally related to the purpose if the procedure by which the decision was taken did not provide an opportunity for victims or their family members to be heard. One of the principles that underpinned the amnesty process was the participation of victims in seeking to achieve national unity and reconciliation. It is these principles and values that must underpin the special dispensation process.

The Constitutional Court further elaborated on this principle requiring both a rational decision and a rational process in *Democratic Alliance*. The Court found in this case that the purpose of appointing a National Director of Public Prosecutions (NDPP) was closely linked to the fact that the President was required to appoint a conscientious person of integrity to that post and that dishonesty was incompatible with this goal. Given the need for a rational relationship between achieving this purpose and the process used, the President should have initiated a further investigation for the purpose of determining whether the real and important questions which had been raised about the President's selected appointee to the post of NDPP rendered the appointment inappropriate. Where the President had ignored adverse findings as to the honesty of the appointee made by another body, there was no rational process followed.<sup>90</sup>

## CRITICAL THINKING

Variable standards for the rationality review undermine respect for the rule of law

Du Plessis and Scott argue that the Constitutional Court judgments based on legality challenges use different levels of scrutiny and that in relation to the rationality review the standard 'varies depending on the circumstances of the particular case. In some instances the court will apply the test stringently, but in others the court takes a far more deferential approach'.<sup>91</sup> They complain that with variability comes uncertainty. 'A central and current problem with the variability of rationality review is the lack of guidance laid down by the Constitutional Court as to the standard's parameters and applicability.'<sup>92</sup> This, they claim, among other problems, undermines respect for the rule of law and justify this as follows:

First, it causes problems for potential litigants who need to decide whether to challenge decisions or conduct that has affected them. Secondly, it creates difficulties for lawyers who have to advise these clients on their potential prospects of success. Due to the huge expense and far-reaching consequences of pursuing litigation for the litigants, lawyers should be able to do more than merely give vague statements about a litigant's prospects of success. With the increasingly variable nature of rationality review comes a concomitant decrease in the certainty with which legal representatives are able to advise clients who are contemplating a rationality challenge. While the goal is not rigid legal certainty, there must at least be some form of clarity or reasonable predictability on the approach that will be adopted by a court. Without this clarity comes the risk that the law is failing to meet the requirements clearly set



out in the Hugo case. Finally, the lack of clear guidelines creates uncertainty for the High Courts that need direction on how to apply the rationality standard. Woolman neatly captures the problems associated with a lack of judicial guidelines: ‘An approach to constitutional adjudication that makes it difficult for lower court judges, lawyers, government officials and citizens to discern, with some degree of certainty, how the basic law is going to be applied, and to know, with some degree of certainty, that the basic law is going to be applied equally, constitutes a paradigmatic violation of the rule of law.’ These problems, relating to the confusion created by the lack of guidelines, are compounded by the importance of the safety-net function of the principle of legality, since a legality challenge may be an applicant’s only available avenue to challenge conduct.<sup>93</sup>

The authors point out that this variable standard is even more problematic if one considers that in many instances the information necessary to determine whether there was a rational link between the purpose and the means used to achieve it, ‘lies within the exclusive knowledge of the state body’.<sup>94</sup> In such situations it would be extremely difficult for the objector to discharge the burden of proof. They therefore suggest that in such cases if the objector makes a detailed written request to the state for the reasons and purpose of the conduct, and the state either fails to give any reasons for the conduct or merely gives perfunctory reasons, then in these situations it is the government which ought to bear the onus of proving that the conduct was rational or suffer the consequences of the court drawing adverse conclusions as to the government’s justification. Although the objection might be raised that this will place too much of a burden on the government, ‘any increased burden is greatly tempered by the low standard the government has to meet in order to satisfy the test’.<sup>95</sup>

Although the exercise of power by the President is thus always in principle reviewable by the courts on the grounds set out above, at least two caveats must be raised. First, in *Minister of Home Affairs v Liebenberg*,<sup>96</sup> the Constitutional Court pointed out that when taking the President to court, it would be important to avoid imprecise and open-ended citing of the President in litigation. When asking a court to declare conduct of the President unconstitutional, it is necessary to indicate precisely which conduct is attributable to the President and falls foul of the Constitution.<sup>97</sup> As the Constitutional Court stated in *Von Abo v President of the Republic of South Africa*:

This requirement is important for at least two reasons. One important reason is that a concisely worded order would disclose the character of the conduct of the President in issue and thereby indicate whether the court concerned was properly clothed with jurisdiction to resolve the dispute. Also the President, as respondent is entitled to know which conduct has offended in order to decide whether to appeal or to correct the constitutionally recalcitrant conduct in issue.<sup>98</sup>

A second caveat relating to the review of the exercise of power by the President is that when a court is required to do so it will not ordinarily require the President to give oral evidence in person. In *SARFU III*, the Constitutional Court found that this was a question ‘of considerable constitutional significance going to the heart of the separation of powers under our Constitution’.<sup>99</sup> When making a decision on whether to call the President as a witness, courts will have to consider two competing considerations. First, courts are obliged to ensure that the status, dignity and efficiency of the Office of the President is protected. At the same time, however, the administration of justice cannot and should not be impeded by a court’s

desire to ensure that the dignity of the President is safeguarded.<sup>100</sup> As the Court explained in SARFU III:

We are of the view that there are two aspects of the public interest which might conflict in cases where a decision must be made as to whether the President ought to be ordered to give evidence. On the one hand, there is the public interest in ensuring that the dignity and status of the President is preserved and protected, that the efficiency of the executive is not impeded and that a robust and open discussion take place unhindered at meetings of the Cabinet when sensitive and important matters of policy are discussed. Careful consideration must therefore be given to a decision compelling the President to give evidence and such an order should not be made unless the interests of justice clearly demand that this be done. The judiciary must exercise appropriate restraint in such cases, sensitive to the status of the head of state and the integrity of the executive arm of government. On the other hand, there is the equally important need to ensure that courts are not impeded in the administration of justice.<sup>101</sup>

### 5.3 The Deputy President and the rest of the Cabinet

#### 5.3.1 Appointment and removal

The Cabinet consists of the President, the Deputy President and other Cabinet Ministers.<sup>102</sup> The President appoints and may also dismiss the Deputy President as well as the other members of the Cabinet.<sup>103</sup> The Deputy President must be appointed from among the members of the NA.<sup>104</sup> All but two members of the Cabinet must similarly be appointed from among the members of the NA.<sup>105</sup> The requirement that all but two of the members of the Cabinet simultaneously have to serve as members of the NA affirms the principle of parliamentary government, mirroring to some degree the Westminster system. This, in theory, ensures that the executive is more directly accountable to the electorate because it allows the democratically elected NA to control the conduct of the executive.<sup>106</sup> This requirement waters down the strict separation between the legislature and the executive as almost all the members of the executive (except for the President and no more than two Cabinet Ministers) at all times also serve as members of the legislature.

This arrangement was challenged during the certification process of the Constitution on the ground that members of the Cabinet continue to be members of the legislature and, by virtue of their positions, are able to exercise a powerful influence over the decisions of the legislature. It was contended that this is inconsistent with the separation of powers doctrine as applied in the United States of America, France, Germany and the Netherlands. The Constitutional Court rejected this argument, noting that there is no universal model of separation of powers. In democratic systems of government in which checks and balances result in the imposition of restraints by one branch of government on another, there is no separation that is absolute.<sup>107</sup> The Court stated that:

The principle of separation of powers, on the one hand, recognises the functional independence of branches of government. On the other hand, the principle of checks and balances focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another. In this sense it anticipates the necessary or unavoidable intrusion of one branch on the terrain of another. No constitutional scheme can reflect a complete separation of powers: the scheme is always one of partial separation.<sup>108</sup>

The fact that this overlap in personnel provides an important mechanism by which the legislature is able to check the exercise of power by the executive is emphasised by the provisions of section 92(2) of the Constitution. This section indicates that members of the Cabinet are ‘accountable collectively and individually to Parliament for the performance of their functions’, a point to which we shall return in the next section.

The provision that allows the President to appoint two members to the Cabinet who are not members of the NA creates the opportunity for the President to appoint members to the Cabinet with special skills or knowledge. This provision can be used to appoint members to the Cabinet who are not active members of the governing party or who are not politicians at all.

The President [109](#) or the NA [110](#) can remove the Deputy President and the other members of the Cabinet from office. The power of the President to dismiss members of his or her Cabinet is political in nature and will usually be exercised after consultations with the leadership of the majority party (although this is not a constitutional requirement). In a concurring judgment in *Masetlha*, Sachs J argued that there was a ‘qualitative distinction’ between the dismissal by the President of a Cabinet Minister or Deputy President, on the one hand, and his or her dismissal of other appointees like the head of the NIA, on the other. This is because the former appointees are ‘purely political appointees placed in positions of governmental leadership’.[111](#) According to Sachs J, ‘[m]embers of Cabinet know that they are hired and can be fired at the will of the President; and if fired, they can mobilise politically, go to the press, even demonstrate outside Parliament, and hope to muster support for themselves at the next congress of their party’.[112](#) This suggests that when the President fires his or her Deputy President or another Cabinet Minister, the ordinary constitutional and legislative requirements relating to fair labour practice do not apply.[113](#)

In terms of section 102(1) of the Constitution, the NA can also pass a vote of no confidence with a simple majority vote in the Cabinet (excluding the President), after which the President must reconstitute the Cabinet. This means that where the NA retains confidence in the President but has lost confidence in one or more members of the President’s Cabinet, it can force the President to fire the Cabinet Minister or Ministers in whom it has lost confidence. This is distinct from a motion of no confidence passed in terms of section 102(2) which would require the President and the Cabinet to resign.

In theory, section 102(1) of the Constitution provides the NA with a powerful tool to hold individual members of the Cabinet accountable. However, it is unlikely that the NA would pass a vote of no confidence in the Cabinet. This is because the President and his or her Cabinet are almost always members of the majority party in the NA and because most of the members of the majority party in the NA are more junior members of the same party as the President and the Cabinet. A vote of no confidence in the Cabinet would probably only happen if the elected leadership of the governing party instructs its members in the NA to pass such a vote of no confidence. This could happen if the party elects new leaders at its elective conference while the President and the Cabinet are perceived to be loyal to the outgoing leadership. It could also happen if there is a coalition government and a majority of members in the NA are unhappy with the performance of one or more members of the coalition Cabinet.

PAUSE FOR REFLECTION

## The actual power of party leadership on our system of government

In 2007 at its Polokwane conference, the ANC elected a new president, a new set of the ‘top six’ office-bearers of the party as well as a newly constituted National Executive Committee (NEC). President Thabo Mbeki and the candidates proposed by his supporters for leadership positions in the ANC were defeated at this conference, but at first President Mbeki and his Cabinet continued to serve in the executive undisturbed. As we have seen, the NEC eventually decided to ‘recall’ President Mbeki who then resigned as President of the country. The ANC NEC could also alternatively have decided, although it did not do so, to retain President Mbeki as President of the country while demanding that he reconstitute his Cabinet to appoint the newly elected members of the ANC top leadership to the Cabinet. If the President had then refused to do so, the NEC would have been able to rely on section 102(1) of the Constitution and could have instructed its members in the NA to adopt a vote of no confidence in the Cabinet (excluding the President). The President would then have been forced to implement the decision of the NEC. This imaginary scenario, unlikely as it may be, illustrates the actual power of the leadership of the governing party in our system of government even where members of that leadership are neither members of the executive nor members of the NA.

### 5.3.2 Powers of the Deputy President and the Cabinet

The Constitution does not list the powers of the Cabinet. As pointed out above, section 82(2) of the Constitution determines that executive authority is exercised by the President and his or her Cabinet and lists the various powers which the Cabinet has to exercise. In terms of section 85 of the Constitution the exercise of executive authority involves:

- the implementation of national legislation save where the Constitution or an Act of Parliament provides otherwise
- developing and implementing national policy
- co-ordinating the function of state departments and administrations
- preparing and initiating legislation
- carrying out any other executive function provided for in the Constitution or in national legislation.

To determine which powers and functions will be exercised by which Cabinet Minister, it is important to note that the President is the person who assigns powers and functions to the Deputy President as well as the rest of the Cabinet.<sup>114</sup> The Deputy President is required to assist the President in the execution of the functions of government.<sup>115</sup> This means that the powers of the Deputy President are not defined by the Constitution. Rather, the powers of the Deputy President are determined by the President. Depending on the relationship between the President and the Deputy President and the relative influence and power of these two people in the governing party, the Deputy President could either fulfil a mostly ceremonial role or could emerge as a powerful de facto Prime Minister.<sup>116</sup>

The President similarly assigns the powers and functions to the various Ministers.<sup>117</sup> This means that the President must assign executive authority to his or her various Ministers in the Cabinet to enable them to exercise their powers and perform their functions. The President often assigns powers to Ministers by assigning different portfolios to different Cabinet Ministers and assigns the administration and implementation of specific pieces of legislation

to individual Ministers. Ministers are then responsible for the exercise of power in terms of the legislation assigned to them.

Members of the Cabinet are accountable individually to the President and to the NA for the administration of their portfolios.<sup>118</sup> They are required to administer their portfolios in accordance with the policy determined by the Cabinet.<sup>119</sup> In a case that dealt with the relationship between Premiers and provincial MECs, but must equally apply to the Cabinet, the Eastern Cape High Court found that the President ‘bears ultimate responsibility’ for ensuring that the national government complies with the law and the other Cabinet members bear the responsibility for operations in their departments.<sup>120</sup>

Members of the Cabinet are also collectively and individually accountable to Parliament for the exercise of their powers and the performance of their functions.<sup>121</sup> They are correspondingly collectively accountable for the performance of the functions of the national government and for its policies.<sup>122</sup> This principle of Cabinet solidarity emphasises the fact that executive authority in South Africa is a collaborative venture and that members of the Cabinet must act together and must share responsibility for their actions.<sup>123</sup> This notion of Cabinet solidarity finds application in two different ways:

- First, as we have seen, the Constitution requires the Cabinet as a collective to retain the confidence of the NA, which can pass a vote of no confidence in the Cabinet (excluding the President) if the Cabinet fails to do so.
- Second, section 85(2) <sup>124</sup> read with section 92(2) of the Constitution suggests that the Cabinet has a duty to act together as they are collectively accountable to Parliament for the decisions of the Cabinet. Cabinet members may disagree with one another when they debate an issue to decide the position of the Cabinet, but once such a decision has been taken, the members of the Cabinet have to take collective accountability for the decisions of the Cabinet. In theory, if an individual member of the Cabinet cannot tolerate or defend a decision of the Cabinet, he or she has the option to resign from the Cabinet.<sup>125</sup>

Ministers are not only collectively accountable for the decisions and actions of the Cabinet as a whole. Section 92(2) of the Constitution also holds the Cabinet individually accountable to Parliament. Individual accountability ensures that Parliament can identify the Cabinet member responsible for a particular issue and can take action to hold that Cabinet member accountable. As we have seen, the Constitution bestows wide powers on Parliament to enable it to hold the individual members of the Cabinet accountable. Moreover, in terms of section 92(3)(b) of the Constitution, Cabinet members are compelled to provide Parliament with full and regular reports concerning matters under their control. Collective ministerial accountability means that Cabinet members ‘act in unison to the outside world and carry joint responsibility before Parliament for the way in which each member exercises or performs powers and functions’.<sup>126</sup> According to Rautenbach and Malherbe,<sup>127</sup> individual responsibility entails the following:

- a duty to explain to Parliament how the powers and duties under his or her control have been exercised and performed (the Constitution provides that members of the Cabinet must act in accordance with the Constitution and provide Parliament with full and regular reports concerning matters under their control)
- a duty to acknowledge that a mistake has been made and to promise to rectify the matter

- a duty to resign if personal responsibility has been accepted.[128](#)

Both the individual and collective responsibilities of Cabinet members are reinforced by section 96 of the Constitution which regulates their ethical conduct.[129](#) Section 96 provides that members of the Cabinet and Deputy Ministers must act in accordance with a code of ethics prescribed by legislation. They may not undertake any other paid work, act in a way that is inconsistent with their office, expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests, or enrich themselves or improperly benefit any other person.[130](#)

The other members of the Cabinet are constrained in a similar manner to that in which the President is constrained in the exercise of their duties. As we pointed out above, when exercising public power in terms of the Constitution, the President as well as other members of the Cabinet are required to exercise their powers personally. In the case of Cabinet Ministers, these powers would have been delegated to them by the President or would derive from legislation whose administration the President had assigned to them in terms of sections 92(1), 98 or 99 of the Constitution.

Furthermore, the exercise of the powers by members of the Cabinet must not infringe any provision of the Bill of Rights. Lastly, the exercise of the powers by members of the Cabinet are also clearly constrained by the principle of legality and, as is implicit in the Constitution, the Cabinet members must act in good faith and must not misconstrue their powers. These significant constraints flow from the supremacy of the Constitution and the demands of the legality principle that is an incidence of the rule of law.

## CRITICAL THINKING

### The role of the Deputy President

The Constitution does not define the powers of the Deputy President. The Constitution merely states that the Deputy President ‘must assist the President in the executions of the functions of government’.[131](#) The President therefore decides to what extent the Deputy President is involved in the day-to-day affairs of the government. The question is whether this leeway should be used to make a sharper distinction between the role of the President and the Deputy President, with the former playing a more ceremonial role above the fray of day-to-day politics while the latter in effect acts as a Prime Minister.

Some point to the French system as a possible model. In France, the President is directly elected by the French people every five years. The French Constitution declares the President Head of State and gives the President control over foreign policy and defence. After parliamentary elections, which are held every five years or sooner if the President calls them, the President appoints a Prime Minister. The appointment requires the approval of Parliament so the Prime Minister almost always comes from the party that controls the legislature. The Prime Minister serves as head of government and is in charge of domestic policy and day-to-day governing. The Prime Minister also recommends for presidential approval the other members of his or her Cabinet.

When the directly elected President represents a different party to that of the Prime Minister, a system of ‘cohabitation’ ensues. The President has to share power with a Prime Minister from a different party and this can lead to gridlock. In South Africa, such a situation will not

arise as the President and the Deputy President will be from the same political party. The advantages of bestowing more power to deal with the domestic policy agenda on the Deputy President, acting as de facto Prime Minister as is the case in France, is that it allows the division of labour and could potentially improve the effectiveness of the government. The dangers of such a system are that two centres of power will develop and the conflict between the President and Deputy President will paralyse the government.

## SUMMARY

The national executive comprises the President, the Deputy President and the members of the Cabinet. The President is elected by the NA and the President and his or her Cabinet must retain the confidence of the majority of members of the NA to ensure the continued functioning of the government. The President acts as Head of State and as head of the executive, and in the latter case must act with the responsible member of Cabinet who must countersign decisions relating to his or her portfolio.

When the NA passes a vote of no confidence in the President in terms of section 102 of the Constitution, the President and his or her Cabinet must resign. The President can also be impeached by the NA in terms of section 89 of the Constitution for serious violations of the Constitution, for serious misconduct or for reasons of incapacity. In theory, this means the NA is more powerful than the President and his or her Cabinet as it elects the President and can also dismiss the President. However, because the President and his or her Cabinet are usually the leaders of the majority party and control the party, it would only be in exceptional cases where the NA would be able to assert its power over the executive branch of government. Members of the Cabinet can, however, be held accountable by the NA.

The exercise of powers by either the President or other members of the Cabinet is constrained. Because of the supremacy of the Constitution, the exercise of power by the President and the Cabinet must always be authorised by and conform to the requirements of the Constitution and ordinary legislation. This means that the power of the President and the Cabinet can be checked by the judiciary. The constraints on the executive when exercising power are several fold: they are required to exercise the powers personally and in accordance with the formal requirements set out by the Constitution; the exercise of the powers must not infringe any provision of the Bill of Rights; the exercise of the powers is also clearly constrained by the principle of legality which requires a rational exercise of power. As is implicit in the Constitution, this means the members of the executive must act in good faith and must not misconstrue their powers.

The President has the power to appoint and also to dismiss members of his or her Cabinet. The President also assigns tasks to members of his or her Cabinet. This power to compose the Cabinet and to determine its functions is constrained by larger political considerations. A dominant political party with a tradition of collective leadership will require the President to consult with the party leadership before making these decisions.

Members of the Cabinet are individually and collectively accountable to Parliament. While robust debate may occur within the Cabinet, once a decision is taken by Cabinet all members of the Cabinet are expected to support the decision regardless of whether they agree with the decision. Members of the Cabinet are both accountable to the President, who appoints and dismisses them, and to the NA which elects the President and can, in exceptional

circumstances, also adopt a motion of no confidence in individual members of the Cabinet to force the President to reconstitute his or her Cabinet.

1.

1A coalition is formed if no party obtains at least 50% of the seats in the NA. Two or more parties who together have more than 50% of the seats in the NA will then agree to work together and form a government, based on agreed policies and principles.

2President of the Republic of South Africa and Others v South African Rugby Football Union and Others (SARFU II) (CCT16/98) [1999] ZACC 9; 1999 (4) SA 147; 1999 (7) BCLR 725 (4 June 1999) para 138.

3S 197(1) of the Constitution states: ‘Within the public administration there is a public service for the Republic.’ See also s 1 of the Public Service Act 103 of 1994 read with s 8 and Currie, I and De Waal, J (2001) *The New Constitutional and Administrative Law*, Vol 1 Constitutional Law 229.

4S 86(1) of the Constitution.

5S 86(3) of the Constitution.

6Section 87 of the Constitution. This means that the South African President will be elected to the NA, will take his or her seat, but will only remain a member of the NA for a few hours until such time as he or she is elected President, after which he or she ceases to be a member of the NA.

7See s 88(2) of the Constitution.

8For example, in terms of Rule 12.3 of the Constitution of the African National Congress (ANC), its national conference – held every five years – elects the President, the Deputy President, National Chairperson, the Secretary General, Deputy Secretary General, the Treasurer General and the remaining 80 additional members of the National Executive Committee (NEC) of the party. The NEC, as a whole, must consist of not less than 50% women. See African National Congress Constitution as amended and adopted at the 53rd National Conference, Mangaung, 2012, available at <http://www.anc.org.za/show.php?id=10177>.

9S 89(1) of the Constitution.

10S 89(2) of the Constitution.

11The South African system is not a pure system of parliamentary government as the President is both Head of State and head of the executive, the President ceases to be a member of the NA once elected and, as we shall see, two members of Cabinet can be appointed from outside the NA. Nevertheless, as far as the constitutional structure is concerned, the South African system is essentially parliamentary in nature and not presidential in nature as the President is not directly elected by the people. See also Murray,



C and Stacey, R ‘The President and the national executive’ in Woolman, S and Bishop, M (2013) Constitutional Law of South Africa 2nd ed rev service 5 18.3.

[12](#)(CCT 115/12) [2013] ZACC 28; 2013 (6) SA 249 (CC); 2013 (11) BCLR 1297 (CC) (27 August 2013).

[13](#)S 47(3)(c).

[14](#)Chikane, F (2012) Eight Days in September: The Removal of Thabo Mbeki 17–18.

[15](#)S 90(1) of the Constitution.

[16](#)S 90(2) of the Constitution.

[17](#)S 90(3) of the Constitution.

[18](#)S 90(4) of the Constitution.

[19](#)See s 83(a) of the Constitution.

[20](#)President of the Republic of South Africa and Another v Hugo (CCT11/96) [1997] ZACC 4; 1997 (6) BCLR 708; 1997 (4) SA 1 (18 April 1997) para 14.

[21](#)See s 85(2) of the Constitution, which states, ‘The President exercises the executive authority, together with the other members of the Cabinet, ...’, read with s 101(2): ‘A written decision by the President must be countersigned by another Cabinet member if that decision concerns a function assigned to that other Cabinet member’. See also President of the Republic of South Africa and Others v South African Rugby Football Union and Others (SARFU III) (CCT16/98) [1999] ZACC 11; 2000 (1) SA 1; 1999 (10) BCLR 1059 (10 September 1999) para 38; and Hugo para 14.

[22](#)See generally Baxter, L (1984) Administrative Law 434–4. See also Hofmeyr v Minister of Justice and Another 1992 (3) SA 108 (C) at 117 F–G.

[23](#)SARFU III para 40: ‘There can be no doubt that when the Constitution vests the power to appoint commissions of inquiry in the President, the President may not delegate that authority to a third party. The President himself must exercise the power. Any delegation to a third party would be invalid.’

[24](#)SARFU III para 40: ‘cases where a functionary vested with a power does not of his or her own accord decide to exercise the power, but does so on the instructions of another’.

[25](#)SARFU III para 40: ‘“passing the buck” contemplates a situation in which the functionary may refer the decision to someone else’.

[26](#)SARFU III para 41.

[27](#)SARFU III para 65.

[28](#)Currie and De Waal (2001) 237.

[29](#)For a discussion on prerogative powers and how these were replaced by enumerated powers by South Africa's democratic Constitution, see Hugo paras 5–10.

[30](#)S 79(1) of the Constitution.

[31](#)Joint Rules of Parliament 203(2).

[32](#)For a case where the President referred a Bill back to the NA, see *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* (CCT12/99) [1999] ZACC 15; 2000 (1) SA 732; 2000 (1) BCLR 1 (11 November 1999).

[33](#)S 91(2) of the Constitution.

[34](#)S 91(4) of the Constitution.

[35](#)S 179(1)(a) of the Constitution.

[36](#)S 202(1) of the Constitution.

[37](#)S 207(1) of the Constitution.

[38](#)S 209(2) of the Constitution.

[39](#)Allen, J (2005, 14 June) South Africa: President Mbeki relieves Deputy President Zuma of post AllAfrica available at <http://allafrica.com/stories/200506140114.html>.

[40](#)See Hartley, R (2008, 23 September) The five big mistakes that cost Mbeki the Presidency TimesLive available at <http://blogs.timeslive.co.za/hartley/2008/09/23/the-five-big-mistakes-that-cost-mbeki-the-presidency/>.

[41](#)Report of the Presidential Review Commission on the Reform and Transformation of the Public Service in South Africa, Pretoria (1998) para 1.3 available at <http://www.info.gov.za/otherdocs/1998/prc98/index.html>. See also Klug, H (2010) *The Constitution of South Africa: A Contextual Analysis* 201.

[42](#)Report of the Presidential Review Commission (1998) para 7.2.1.4.

[43](#)Chothia, F and Jacobs, S 'Remaking the Presidency: The tension between co-ordination and centralisation' in Jacobs, S and Calland, R (eds) (2002) *Thabo Mbeki's World: The Politics and Ideology of the South African President* 150.

[44](#)Klug (2010) 203.

[45](#)See generally Calland, R (2013) *The Zuma Years: South Africa's Changing Face of Power* for a discussion of the way in which the Office of the Presidency has operated during President Jacob Zuma's tenure.

[46](#)Calland (2013) 50.

[47](http://www.bdlive.co.za/articles/2011/11/22/steven-friedman-secrecy-bill)Friedman, S (2012, 6 August) Secrecy Bill Business Day Live available at <http://www.bdlive.co.za/articles/2011/11/22/steven-friedman-secrecy-bill>.

[48](#)S 174(6) of the Constitution which states: ‘The President must appoint the judges of all other courts on the advice of the Judicial Service Commission.’

[49](#)S 193(4) of the Constitution.

[50](#)Act 32 of 1998.

[51](#)S 174(3) of the Constitution.

[52](#)S 174(3) of the Constitution.

[53](#)Democratic Alliance v President of South Africa and Others (CCT 122/11) [2012] ZACC 24; 2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC) (5 October 2012) paras 14–26.

[54](#)S 101(1) of the Constitution.

[55](#)S 101(2) of the Constitution.

[56](#)Currie and De Waal (2001) 241.

[57](#)Hugo para 10.

[58](#)SARFU III para 148. Even with regard to the interim Constitution, which did not contain an explicit provision about the rule of law, the Constitutional Court found in *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* (CCT7/98) [1998] ZACC 17; 1999 (1) SA 374; 1998 (12) BCLR 1458 (14 October 1998) paras 56–9 that the doctrine of legality, an incidence of the rule of law, was an implied provision of the interim Constitution. The Court stated at para 58, ‘It seems central to the conception of our constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. At least in this sense, then, the principle of legality is implied within the terms of the interim Constitution.’

[59](#)Hugo para 10.

[60](#)(CCT11/96) [1997] ZACC 4; 1997 (6) BCLR 708; 1997 (4) SA 1 (18 April 1997) para 15. The Court referred to judgments by the Bavarian and Hessen Constitutional Courts to support this claim. See *BayVerfGHE NF 18 140* (1965) at 147; *HessStGH NJW 1974*, 791 at 793.

[61](#)Hugo para 28.

[62](#)Hugo para 29.

[63](#)S 91(2) of the Constitution.

[64](#)(CCT 01/07) [2007] ZACC 20; 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 (3 October 2007).

[65](#)Masetlha para 77.

[66](#)Masetlha para 77.

[67](#)(CCT10/98) [1998] ZACC 20; 1999 (2) SA 91; 1999 (2) BCLR 151 (2 December 1998) para 41.

[68](#)Masetlha para 77.

[69](#)The actions of the President may also be found to infringe a constitutional right given effect to in legislation. In *President of the Republic of South Africa and Others v M & G Media Ltd* (CCT 03/11) [2011] ZACC 32; 2012 (2) BCLR 181 (CC); 2012 (2) SA 50 (CC) (29 November 2011), for example, the Constitutional Court had to decide whether the refusal by the President to hand over a Report commissioned by the President to the Mail & Guardian newspaper contravened the provisions of the Promotion of Access to Information Act 2 of 2000 which gives effect to s 32 of the Constitution.

[70](#)(CCT16/98) [1999] ZACC 11; 2000 (1) SA 1; 1999 (10) BCLR 1059 (10 September 1999).

[71](#)SARFU III paras 146–8.

[72](#)See *Albutt v Centre for the Study of Violence and Reconciliation and Others* (CCT 54/09) [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (2) SACR 101 (CC); 2010 (5) BCLR 391 (CC) (23 February 2010).

[73](#)Masetlha para 68.

[74](#)*Justice Alliance of South Africa v President of Republic of South Africa and Others, Freedom Under Law v President of Republic of South Africa and Others, Centre for Applied Legal Studies and Another v President of Republic of South Africa and Others* (CCT 53/11, CCT 54/11, CCT 62/11) [2011] ZACC 23; 2011 (5) SA 388 (CC); 2011 (10) BCLR 1017 (CC) (29 July 2011) para 54. See also *Executive Council of the Province of the Western Cape v Minister for Provincial Affairs and Constitutional Development and Another, Executive Council of KwaZulu-Natal v President of the Republic of South Africa and Others* (CCT15/99,CCT18/99) [1999] ZACC 13; 2000 (1) SA 661; 1999 (12) BCLR 1360 (15 October 1999) para 54.

[75](#)(CCT27/95) [1995] ZACC 8; 1995 (10) BCLR 1289; 1995 (4) SA 877 (22 September 1995) para 62.

[76](#)*Executive Council of the Western Cape Legislature* para 62.

[77](#)*Executive Council of the Western Cape Legislature* para 62. In a separate judgment in this case, Mahommed J confirmed this principle, but for slightly different – more substantive – reasons. Mahommed said at para 136 that these issues cannot be determined in the abstract but depend ‘inter-alia on the constitutional instrument in question, the powers of the legislature in terms of that instrument, the nature and ambit of the purported delegation, the subject-matter to which it relates, the degree of delegation, the control and supervision retained or exercisable by the delegator over the delegatee, the circumstances prevailing at

the time when the delegation is made and when it is expected to be exercised, the identity of the delegatee and practical necessities generally’.

[78](#)(CCT 53/11, CCT 54/11, CCT 62/11) [2011] ZACC 23; 2011 (5) SA 388 (CC); 2011 (10) BCLR 1017 (CC) (29 July 2011).

[79](#)Act 47 of 2001.

[80](#)Justice Alliance paras 65–8.

[81](#)See Hugo para 29. See also SARFU III para 148; Fedsure Life paras 56–8; Masetlha para 23; Minister for Justice and Constitutional Development v Chonco and Others (CCT 42/09) [2009] ZACC 25; 2010 (1) SACR 325 (CC); 2010 (2) BCLR 140 (CC); 2010 (4) SA 82 (CC) (30 September 2009) para 30; Albutt para 49; Democratic Alliance para 31.

[82](#)Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others (CCT31/99) [2000] ZACC 1; 2000 (2) SA 674; 2000 (3) BCLR 241 (25 February 2000) para 90; Kruger v President of the Republic of South Africa and Others (CCT 57/07) [2008] ZACC 17; 2009 (1) SA 417 (CC); 2009 (3) BCLR 268 (CC) (2 October 2008) para 99.

[83](#)Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others (CCT 27/03) [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) (12 March 2004) para 44.

[84](#)(CCT 54/09) [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (2) SACR 101 (CC); 2010 (5) BCLR 391 (CC) (23 February 2010) para 51. See also Democratic Alliance para 30.

[85](#)(CCT 122/11) [2012] ZACC 24; 2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC) (5 October 2012) para 32.

[86](#)Democratic Alliance para 90. See also Prinsloo v Van der Linde and Another (CCT4/96) [1997] ZACC 5; 1997 (6) BCLR 759; 1997 (3) SA 1012 (18 April 1997) para 25; Pharmaceutical Manufacturers para 90.

[87](#)See Affordable Medicines Trust and Others v Minister of Health and Another (CCT27/04) [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) (11 March 2005) para 49; Pharmaceutical Manufacturers para 20; SARFU III para 38; Fedsure Life para 32.

[88](#)Albutt para 49.

[89](#)Albutt para 71.

[90](#)Democratic Alliance para 89.

[91](#)Du Plessis, M and Scott, S (2013) The variable standard of rationality review: Suggestions for improved legality jurisprudence’ South African Law Journal 130(3):597–620 at 597.

[92](#)Du Plessis and Scott (2013) 598.

[93](#)Du Plessis and Scott (2013) 608–9 (footnotes omitted).

[94](#)Du Plessis and Scott (2013) 610.

[95](#)Du Plessis and Scott (2013) 617–8.

[96](#)(CCT22/01) [2001] ZACC 3; 2001 (11) BCLR 1168; 2002 (1) SA 33 (CC) (8 October 2001).

[97](#)Liebenberg para 15. See also *Von Abo v President of the Republic of South Africa* (CCT 67/08) [2009] ZACC 15; 2009 (10) BCLR 1052 (CC); 2009 (5) SA 345 (CC) (5 June 2009) para 45.

[98](#)(CCT 67/08) [2009] ZACC 15; 2009 (10) BCLR 1052 (CC); 2009 (5) SA 345 (CC) (5 June 2009) para 45.

[99](#)SARFU III para 240.

[100](#)SARFU III para 242.

[101](#)SARFU III para 243.

[102](#)S 91(1) of the Constitution.

[103](#)S 91(2) of the Constitution.

[104](#)S 91(3)(a) of the Constitution.

[105](#)S 91(3)(b) and (c) of the Constitution.

[106](#)Currie and De Waal (2001) 254.

[107](#)Certification of the Constitution of the Republic of South Africa, 1996 (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996) para 108.

[108](#)First Certification para 109.

[109](#)S 91(2) of the Constitution.

[110](#)S 102 of the Constitution.

[111](#)Masetlha para 228, where Sachs stated: ‘This suggests a qualitative distinction based on the fact that the three are not purely political appointees placed in positions of governmental leadership. Rather, they are important public officials with one foot in government and one in the public administration. Members of Cabinet know that they are hired and can be fired at the will of the President; and if fired, they can mobilise politically, go to the press, even demonstrate outside Parliament, and hope to muster support for themselves at the next congress of their party.’

[112](#)Masetlha para 228.

[113](#)See also Currie and De Waal (2001) 254 and Mphele v Government of the Republic of South Africa 1996 (7) BCLR 921 (CK) 954E.

[114](#)S 91(2) of the Constitution.

[115](#)S 91(5) of the Constitution.

[116](#)See Devenish, GE (1998) A Commentary on the South African Constitution 158. When President Thabo Mbeki served as Deputy President in the Cabinet of President Nelson Mandela he was widely regarded as playing the role of Prime Minister. See generally Gumede, WM (2008) Thabo Mbeki and the Battle for the Soul of the ANC 33–62.

[117](#)S 91(2) of the Constitution.

[118](#)S 92(1) and 92(2) of the Constitution.

[119](#)This is the necessary implication of s 92(2) which states that members of the Cabinet are collectively responsible to Parliament.

[120](#)See Magidimisi v Premier of the Eastern Cape and Others (2180/04, ECJ031/06) [2006] ZAECHC 20 (25 April 2006) paras 20–1:

The first respondent is the Premier of the province. The Constitution vests her with the ultimate executive authority of the province. The Premier and the Members of the Executive Council are responsible for the implementation of legislation in the province and for the performance of all other constitutional and statutory executive functions of the province. The Premier has taken an oath of office to ‘obey, respect and uphold the Constitution and all other law of the Republic’. This includes the duties to uphold the rule of law... . As the ultimate executive authority in the province the Premier thus bears the ultimate responsibility to ensure that the provincial government honours and obeys all judgments of the courts against it. The second respondent, the Member of the Executive Council for Finance, bears the same general constitutional duties as those of the Premier, except that he does not bear the ultimate executive authority of the Premier. In addition, however, he bears responsibility for decisions of the provincial treasury. This would include decisions relating to the payment of judgments against the province for the payment of money.

[121](#)S 92(2) of the Constitution.

[122](#)S 96(3) of the Constitution.

[123](#)SARFU II para 41. See also Murray and Stacey (2013) 18.32.

[124](#)S 85(2) states: ‘The President exercises the executive authority, together with the other members of the Cabinet ...’

[125](#)See Murray and Stacey (2013) 18.32. They point out that this aspect requires confidentiality from members of the Cabinet and Cabinet members are usually not allowed to divulge information about debates within Cabinet. Although this rule is not encoded in the

Constitution, it has been respected since the advent of the interim Constitution in 1994. The need for confidentiality has also been accepted by the Constitutional Court in SARFU III para 243.

126See Rautenbach, IM and Malherbe, EFJ (2009) Constitutional Law 193.

127Rautenbach and Malherbe (2009) 193.

128See also Mafunisa, MJ (2008) The role of codes of conduct in promoting ethical conduct in the South African public service South African Journal of Labour Relations 32(1):81–92.

129See also the Code of Conduct for Assembly and Permanent Council Members available at [http://www.parliament.gov.za/live/content.php?Item\\_ID=235](http://www.parliament.gov.za/live/content.php?Item_ID=235).

130S 96(2) of the Constitution.

131S 91(5).



## **CHAPTER 6**

### Separation of powers and judicial authority

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#### [6.2 The judiciary in the new constitutional dispensation](#)

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#### [Summary](#)

### 6.1 The historic legacy of parliamentary sovereignty and apartheid on the judiciary

#### Figure 6.1 Separation of powers and judicial authority

In a constitutional democracy the judiciary is often referred to as the 'bastion of the legal order'.<sup>1</sup> This is because in a constitutional democracy with a supreme and enforceable constitution, an independent judiciary is free to interpret and apply the law impartially and without consideration of the wishes of politicians, powerful business interests or civil society groups. According to this theory, the system of separation of powers and checks and balances can only operate optimally if an independent and impartial judiciary is empowered to enforce the provisions of the Constitution. In such a system the judiciary acts as referee of the democratic process while also checking whether the two political branches of government, the legislature and the executive, act within the boundaries set out by the constitution and by legislation. The more dominant a political party is in government and the larger its majority in Parliament, the more likely it is that other role players will revert to the independent and impartial courts to check the exercise of powers of the legislature and executive, and to limit the potential abuse of power and breaches of the constitution, which some commentators associate with a prolonged period of political dominance by one political party.

As South Africa is, at the time of writing, viewed by many as a one-party dominant democracy,<sup>2</sup> these tendencies are also arising in the South African context. This places the judiciary in a difficult position. On the one hand, it is empowered by the Constitution to enforce its provisions and to declare invalid acts and omissions of the legislature and the executive that fail to comply with the obligations imposed by the Constitution.<sup>3</sup> The judiciary has a duty to enforce the provisions of the Constitution and the law, and to check the exercise of power by the legislature, executive and other powerful role players. From a purely institutional and practical political perspective, the judiciary can appear to be relatively weak in relation to the other two branches of government. It may appear to lack the political clout and democratic legitimacy associated with the elected branches of government and is dependent on the other two branches of government for its funding and for ensuring that its decisions are adhered to. The truth is, as the Constitutional Court has pointed out, that the judiciary cannot function properly without the support and trust of the public.<sup>4</sup> As former Chief Justice Ismail Mahomed explained:

Unlike Parliament and the executive, however, judicial officers do not have the powers of the purse, the army, and the police to execute their will. All the courts put together in the country do not have a single soldier. They would be impotent to protect the Constitution or to execute the law if the agencies of the State which control the mighty physical and financial resources of the State, refused to command those resources to enforce the orders of the courts. The courts could then be reduced to paper tigers with a ferocious capacity to roar and to snarl but no teeth to bite and no sanctions to execute their judgments which could then simply be reduced to pieces of sterile scholarship, or futile exhibitions of toothless wisdom. The ultimate power of the courts must therefore rest on the esteem in which the judiciary is held within the psyche and soul of the nation and in the confidence it enjoys within the hearts and minds of potential litigants in search of justice. That esteem and that respect must substantially depend on the independence and integrity of judicial officers. No public figure anywhere, however otherwise popular, could afford to be seen to defy the order of a court which enjoys, within the nation, a perception of independence and integrity. His or her own future would then be in mortal jeopardy.<sup>5</sup>

The way in which this tension can best be dealt with is by recognising that an independent and impartial judiciary is most effective when it respects the separation of powers doctrine and does not unnecessarily intrude on the domain of the legislature and the executive. However, this does not mean the courts must be timid in protecting and enforcing the Constitution. In *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* the Constitutional Court thus said:

In our constitutional democracy all public power is subject to constitutional control. Each arm of the state must act within the boundaries set. However, in the end, courts must determine whether unauthorised trespassing by one arm of the state into the terrain of another has occurred. In that narrow sense, the courts are the ultimate guardians of the Constitution. They do not only have the right to intervene in order to prevent the violation of the Constitution, they also have the duty to do so. It is in the performance of this role that courts are more likely to confront the question of whether to venture into the domain of other branches of government and the extent of such intervention. It is a necessary component of the doctrine of separation of powers that courts have a constitutional obligation to ensure that the exercise of power by other branches of government occurs within constitutional bounds. But even in these circumstances, courts must observe the limits of their own power.<sup>6</sup>

Courts must therefore act in a restrained but principled manner and must interpret and enforce the Constitution in a fearless way. This will help to ensure that the political process remains fair, democratic space remains open and political contestation remains robust while also playing a decisive role in protecting the vulnerable and marginalised in society.<sup>7</sup> When considering the role and functions of the judiciary, it is important to take note of this broader context within which the judiciary operates. This section of the chapter therefore focuses on the powers, functioning and composition of the judiciary in the light of the pressing need for the judiciary to retain the esteem and respect of the wider society while also scrupulously enforcing the Constitution and the law in an impartial and independent manner. This will be done against the background of the separation of powers doctrine.

Note from the outset that the judiciary was not left untainted by its role during South Africa's apartheid past.<sup>8</sup> There are many reasons why the judiciary cannot be said to have survived the apartheid era untainted. Before 1994, the doctrine of parliamentary supremacy was one of the cornerstones of South African constitutional law. This doctrine obviously limited the judiciary's capacity to enforce individual rights and freedoms. As Mtshaulana points out, because 'the rule of law was equated to rule by law, all arbitrary exercise of power, ... exercised in terms of a law enacted by correct procedures prescribed by Parliament was considered lawful and in accordance with the rule of law'.<sup>9</sup> Although some judges attempted to interpret and apply the law in such a way as to limit the harsh effects of apartheid laws, others diligently enforced apartheid laws. This meant that the judiciary lacked legitimacy in the eyes of the majority of people in South Africa.<sup>10</sup>

After anti-apartheid lawyers had won several important victories in the courts in the 1980s during the States of Emergency,<sup>11</sup> the Appellate Division overturned many of these judgments. This confirmed that the apartheid state had virtually unlimited power under the emergency provisions.<sup>12</sup> The outcome in these cases further confirmed the lack of impartiality and independence of the highest court and eroded whatever legitimacy the judiciary may still have enjoyed.

However, there is some disagreement about whether the timid approach of many judges during the apartheid years entirely destroyed the judiciary's credibility. On the one hand, Madala argues that 'the apartheid system created a society in which the majority came to regard the courts, judges and administration of justice with suspicion and anger'.<sup>13</sup> On the other hand, Ellmann argues that black South Africans surprisingly retained a significant degree of confidence in the legal system and the courts in particular.<sup>14</sup> Ellmann argues that this confidence lent a measure of legitimacy to the legal system. This, coupled with the history of anti-apartheid lawyering, 'might have encouraged South Africans to see virtue in the ideals of fearless advocacy, independent judging and the Rule of Law', offering the promise that these same ideals would be honoured in the post-apartheid South Africa.<sup>15</sup>

It is nevertheless clear that the institutionalisation of apartheid through law and legal regulation transformed the legal system and entrenched the political dominance of the minority over the majority through the operation of law enforced by the judiciary.<sup>16</sup> To this end, the judiciary 'was unable to resolve the impasse [of its subjugation] because it did not have the option to review and reverse unjust laws, rather the courts and all other institutions had to implement and administer such laws'.<sup>17</sup> Because the judiciary operated under the system of parliamentary supremacy, it meant that 'the judiciary during the apartheid period functioned as part of the apartheid legal order and contributed to legitimising and sustaining blatantly discriminatory and unjust legislation'.<sup>18</sup> Judges were regarded as mere mechanical

interpreters of the law. Their function was seen by many – including by most judges and legal practitioners – merely to ascertain the intention of the apartheid legislature through the text of the legislation and then to give effect to that intention, no matter how obnoxious the intention might have been.<sup>19</sup> Most judges believed that they could employ only limited interpretational aids in the event of ambiguity or inconsistency, or if adherence to the ordinary meaning of the text would result in absurdity.<sup>20</sup> They adhered to the notion that any modifications, corrections or additions to the text should be left to the legislature as the government branch responsible for making law. Value judgments of the content of a statute were irrelevant when interpreting and applying the legislation passed by the apartheid Parliament.<sup>21</sup> Corder draws the conclusion that:

The overall picture [of judicial attitudes] which emerges is one of a group of men who saw their dominant roles as the protectors of a stability ... The judges expressed it in terms of a positivistic acceptance of legislative sovereignty, despite a patently racist political structure, and a desire to preserve the existing order of legal relations, notwithstanding its basis in manifest social inequalities ...<sup>22</sup>

These attitudes were amplified by the fact that the power of judges was constrained under the system of parliamentary supremacy.<sup>23</sup>

However, despite problems with the formalistic approach to the interpretation and application of unjust laws, there is widespread agreement that before the advent of democracy, the judiciary did exhibit many of the formal attributes of independence. Courtrooms were open to the general public and judges enjoyed security of tenure and of salary even though politics played a role in the promotion of judges to the Appellate Division. Judges served until the age of 70 and could be removed only by the State President at the request of the Houses of Parliament on the grounds of misbehaviour or incapacity. Moreover, the salaries of judges were legally guaranteed and could not be reduced during their term of office.<sup>24</sup>

Notwithstanding these features, the judiciary was not entirely free from indirect political influence through the process of appointment.<sup>25</sup> Before 1994, the State President appointed judges in terms of section 10 of the Supreme Court Act.<sup>26</sup> However, in practice, it was the Minister of Justice who made the appointments based on the recommendations of the Chief Justice or Judge President of the relevant division of the High Court.<sup>27</sup> The State President then merely formalised these appointments. The process of identifying potential candidates and their selection was also ‘shrouded in secrecy’ and ‘political factors played a role in determining who secured appointment and who was promoted’.<sup>28</sup>

Furthermore, in the pre-democratic era, the judiciary was composed almost entirely of white males, drawn from the elitist and privileged ranks of the ruling minority. Judicial appointees were drawn primarily from the ranks of senior counsel practising as advocates at the various bars in South Africa. Before 1990, only one white female had been appointed as a judge in South Africa while no black judges had been appointed.<sup>29</sup> The selection process was a confidential one which meant that candidates could be hand-picked based on whether their beliefs were sympathetic to the government of the day.<sup>30</sup> The first black male judge, Ismael Mahomed, was appointed in 1991.<sup>31</sup> When South Africa became a democracy in 1994, out of 166 judges, 161 were white men, two were white women, three were black men and there were no black women at all.<sup>32</sup>

Table 6.1 Composition of the judiciary in 1994 <sup>33</sup>

Total	White male	Black male	White female	Black female
166	161	3	2	0

Before 1994, the Appellate Division of the Supreme Court (since renamed the Supreme Court of Appeal), with its seat in Bloemfontein, was the highest court in South Africa for all matters. The Appellate Division considered appeals from the various Provincial Divisions of the Supreme Court (since renamed High Courts), which had their seats in the main urban centres across South Africa. The Supreme Court (including the Appellate Division), together with a small number of other specialised courts created by legislation,<sup>34</sup> made up the superior courts.<sup>35</sup> The lower courts consisted primarily of the magistrates' courts which were divided into regional and district courts.

In 1927, a separate system of courts was also created for people classified as 'Africans' to interpret and enforce customary law.<sup>36</sup> This traditional judicial system, which was designed to deal with customary law through the institution of traditional leadership, was also subject to the control of first the Union government and then the apartheid government. The institution was controlled by native commissioners who included traditional leaders. They became state functionaries, exercising authority and constituting courts, no longer under the mandate of the people, but that of the government of the day.<sup>37</sup> Even though the traditional system of justice had elements of a democratic culture because of its consensual decision making, its values were fundamentally eroded by its transformation by colonial and apartheid rule.

### CRITICAL THINKING

How can the formation of new judicial structures that would truly deal responsibly with living customary law be achieved?

Vani argues that the colonial encounter fundamentally changed the way in which customary law was applied and developed in apartheid South Africa:

- Roman-Dutch and English law were given precedence over bodies of customary law and developed at the expense of customary law.
- Rules of evidence imported from a colonial legal system and imposed by statute and convention in court procedures resulted in the disappearance of customary law rules and principles.
- Strict criteria were imposed to prove the legal validity of customs. It had to be proved that customs had existed from time immemorial, and that they were invariable, continuous, certain, notorious, reasonable, peaceable and obligatory. Customs could not be immoral or opposed to an express enactment or to public policy.
- The rule of stare decisis ended the flexibility of customary law by preventing innovation to meet the changes in community opinion and sentiments. Modern legal machinery forced customary law to fall in line with national standards. <sup>38</sup>

Customary law was 'preserved, upgraded and frozen out of relevance to the flux of the [traditional community's] life'.<sup>39</sup> This was evidenced by cases such *Bhe and Others v Khayelitsha Magistrate and Others* <sup>40</sup> and *Shilubana and Others v Nwamitwa*,<sup>41</sup> which focused on the development of customary law through the lens of either the common law or

the Constitution. Customary law thus ‘became atrophied as a result of the rupture of its relationship with other sources of law’.[42](#)

Even the manner in which customary law was recorded changed. Before the colonial encounter, it ‘was a body of orally transmitted precepts and precedents’.[43](#) Where disputes arose, ‘solutions were sought to take the total situation of the parties into consideration’.[44](#) These basic features were eroded by the Union and apartheid administration and customary law:

became a fixed body of law, indistinguishable from statute and case law. Opinions and evidence given by villagers on custom in courts were isolated from their contexts and utilized to describe a single transaction or an offence which gave rise to a sense of individual right not dependent on community opinion, enforced by courts even in opposition to community opinion.[45](#)

Moseneke J (as he then was) expressed a similar sentiment in *Daniels v Campbell and Others*:

True to their worldview, [which ‘originates from the deep-rooted prejudice’] judges of the past displayed remarkable ethnocentric bias and arrogance at the expense of those they perceived different. They exalted their own and demeaned and excluded everything else.[46](#)

Given these changes and the transformation during Union and apartheid rule of customary law and the institutions called on to develop and enforce it, it can be argued that the creation of new traditional courts that rely on the discredited structures of traditional leadership runs the risk of entrenching Union and apartheid forms of judicial governance instead of truly respecting age-old customary legal structures. But should the South African judiciary be restructured to enable the formation of new judicial structures that would truly deal responsibly with living customary law? If so, how could this be achieved? There are no easy answers to such questions as the debate which started in 2012 with proposals for the creation of new traditional courts illustrates.[47](#)

## 6.2 The judiciary in the new constitutional dispensation

### 6.2.1 The structure of the judiciary in the 1996 Constitution

In fulfilling the objectives of the new constitutional order, the change in government included the restructuring of the judicial system. The restructuring of the judicial system included changes to the hierarchical structure of the courts. Section 166 of the Constitution thus provides that the courts are:

1. (a) the Constitutional Court;
2. (b) the Supreme Court of Appeal;
3. (c) the High Courts, including any high court of appeal that may be established by an Act of Parliament to hear appeals from High Courts;
4. (d) the Magistrates’ Courts; and
5. (e) any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Courts or the Magistrates’ Courts.

One of the most significant changes is that a new Constitutional Court was created in the interim Constitution to serve as the final court in all constitutional and related matters. The Constitutional Court is headed by the Chief Justice who is also the head of the judiciary. The Chief Justice exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts.<sup>48</sup> The Deputy Chief Justice serves as the deputy leader of the judiciary and must ‘exercise such powers or perform such functions of the Chief Justice in terms of this or any other law as the Chief Justice may assign to him or her; and, in the absence of the Chief Justice, or if the office of Chief Justice is vacant, exercise the powers or perform the functions of the Chief Justice, as Acting Chief Justice’.<sup>49</sup>

The Constitutional Court has pointed out that the distinctive appointment process for the Chief Justice and Deputy Chief Justice (discussed below) indicates the high importance of their offices. They are required to ‘represent the judiciary and to act on its behalf in dealings with the other arms of government’<sup>50</sup> and they may also be called on ‘to perform ceremonial and administrative duties’.<sup>51</sup> As such, the Chief Justice and the Deputy Chief Justice ‘are the most senior judges in the judicial arm of government, and their distinctive manner of appointment reflects the fact that they may be called upon to liaise and interact with the Executive and Parliament on behalf of the Judiciary’.<sup>52</sup>

Once they have been appointed, however, the Chief Justice and Deputy Chief Justice take their place alongside nine other judges of the Constitutional Court and have the same powers as any other judge of the Constitutional Court in as far as decisions about individual cases before the Court are concerned.<sup>53</sup>

The seat of the Constitutional Court is in Johannesburg, but the Chief Justice may allow the Court to sit elsewhere in the country if it is expedient or in the interests of justice to do so.<sup>54</sup>

The Appellate Division was renamed the Supreme Court of Appeal (SCA). Apart from the name change, the Appellate Division is no longer a division of the Supreme Court, but a fully fledged constitutional entity in its own right.<sup>55</sup> The SCA is headed by the President of the SCA who is assisted by a Deputy President of that Court.<sup>56</sup> In the absence of the President of the SCA or if the office of President of the SCA is vacant, the Deputy President perform the functions of the President of the SCA as Acting President of that Court.<sup>57</sup> The seat of the SCA is in Bloemfontein, but the President of the SCA may allow it to sit elsewhere in the country if it is expedient or in the interests of justice to do so.<sup>58</sup>

Both the Constitutional Court and the SCA have jurisdiction across the Republic. They do not, however, have jurisdiction over exactly the same subject matter. While the Constitutional Court has jurisdiction over all constitutional and non-constitutional matters, the SCA does not. This is because the SCA does not have jurisdiction over those matters that fall into the exclusive jurisdiction of the Constitutional Court.

The Constitution also created a number of High Courts.<sup>59</sup> These were created from former provincial and local divisions of the Supreme Court and from the various superior courts of the former so-called ‘independent’ homelands. The different High Courts have now been replaced with a single High Court of South Africa. The High Court of South Africa, however, consists of the Divisions determined by an Act of Parliament.<sup>60</sup> The High Court functions as a superior court and acts both as a court of first instance and as a court hearing appeals from the lower courts. High Courts have geographically limited jurisdiction. Each Division of the

High Court consists of a Judge President and one or more Deputy Judges President, each with specified headquarters within the area under the jurisdiction of that Division and so many other judges as may be determined in accordance with the prescribed criteria.<sup>61</sup> The Judge President leads his or her Division and is also responsible for the co-ordination of the judicial functions of all magistrates' courts falling within the jurisdiction of that Division.<sup>62</sup>

In 2013, Parliament passed legislation to streamline the High Court system to create separate Divisions of the High Court for each of South Africa's nine provinces.<sup>63</sup> The High Courts now consist of the following Divisions:

- Eastern Cape Division, with its main seat in Grahamstown
- Free State Division, with its main seat in Bloemfontein
- Gauteng Division, with its main seat in Pretoria
- KwaZulu-Natal Division, with its main seat in Pietermaritzburg
- Limpopo Division, with its main seat in Polokwane
- Mpumalanga Division, with its main seat in Nelspruit
- Northern Cape Division, with its main seat in Kimberley
- North West Division, with its main seat in Mahikeng
- Western Cape Division, with its main seat in Cape Town.

The magistrates' courts remain essentially unchanged. However, they have now become creatures of the Constitution and, to strengthen the independence of the judiciary, magistrates no longer fall within the ambit of the public service.<sup>64</sup> Magistrates' courts and all other courts are empowered in terms of section 170 of the Constitution to decide any matter determined by an Act of Parliament. Magistrates' courts may not enquire into or rule on the constitutionality of any legislation or conduct of the President. Although these courts are essential for the administration of justice, serving as the first port of call for most people who encounter the legal system, we will not focus on these courts because of their lack of constitutional jurisdiction.

Apart from the courts referred to in the Constitution, there are also several specialist courts created by statute. These specialist courts may be divided into superior specialist courts and inferior specialist courts.

The superior specialist courts include, but are not limited to, the following:

- The Labour Court was established in terms of section 151 of the Labour Relations Act <sup>65</sup> to deal with disputes between employers and employees.
- The Land Claims Court was established in terms of section 22 of the Restitution of Land Rights Act <sup>66</sup> to resolve disputes that arise from land claims in relation to South Africa's land reform initiative. This initiative came about as a result of the legacy of apartheid that left many South Africans destitute after the apartheid government dispossessed them of their land.
- The Tax Court was established in terms of section 83(3) of the Income Tax Act.<sup>67</sup>

The inferior specialist courts include, but are not limited to, the following:

- The Children's Court was established to deal with matters related to children such as custody.<sup>68</sup>



- • The Maintenance Courts were established in terms of the Maintenance Act [69](#) to deal with issues around maintenance.
- • The Domestic Violence Courts were established in terms of the Domestic Violence Act. [70](#)

These specialist courts, which Berman refers to as ‘problem-solving courts’, are an important initiative seeking to provide a significant opportunity for using litigation as a transformative strategy in the promotion of constitutional values and principles. [71](#) However, apart from the Equality Courts, these courts do not usually play a direct role in the adjudication of constitutional issues.

## 6.2.2 Constitutional jurisdiction of the various courts

Jurisdiction refers to the power or competence of a court to hear and adjudicate on, and to determine and dispose of, a legal dispute. In civil matters, litigants must ensure that they approach the correct court with the requisite jurisdiction to hear the matter. In criminal matters, the National Prosecuting Authority (NPA) must ensure that a person is tried in the appropriate court with the power to consider his or her guilt and hand down the appropriate sentence. If we approach a court that does not have the jurisdiction to hear a matter or if we approach a court who has jurisdiction to hear similar matters but only on appeal, then the court will dismiss the application before hearing the merits of the case because it lacks jurisdiction to hear the case.

The rules of jurisdiction when constitutional issues are raised in a case differ in important ways from the rules of jurisdiction in non-constitutional matters. The reason for this is, in part, that in constitutional matters litigants have access to distinct remedies not usually available in non-constitutional matters. As jurisdictional issues are inextricably linked to questions of what remedy is being sought, there is a close relationship between constitutional jurisdiction and the remedy being sought in a particular constitutional matter. For example, constitutional cases often revolve around arguments about whether the law or the action of someone is unconstitutional and invalid, and whether it should be set aside. If a court does invalidate and set aside legislation or the acts of the President or other members of the executive, the court will be ‘interfering’ in the work of the democratically elected branches of government. The Constitution grants jurisdiction to certain courts only to award such remedies. There are also special rules relating to when these remedies may be granted and when the ruling by a court on remedies is final or not. There will therefore always be a close relationship between the remedy that is sought and the question of whether a court has jurisdiction in a case so this section should be read with the section on constitutional remedies. [72](#)

In South Africa, the question of constitutional jurisdiction is further complicated by the fact that the interim and then the 1996 Constitutions created a new Constitutional Court which was welded onto the existing judicial system. In the interim Constitution, the Constitutional Court was initially placed in an equal position with the SCA, which retained its final jurisdiction over all non-constitutional matters but had no jurisdiction at all over constitutional issues. [73](#) In the 1996 Constitution this arrangement was changed and the SCA now also enjoys constitutional jurisdiction [74](#) although the Constitutional Court retained final jurisdiction over all constitutional matters. [75](#) To complicate matters further, the jurisdiction of the Constitutional Court was extended by the Constitution Seventeenth Amendment Act of 2012 (which came into effect in August 2013). When considering the various jurisdictional

issues, it is therefore important to note this history and to understand that the system now provides for two distinct jurisdictional scenarios: first, in matters not raising any constitutional or related issue, and second, in matters raising constitutional issues. Given the fact that it is not always easy to determine whether a matter raises a constitutional issue or not, this division of jurisdictional turf is not without its problems.

#### 6.2.2.1 Constitutional Court

Until August 2013, the Constitutional Court was a specialist court and not a court of general jurisdiction.<sup>76</sup> However, it is important to note that the Constitution Seventeenth Amendment Act has now drastically changed the jurisdiction of the Constitutional Court. The jurisdiction of the Constitutional Court before this change must be contrasted with the arrangement which came into effect in 2013. Previously, the Constitutional Court was the court of final instance in relation to constitutional matters ‘and issues connected with a decision on a constitutional matter’.<sup>77</sup> This included any question that was not a constitutional matter but nevertheless had to be decided by the Court in order to reach a decision on a constitutional matter.<sup>78</sup> Constitutional matters include ‘any issue involving the interpretation, protection or enforcement of the Constitution’.<sup>79</sup> Although the extension of the jurisdiction of the Constitutional Court beyond constitutional issues (which we discuss below) appears to be a dramatic change, this change in jurisdiction may have less of an impact than we might think. This is because it is not always easy to distinguish between a constitutional matter and a non-constitutional matter. There are several reasons for this:

- First, in the important case, *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex parte President of the Republic of South Africa and Others*, the Constitutional Court stated that:

I cannot accept this contention which treats the common law as a body of law separate and distinct from the Constitution. There are not two systems of law, each dealing with the same subject matter, each having similar requirements, each operating in its own field with its own highest court. There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.<sup>80</sup>

Read with section 39(2) of the Constitution, which states that ‘[w]hen interpreting legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights’, this means that any interpretation of legislation and any development of the common law or customary law will potentially raise constitutional issues. Legislation must be interpreted in line with the spirit, purport and object of the Bill of Rights if the words are reasonably capable of such an interpretation or are not unduly strained.<sup>81</sup> This makes such an interpretative exercise a constitutional matter. This is also called reading down.<sup>82</sup> Where ‘the common law deviates from the spirit, purport and objects of the Bill of Rights the courts have an obligation to develop it by removing that deviation’.<sup>83</sup> This means that potentially any argument about the development of the common law or the interpretation of legislation could raise constitutional issues in an indirect manner.<sup>84</sup>

- Second, under the 1996 Constitution, ‘[t]he exercise of all public power must comply with the Constitution which is the supreme law, and the doctrine of legality which is part of that law’.<sup>85</sup> Any challenge to the exercise of public power is

therefore a constitutional matter and is susceptible to the jurisdiction of the Constitutional Court. Public power is usually exercised by a public body or institution authorised by the Constitution or ordinary law to exercise that power. It includes power exercised by the President, Ministers, state officials and the courts.<sup>86</sup>

- • Third, the Constitutional Court also has the jurisdiction to hear disputes as to whether any law or conduct is inconsistent with the Constitution and can declare such law or conduct unconstitutional and invalid.
- • Fourth, the Constitutional Court can determine issues relating to the status, powers and functions of an organ of state.<sup>87</sup>
- • Fifth, questions arising from the interpretation and application of ordinary legislation that has been enacted to give effect to constitutional rights or in compliance with the legislature's constitutional obligations are also constitutional matters.<sup>88</sup> For example, section 9(4) of the Constitution requires the legislature to enact legislation to prohibit unfair discrimination. The legislature consequently passed the Promotion of Equality and Prevention of Unfair Discrimination Act <sup>89</sup> to give effect to this injunction. Thus, any interpretation and application of this Act would give rise to a constitutional issue.<sup>90</sup>

Although the scope of what constitutes a constitutional issue is therefore potentially extraordinarily broad, this does not mean that all factual and legal questions can be turned into constitutional issues. However, the extension of the jurisdiction of the Constitutional Court in 2013 has now rendered this distinction less important as far as points of law are concerned. The amended section 167(3)(a) of the Constitution now makes clear that the Constitutional Court is the highest court of the Republic. Previously, this section stated that the Constitutional Court was the highest Court for all constitutional matters only. The 2013 amendments now determine that the Constitutional Court may decide constitutional matters and

any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court.<sup>91</sup>

The Constitutional Court itself has the power to make the final decision on whether a matter is within its jurisdiction.<sup>92</sup> These amendments mean that the Constitutional Court is no longer confined to hearing constitutional matters and matters that are connected with constitutional matters. The Court can now also consider non-constitutional matters. However, the Constitutional Court cannot hear appeals based solely on factual disputes. In cases where an appeal is lodged with the Constitutional Court that does not deal with a constitutional matter, the Constitutional Court has a relatively wide discretion to decide whether it will hear the appeal or not. In doing so, it will have to take two factors into consideration. First, it can only hear appeals on the grounds that the matter raises an arguable point of law. Second, this point of law must be of such general public importance that it is necessary for the Constitutional Court to hear the matter to give clarity on this point of law. As we shall see below, in certain cases the Constitutional Court has no choice and must consider a case before it. However, where an appeal is lodged with the Constitutional Court in a non-constitutional matter, the Constitutional Court itself can decide whether to hear the case but only if the two requirements set out above are met. Even if the two requirements are met, this does not mean the Constitutional Court must hear the appeal. It has a discretion to decide whether to hear it or not.

As pointed out above, matters that turn purely on questions of fact are not constitutional matters nor do they raise ‘an arguable point of law’. This means such matters that raise only purely factual disputes cannot be heard by the Constitutional Court. Similarly, the Constitutional Court cannot hear matters involving the straightforward application of law that do not raise constitutional questions, do not require the Court to interpret or develop legislation, common law or customary law in line with the spirit, purport and objects of the Bill of Rights, and do not raise an arguable point of law.<sup>93</sup>

#### PAUSE FOR REFLECTION

The distinction between factual disputes and disputes about points of law

The Constitutional Court’s judgment in *S v Boesak* <sup>94</sup> provides a helpful illustration of the distinction between factual disputes and disputes about points of law in the context of the pre-seventeenth amendment regime which still required a constitutional question to be raised for the Constitutional Court to hear the case. Boesak was convicted on a charge of fraud and three charges of theft in the High Court. On appeal, the SCA set aside the conviction on one of the theft charges but dismissed the appeal on the other charges. It nevertheless reduced the sentence to one of three years’ imprisonment.<sup>95</sup>

Boesak approached the Constitutional Court to have the remaining convictions set aside, arguing that there was not sufficient evidence to support the findings of the SCA that his guilt had been proven beyond reasonable doubt. The SCA, Boesak argued, had interpreted the facts wrongly. This was a violation of the right to be presumed innocent guaranteed by section 35(3)(h) of the Bill of Rights.

The Constitutional Court found that, in essence, Boesak was arguing that the High Court and the SCA had got the facts wrong. It found that even if this were true, this would not raise a constitutional issue. The Court then went on to identify three broad principles informing the identification of constitutional issues:

1. (a) A challenge to a decision of the SCA on the basis only that it is wrong on the facts is not a constitutional matter.

In the context of section 167(3) of the Constitution the question whether evidence is sufficient to justify a finding of guilt beyond reasonable doubt cannot in itself be a constitutional matter. Otherwise, all criminal cases would be constitutional matters, and the distinction drawn in the Constitution between the jurisdiction of this Court and that of the SCA would be illusory. There is a need for finality in criminal matters. The structure of the Constitution suggests clearly that finality should be achieved by the SCA unless a constitutional matter arises. Disagreement with the SCA’s assessment of the facts is not sufficient to constitute a breach of the right to a fair trial. An applicant for leave to appeal against the decision of the SCA must necessarily have had an appeal or review as contemplated by section 35(3)(o) of the Constitution. Unless there is some separate constitutional issue raised therefore, no constitutional right is engaged when an appellant merely disputes the findings of fact made by the SCA.

1. (b) The development of, or the failure to develop, a common-law rule by the SCA may constitute a constitutional matter.

This may occur if the SCA developed, or failed to develop, the rule under circumstances inconsistent with its obligation under section 39(2) of the Constitution or with some other right or principle of the Constitution.

1. (c) The application of a legal rule by the SCA may constitute a constitutional matter.

This may occur if the application of a rule is inconsistent with some right or principle of the Constitution.<sup>96</sup>

The Constitutional Court's jurisdiction can be divided into concurrent jurisdiction and exclusive jurisdiction. Its concurrent jurisdiction is exercised concurrently with the High Courts and the SCA. On certain matters, only the Constitutional Court can decide, giving it exclusive jurisdiction on these issues.

The 1996 Constitution provides for the concurrent exercise of jurisdiction of the High Courts, the SCA and the Constitutional Court in respect of direct challenges to the constitutionality of all forms of legislation. This means that any challenge to a provision of an Act of Parliament, a provincial legislature or delegated legislation would usually first be lodged in the High Court. If the High Court or later the SCA declares the legislation invalid, the Constitutional Court must confirm this before such an order will have any force or effect.<sup>97</sup> This means all decisions by a High Court or the SCA declaring a legislative provision unconstitutional and invalid will always end up in the Constitutional Court as the Constitutional Court is required either to confirm the order of invalidity of the lower court or to reject that order. This is necessary because it would be untenable for a situation to arise where a High Court declares a legislative provision to be invalid and this provision is thus inoperable within the jurisdiction of that High Court while it remains in force in other jurisdictions. If a lower court does not declare the legislation invalid, an appeal can nevertheless be lodged against this decision with the Constitutional Court.

Jurisdiction on issues around the interpretation and application of legislation, common law or customary law are also shared between the High Courts, SCA and Constitutional Court. As we have seen, where a dispute arises on an arguable point of law of general public importance (even when this point of law is non-constitutional in nature), then the Constitutional Court also has concurrent jurisdiction with lower courts.

Over and above this concurrent jurisdiction, the Constitutional Court also has exclusive jurisdiction to hear cases dealing with a distinct set of issues. As the Constitutional Court explained in *Women's Legal Trust v President of the Republic of South Africa and Others*:

These exclusive competencies draw on the Court's political legitimacy. They reflect its special status as guardian of the Constitution, with exclusively constitutional functions and a specially determined composition. Any exercise of the judicial function may cause tension with the other arms of government and trigger political contention. Hence the mere fact that a matter is or may become politically fraught does not of itself mean that only this Court has jurisdiction to deal with it. More is needed. Dispositive indications may lie in the nature of the obligation, whether its content can be clearly ascertained, whether it is stated unambiguously in the Constitution, how its content is determined, and whether it is capacity-defining or power-conferring.<sup>98</sup>

Thus, the Constitutional Court has exclusive jurisdiction to decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state.<sup>99</sup> For example, where a dispute arises between a provincial government and the national government about their respective powers or between a provincial legislature and the national Parliament about the respective legislative powers of each, then only the Constitutional Court has jurisdiction to hear the case.

The Constitutional Court also has exclusive jurisdiction to decide on the constitutionality of any parliamentary or provincial Bill referred to it by the President or the relevant Premier in terms of section 79 or 121 of the Constitution when the President or the respective Premier has reservations about the constitutionality of a Bill.<sup>100</sup> In addition, the Constitutional Court has exclusive jurisdiction to decide on applications by members of the NA or provincial legislatures to declare invalid all or parts of an Act of Parliament or the provincial legislatures in terms of section 80 or 122 of the Constitution.<sup>101</sup> In terms of these sections, such an application can only be made if supported by at least one-third of the members of the NA <sup>102</sup> or at least 20% of the members of a provincial legislature.<sup>103</sup> Such an application must be made within 30 days of the date on which the President or the Premier assented to and signed the Act.<sup>104</sup> This provision allows opposition parties who believe that a newly passed Act is unconstitutional to refer the Act to the Constitutional Court before the Act is implemented.

The Constitutional Court has exclusive jurisdiction to decide on the constitutionality of any amendment to the Constitution.<sup>105</sup> Note, however, that in *United Democratic Movement v President of the Republic of South Africa and Others (No 2)*, the Court stated that amendments to the Constitution passed in accordance with the manner and form requirements of section 74 of the Constitution ‘become part of the Constitution’.<sup>106</sup> Once part of the Constitution, amendments cannot be challenged on the grounds of inconsistency with other provisions of the Constitution. This means ‘[t]he Constitution, as amended, must be read as a whole and its provisions must be interpreted in harmony with one another. It follows that there is little if any scope for challenging the constitutionality of amendments that are passed in accordance with the prescribed procedures and majorities’.<sup>107</sup> Challenges to the constitutionality of amendments to the Constitution would therefore be based on whether the correct procedure was followed when passing the amendment. For example, if an amendment to the Constitution directly or indirectly amends section 1 of the Constitution, such an amendment must be passed with a 75% majority in the NA. If an amendment of any section of the Constitution would have the effect, say, of watering down the provision in section 1 regarding the supremacy of the Constitution and it is not passed with a 75% majority, the Court would be able to invalidate the amendment.

It is unclear whether a duly passed amendment of the ‘basic structure’ of the Constitution could be challenged in the Constitutional Court. In *Premier of KwaZulu-Natal and Others v President of the Republic of South Africa and Others*, Mahomed DP made the following obiter remarks about this matter:

There is a procedure which is prescribed for amendments to the Constitution and this procedure has to be followed. If that is properly done, the amendment is constitutionally unassailable. It may perhaps be that a purported amendment to the Constitution, following the formal procedures prescribed by the Constitution, but radically and fundamentally restructuring and reorganising the fundamental premises of the Constitution, might not qualify as an ‘amendment’ at all.<sup>108</sup>

Given the fact that any radical restructuring of the fundamental premises of the Constitution would, in effect, constitute an amendment of section 1 of the Constitution which requires a 75% majority in the NA, it is difficult to see that the Constitutional Court would ever have the opportunity to develop this obiter statement.

The Constitutional Court has exclusive jurisdiction to decide that Parliament or the President has ‘failed to fulfil a constitutional obligation’.<sup>109</sup> The words ‘fulfil a constitutional obligation’ must be given a narrow meaning.<sup>110</sup> This is because the words are part of a broader distribution of jurisdictional competence in the Constitution. We need to interpret the words narrowly to ensure that they do not clash with the provision in section 172(2)(a) that gives other courts jurisdiction over ‘conduct of the President’. The same reasoning applies to obligations the Constitution imposes on Parliament as section 172(2)(a) also grants other courts jurisdiction over the validity of Acts of Parliament.<sup>111</sup> While the phrase ‘failed to fulfil a constitutional obligation’ in section 167(4)(e) must be narrowly construed, section 172(2)(a), which gives other courts competence to scrutinise the constitutionality of presidential and parliamentary acts, must be widely interpreted <sup>112</sup> to ensure that absurdities do not arise. Thus the Constitutional Court has held that it alone has jurisdiction to determine whether Parliament has fulfilled its obligation to facilitate public involvement in passing legislation.<sup>113</sup> Lastly, only the Constitutional Court has the jurisdiction to certify a provincial constitution in terms of section 144.<sup>114</sup>

As pointed out above, in all matters not exclusively reserved for the jurisdiction of the Constitutional Court, the Constitutional Court ordinarily functions as a court of appeal, hearing cases that come to it after decisions by the High Courts and/or the SCA, or hearing cases in which it is required to consider whether to confirm an order of invalidity from lower courts. However, section 167(6) of the Constitution allows direct access to the Constitutional Court – even in cases where it does not have exclusive jurisdiction – when in the view of the Constitutional Court it is in the interest of justice to allow such direct access. This is an extraordinary procedure and the Court will only grant direct access to litigants on issues on which it has concurrent jurisdiction in the most exceptional cases. This means that ‘compelling reasons are required to justify a different procedure and to persuade this Court that it should exercise its discretion to grant direct access’.<sup>115</sup> As a general rule, the Constitutional Court is reluctant to grant direct access as it would then have to decide the legal and factual issues without the benefit of the wisdom of one or more lower courts. It has ruled that the ‘Court is placed at a grave disadvantage if it is required to deal with difficult questions of law, constitutional or otherwise ... virtually as a court of first instance’.<sup>116</sup> It is also not considered to be in the interest of justice for a court to sit as a court of first and last instance as the losing litigants will then have no chance of appealing against the decision given:

Experience shows that decisions are more likely to be correct if more than one court has been required to consider the issues raised. In such circumstances the losing party has an opportunity of challenging the reasoning on which the first judgment is based, and of reconsidering and refining arguments previously raised in the light of such judgment.<sup>117</sup>

To decide whether it is in the interest of justice to grant direct access, the Court will ask whether the case is of such urgency that direct access should be granted.<sup>118</sup> This is because the Court has argued that it was normally important for a case first to be heard in the High Court (and perhaps the SCA) because of the ‘benefits that may be derived from the judgments of other courts’.<sup>119</sup> Those courts should therefore not ordinarily be bypassed by

litigants who want to speed up the hearing of their case.<sup>120</sup> The Court first considered the provision relating to direct access in *Bruce and Another v Fleecytex Johannesburg CC and Others* where it set out the factors that are relevant to applications for direct access to it as follows:

Whilst the prospects of success are clearly relevant to applications for direct access to this Court, there are other considerations which are at least of equal importance. This Court is the highest Court on all constitutional matters. If, as a matter of course, constitutional matters could be brought directly to it, we could be called upon to deal with disputed facts on which evidence might be necessary, to decide constitutional issues which are not decisive of the litigation and which might prove to be purely academic, and to hear cases without the benefit of the views of other Courts having constitutional jurisdiction. These factors have been referred to in decisions given by this Court on applications for direct access under the interim Constitution, and are clearly relevant to the granting of direct access under the 1996 Constitution. It is, moreover, not ordinarily in the interests of justice for a court to sit as a court of first and last instance, in which matters are decided without there being any possibility of appealing against the decision given.<sup>121</sup>

### CRITICAL THINKING

Does the SCA still have a meaningful role to play?

As we have noted, the Constitution Seventeenth Amendment Act has changed the jurisdictional landscape. Among other things, this amendment effected changes to section 167(3)(a) of the Constitution to affirm the Constitutional Court as ‘the highest court of the Republic’. This amendment thus turned the Constitutional Court into the court of final instance for all matters of points of legal doctrine (but not of factual disputes or disputes about the application of legal principles to factual disputes), whether these matters relate to the Constitution or not.

The SCA (discussed below) has therefore ceased to be the highest court for all non-constitutional matters. The proposed amendments have potentially far-reaching consequences, but these are ameliorated by amendments to section 167(3)(b) of the Constitution which states that the Constitutional Court may decide constitutional matters and ‘any other matter’, but only ‘if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court’. The Constitutional Court retains the power to make the final decision on whether a matter is within its jurisdiction.<sup>122</sup> Section 167(3)(b) extends the jurisdiction of the Constitutional Court to all matters but allows the Court to manage its own docket by granting it the discretion to decide when to take on non-constitutional matters on the basis that these raise a point of law of general public importance.

Given the fact that section 39(2) of the Constitution already allows the Court to consider matters regarding the development of the common law and customary law and the interpretation of legislation in line with the spirit, purport and object of the Bill of Rights, it is unclear to what extent the amendment will affect the case load of the Court. In effect, the answer to this question will depend on the rules developed by the Constitutional Court around when to consider a case that does not directly or indirectly raise any constitutional issue. However, arguably, the amendments lower the status and diminish the influence of the SCA as it no longer acts as the highest court in all non-constitutional matters. The question that can



be posed is whether the SCA has not become superfluous. What meaningful role does the SCA still play, given that it no longer acts as the highest court in any matter apart from on disputes of fact?

#### 6.2.2.2 Supreme Court of Appeal

As pointed out above, the interim Constitution established a seemingly clear division between the jurisdiction of the two appellate courts in relation to constitutional and non-constitutional issues.<sup>123</sup> The SCA was the court of final instance in non-constitutional matters while the Constitutional Court was the court of final instance in constitutional matters. In terms of the interim Constitution, the SCA had no jurisdiction to deal with constitutional matters.

The 1996 Constitution changed this arrangement and awarded the SCA jurisdiction to hear and decide constitutional matters as it is empowered to hear appeals ‘in any matter arising from the High Court’.<sup>124</sup> Before the advent of the Constitution Seventeenth Amendment Act where a matter did not include a constitutional issue, the SCA was the court of final instance. Now the SCA may be the court of final instance in non-constitutional issues but only if the Constitutional Court decides not to hear an appeal from the SCA on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by the Constitutional Court. This means that the SCA will only be the truly final court for decisions relating to factual findings and ordinary appeals relating to the application of non-contested legal rules to sets of facts. When a case raises constitutional issues and does not deal with an issue on which the Constitutional Court has exclusive jurisdiction, the case is first heard by the High Court after which an appeal can be lodged with either the SCA or the Constitutional Court directly.

When the constitutional matter involved is one that turns on the direct application of the Constitution and does not involve the development of the common law or customary law, considerations of cost and time may make it desirable that the appeal be brought directly from the High Court to the Constitutional Court, circumventing the SCA.<sup>125</sup> The issue is different when the SCA is asked to develop the common law. The Constitutional Court will not ordinarily exercise its jurisdiction to develop the common law without the SCA having considered the matter first.<sup>126</sup> This is because the SCA is viewed as having a broad understanding and insight into the nature and scope of the common law. It will therefore arguably be able to make a valuable contribution to any debate on whether and to what extent the common law should be developed.

In *Masiya v Director of Public Prosecutions Pretoria (The State) and Another*, the Constitutional Court endorsed this important role of the SCA, holding that any constitutional issues that involve, for example, the development of the common law, should first be taken to the SCA because of its jurisdiction and expertise in the common law.<sup>127</sup> The same applies to matters involving the indirect application of the Bill of Rights to the interpretation of ordinary legislation. In such cases, the SCA would normally be required to deal with a case before it is considered by the Constitutional Court.<sup>128</sup> As the Constitutional Court stated in *Amod v Multilateral Motor Vehicle Accidents Fund*:

When a constitutional matter is one which turns on the direct application of the Constitution and which does not involve the development of the common law, considerations of costs and time may make it desirable that the appeal be brought directly to this Court. But when the constitutional matter involves the development of the common law, the position is different.

The Supreme Court of Appeal has jurisdiction to develop the common law in all matters including constitutional matters. Because of the breadth of its jurisdiction and its expertise in the common law, its views as to whether the common law should or should not be developed in a 'constitutional matter' are of particular importance.[129](#)

#### 6.2.2.3 High Courts

The Constitution confers wide-ranging jurisdiction on the various High Courts in respect of constitutional matters as the High Courts may decide any constitutional matter except those matters exclusively reserved for the jurisdiction of the Constitutional Court or matters assigned by an Act of Parliament to another court of a similar status as a High Court.[130](#) This means that most cases raising constitutional issues will first be heard in one of the High Courts. However, as we noted above, where the High Court declares invalid any provisions of an Act of Parliament or a provincial legislature, such an order must be confirmed by the Constitutional Court before that order has any force.[131](#) In such cases, no appeal to the SCA is required and no leave for appeal need be sought from the Constitutional Court.

The situation is different where a High Court declines to find legislation inconsistent with the Constitution and does not declare the impugned provisions invalid. In this case, there will be no automatic referral to the Constitutional Court and an appeal will have to be lodged by the party seeking an order of invalidity.[132](#)

#### 6.2.2.4 Magistrates' courts

Magistrates' courts do not have jurisdiction to hear constitutional matters. Section 170 of the Constitution states that magistrates' courts and all other courts may decide any matter determined by an Act of Parliament, but a court of a status lower than a High Court may not enquire into or rule on the constitutionality of any legislation or any conduct by the President. Section 110(1) of the Magistrates' Courts Act [133](#) confirms that magistrates' courts cannot pronounce on the validity of any law or conduct of the President. Section 110(2) states that when an allegation that a law or conduct by the President is unconstitutional and invalid is raised in a magistrates' court, the magistrate in question must continue and decide the matter on the assumption that the law or conduct in question is valid. If a litigant wishes to pursue the question, he or she will have to approach the High Court.

### 6.3 The independence of the superior courts

#### 6.3.1 Introduction

South Africa's transition to an open and democratic society with a supreme Constitution relied heavily on the establishment of an independent and impartial judiciary. In the new system, the role of the judiciary was dramatically expanded to ensure the protection of fundamental rights and to ensure that government (as well as private institutions) remained within the bounds of the law and honoured the constitutional commitment to openness and democracy. Given the manner in which the judiciary was tainted during apartheid, it may be surprising that this institution was entrusted with such a crucial role in the transition to democracy, especially given the fact that in terms of the political settlement, it was the only branch that remained largely unchanged in the new democratic era.[134](#) As we have pointed out, when the new Constitution came into effect, the judiciary was still largely dominated by

white men and tainted by its role in the interpretation and implementation of apartheid legislation.<sup>135</sup>

Despite this history, when South Africa became a democracy, no judges were relieved of their duties and the courts did not only retain their powers, but were given extended powers far exceeding those they had enjoyed under apartheid. The only change came in the form of the addition of the Constitutional Court to the existing court structure and changes to the manner in which judges are appointed. While the other courts and the judges who staffed these courts remained in place, the interim Constitution provided for the creation of a separate Constitutional Court to act as the final arbiter of all constitutional matters.

Against this background, the creation of the Constitutional Court is a significant development in South Africa's transition, representing a first step on the journey of transforming the legal system as a whole. It is difficult to imagine that the judiciary would have been awarded such an important role in the transition if a new Constitutional Court had not been put in place. It is also difficult to imagine that the judiciary would have been entrusted with the enforcement of a supreme Constitution in the absence of a newly created Constitutional Court. The decision to create the Constitutional Court was therefore partly a pragmatic political move and partly a principled move aimed at increasing the legitimacy of the judiciary. As the highest Court on constitutional matters and now also on other matters of legal doctrine, it was important that the Court be seen to be impartial and independent and not tainted by South Africa's apartheid past. Given the fact that the Court would also act as the ultimate guardian of the impartiality and independence of all other courts,<sup>136</sup> its creation could therefore be said to be the first step in restoring the independence of the South African judiciary. It also allowed the retention of the court structure and made it easier for the drafters of the interim and 1996 Constitutions to safeguard the tenure of judges appointed by the apartheid government before 1994.

### CRITICAL THINKING

Should South Africa have followed the Kenyan model of vetting old-order judges?

When Kenya adopted a new Constitution in 2010, one of the most vexing questions faced by its drafters was how to deal with members of the judiciary, many of whom were widely believed to be corrupt or politically compromised. The Kenyan Constitution created a system of 'vetting' that required all judges to be vetted by an independent board of experts.<sup>137</sup> Only those judges who passed the vetting process retained their positions. Judges found to have been implicated in corruption or who had not shown the requisite diligence or impartiality required of members of an independent judiciary were not retained. The process was aimed at re-establishing the credibility and integrity of the Kenyan judiciary.

As we have seen, a similar process was not followed in South Africa and all judges appointed during the apartheid era retained their positions. Instead, section 174(1) of the South African Constitution merely states that 'any appropriately qualified woman or man who is a fit and proper person' may be appointed as a judicial officer while section 174(2) requires that the need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when appointing new judicial officers. This decision ensured continuity in the judiciary while envisaging that a gradual transformation of the judiciary would take place through the appointment of new judges as old-order judges retired.

The question is whether this choice was a wise one or whether the Kenyan model would have been more appropriate. Given the need for the judiciary to enjoy legitimacy with the majority of South Africans, did the South African model place too much emphasis on the transformation of the judiciary through a gradual appointment of new-order judges?

The independence of the judiciary is a distinctive feature of a constitutional democracy. This independence refers to two ideals related to the functioning of the courts as it pertains to 'the relationship between the courts and other state organs, the organisation of the relationship between the courts themselves and the internal organisation of the courts as well as aspects regarding the legal position of individual members of the judiciary'.<sup>138</sup>

The first ideal is that individual judges should interpret and enforce the law impartially and without bias. This requires individual judges to approach a specific case with an open mind, without taking into account their own personal views, ideological commitments or party political beliefs. Impartiality is a complex notion. At its most extreme, impartiality relates to the ability of each individual judge to apply the law without fear or favour in accordance with the law, oath of office and with his or her own sense of justice without submitting to any kind of pressure or being swayed by his or her own views on political, social and economic matters.<sup>139</sup> This extreme notion of impartiality presupposes that a judge can banish from his or her mind all personal views and prejudices and can interpret a legal text and apply it to a set of facts without being swayed by political or other personal commitments or culturally influenced values and assumptions. However, it is not clear whether a judge can always do so, especially as far as the interpretation of the rather open-ended and general language of the Constitution is concerned. Often a text – especially a text like the Constitution containing general language – will not have one objective meaning and a judge may be required to interpret that text. Interpretation requires a judge to refer to considerations outside the text itself to help give meaning to that text. In the first decision handed down by the Constitutional Court, Kentridge J signalled awareness of (but skirted) this issue when he remarked:

I am well aware of the fallacy of supposing that general language must have a single 'objective' meaning. Nor is it easy to avoid the influence of one's personal intellectual and moral preconceptions. But it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean.<sup>140</sup>

On the one hand, the Court acknowledged the fact that the language of the Constitution does not necessarily yield one 'objective' meaning which the Court can discover in a mechanistic fashion. It thus recognised the need to refer to extra-textual factors – such as the South African context and history and comparable foreign case law <sup>141</sup> – when interpreting the provisions of the Constitution. On the other hand, the judgment resisted any move that would implicate the personal views, political commitments and philosophy of the judges themselves in the interpretative project in order to safeguard the (symbolic) boundary between the work done by judges when they interpret and apply the law and politics.<sup>142</sup>

In *S v Makwanyane and Another*,<sup>143</sup> several of the justices asserted the irrelevance of their personal, political or philosophical views when interpreting the Constitution. Impartiality, they claimed, required judges to ground their judgments in general human rights principles that are above controversy and cannot be related to the personal views of a judge.<sup>144</sup> At the same time, many of the justices tentatively acknowledged the open-ended nature of the language of the Constitution and the inherent need to refer to 'extra-legal' values and texts,

including the South African political context and history, to justify their decisions.<sup>145</sup> The Constitutional Court has since often declared its commitment to the centrality of the constitutional text in constitutional interpretation. The judges of this court also acknowledge that any such interpretation can only be conducted with the assistance of objective or objectively determinable criteria, or, at the very least, criteria that are somehow distanced from the personal views, opinions and political philosophy of the presiding judge.<sup>146</sup> However, it is an open question whether judges can truly empty their minds of all their personal views and political commitments when they interpret the Constitution and apply it to a specific set of facts.

Despite these difficulties, the ideal of impartial adjudication remains a cornerstone of an independent judiciary which has often been affirmed by the Constitutional Court. Thus, the Constitutional Court in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others – Judgment on recusal application (SARFU II)* stated that:

It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.<sup>147</sup>

#### PAUSE FOR REFLECTION

The test for independence

In *S and Others v Van Rooyen and Others (General Council of the Bar of South Africa Intervening)*,<sup>148</sup> the Constitutional Court affirmed that judicial independence requires that individual judges must be able to hear and decide cases that come before them and that no outsider should be able to interfere with the way a judge conducts his or her case and makes his or her decision. This requires judges to act impartially and, at an institutional level, it requires structures to protect courts and judicial officers against external interference.<sup>149</sup>

At the same time, it is important to note that there are hierarchical differences between higher courts and lower courts and that the requirements for independence could be different for the two types of courts.<sup>150</sup> Just because they are treated differently does not mean that magistrates' courts are not independent. Lower courts are entitled to protection by higher courts if their independence is threatened so the greater the protection that is given to higher courts, the greater the protection is for lower courts. Moreover, lower courts do not have the power to deal with constitutional matters and the jurisdiction of the lower courts set out in the Constitution is much more restricted than that of the higher courts. This means that lower courts do not need the same kind of safeguards as the higher courts.

The test for independence is whether the court or tribunal 'from the objective standpoint of a reasonable and informed person, will be perceived as enjoying the essential conditions of independence'.<sup>151</sup> It is important that there is public confidence in the administration of justice. Without that confidence, the system cannot command the respect and acceptance that are essential to its effective operation. It is, therefore, important that a tribunal should be perceived as independent, as well as impartial, and that the test for independence should

include that perception. This test is an objective one.<sup>152</sup> The apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. We must ask what would an informed person conclude when viewing the matter realistically and practically, and having thought the matter through. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel.

It is important to note that this objective test must be properly contextualised.<sup>153</sup> The perception that is relevant for such purposes is, however, a perception based on a balanced view of all the material information. We ask how things appear to the well-informed, thoughtful and objective observer, rather than the hypersensitive, cynical and suspicious person. Bearing in mind the diversity of our society, this cautionary injunction is of particular importance in assessing institutional independence. The well-informed, thoughtful and objective observer must be sensitive to the country's complex social realities, in touch with its evolving patterns of constitutional development, and guided by the Constitution, its values and the differentiation it makes between different levels of courts.

The Van Rooyen judgment provides a general test to establish whether a judge would be impartial and independent. We contend that when considering whether the appointments procedure and other structural safeguards intended to safeguard the impartiality and independence of judges are sufficient, this test must be used.

Judges may not always be able to be impartial (in the sense of being able to make decisions without taking into account factors that are legally irrelevant) and may not be able to act without fear or favour if the conditions under which the judicial function is exercised do not allow for this and if the judiciary is not created as an independent institution that functions separately from the other branches of government. Judges will only be able to rule impartially and to be truly independent (from pressure of both the state and private actors) if they are able to operate independently from the other branches of government. They must be free from potential direct and indirect pressures that could sway individual judges trying to act in as impartial a manner as is humanly possible.

Structural safeguards must therefore be put in place to ensure that judges are protected from the influence of and interference by other branches of government (as well as from private business interests).<sup>154</sup> This requirement for structural safeguards to guarantee the impartiality and independence of judges places an emphasis on the functional independence of the judiciary within the larger political system and its functional relationship with the other branches of government in South Africa. This second aspect of independence relates to:

the degree to which the judicial institution has a distinct and discrete role ... detached from the interests of the political system, the concerns of powerful social groups or the desires of the general public ... to regulate the legality of state acts, enact justice and determine general and constitutional and legal values.<sup>155</sup>

This means that judicial independence is not meaningful if judges cannot exercise their judicial powers to check the arbitrary or unjust exercise of power by political and social actors in society. The courts (and the judges who staff the courts) must not be constrained by fear or by practical difficulties from carrying out the ideal judicial role. This implies that

structures must be put in place to ensure that judges are insulated from political and financial pressures and incentives.<sup>156</sup> This fact was endorsed by Chaskalson CJ in *Van Rooyen* where he argued that:

the constitutional protection of the core values of judicial independence accorded to all courts by the South African Constitution means that all courts are entitled to and have the basic protection that is required ... implicit in this is recognition of the fact that the courts and their structure, with the hierarchical differences between higher courts and lower courts which then existed, are considered by the Constitution to be independent ... that involves an independence in the relationship between the courts and other arms of government.<sup>157</sup>

To determine whether courts enjoy sufficient structural independence, several factors must be explored. We do so here with reference to the superior courts. As we have seen, magistrates do not exercise constitutional jurisdiction, which means we will leave aside the position of magistrates' courts.

### 6.3.2 Appointment of judges

As noted above, before 1994, political considerations often played a decisive role in the appointment of judges, thus potentially affecting the impartiality and independence of judges. The drafters of the interim and final Constitutions were faced with a difficult task in addressing this problem.

On the one hand, in the new constitutional dispensation, judges are given extensive additional powers. This includes the power to declare invalid acts of the democratically elected Parliament and acts of the executive, including the President. This means that the decisions of judges will often have political consequences. Judges are therefore potential actors in the political process as decisions of judges can have far-reaching political consequences.<sup>158</sup> The questions raised in chapter 2 about the counter-majoritarian dilemma therefore loom large. It was therefore felt that the appointment of judges could not be entirely insulated from the political process. This would potentially delegitimise the judiciary and make it more difficult for it to strike down legislation and the acts of members of the executive. On the other hand, it would be undesirable to leave the appointment of all judges in the hands of the President or other elected politicians. This could potentially lead to a perception that party political considerations are the sole criteria for the appointment of judges, thus affecting the independence and impartiality of the judiciary.<sup>159</sup>

As a compromise, the Constitution created the Judicial Service Commission (JSC) which is involved in the appointment of all superior court judges (although this involvement differs depending on who is appointed). The JSC was envisaged as playing a fundamental role in ensuring the independence of the judiciary. The creation of the JSC constituted the most radical break from the pre-constitutional procedure for the appointment of judges.<sup>160</sup> Section 178 of the Constitution as well as the Judicial Service Commission (JSC) Act <sup>161</sup> established and regulates this body.

The composition of the JSC is of some importance. The ANC favoured the establishment of a politically dominated body while, unsurprisingly, the judges and legal profession favoured a body in which the legal community would be in the majority.<sup>162</sup> The composition of the JSC reflects a compromise between these two positions. The JSC is normally composed of 23 members who are drawn from the judiciary, two branches (attorneys and advocates) of the

legal profession, the two Houses of the national legislature, the executive, civil society and academia.<sup>163</sup> The chair is taken by the Chief Justice who also heads the Constitutional Court. Of the 23 members, 15 represent political interests, including the Minister of Justice, the six members of the NA (three members from minority parties), four members of the NCOP (representing the majority party) and four presidential nominees.<sup>164</sup>

When the members of the JSC discuss matters relating to a specific High Court, the Premier of the province together with the Judge President of the province also sit on the Commission.<sup>165</sup> Matters that affect a specific High Court include, for example, decisions about the appointment of judges to that High Court, as well as decisions about the possible disciplining or even removal of a judge of that High Court from office. If the Premier of the province is absent when the JSC makes a decision regarding either the appointment or the disciplining of a judge serving in that province, the decision of the JSC will be invalid.<sup>166</sup>

When vacancies occur in a court, the Chief Justice, as Chairperson of the JSC, calls for nominations after which shortlisted candidates are publicly interviewed. The JSC then makes recommendations to the President on whom to appoint. While the JSC conducts its interviews in public – a welcome departure from the secretive process followed during the apartheid years – there is little transparency exhibited in the criteria used for selection. The deliberations of the JSC are also kept confidential. This has led to criticism on the basis that the JSC's reasons for preferring one candidate are not always clear.<sup>167</sup> The JSC has also been criticised for the manner in which it interviews candidates. It is said that rarely are questions framed so as to afford a candidate an opportunity to explain his or her approach to adjudication and conception of the important constitutional values, and the candidate's general judicial philosophy and commitment to legal transformation.<sup>168</sup>

The role of the JSC in the appointment of judges differs depending on the nature of the appointment to be made. The President as head of the national executive has a relatively wide discretion when he or she appoints the Chief Justice and the Deputy Chief Justice who both also serve on the Constitutional Court. When making these appointments, the President, as head of the national executive, appoints the person of his or her choice after consulting the JSC and the leaders of parties represented in the NA.<sup>169</sup> The President must therefore consult the JSC, as well as the leaders of opposition parties in the NA, before deciding on a candidate for appointment, but the decision remains his or hers alone. Similarly, when appointing the President and Deputy President of the SCA, the President, as head of the national executive, appoints the person of his or her choice after consulting the JSC (but in such cases the President need not consult the leaders of parties represented in the NA).<sup>170</sup>

There has been some controversy around the nature of the consultation process required although, as stated, it is clear that consultation has to occur prior to the appointment. Ex post facto consultation after the President has made a final decision on an appointment is not acceptable. No matter how rigorous this consultation might have been, consultation requires more than informing the parties to be consulted of a decision. Although the Constitution does not define the notion of consultation, it has been argued that 'at least it must entail the good faith exchange of views, which must be taken seriously'.<sup>171</sup> However, it does not mean that the President must follow the advice of those consulted.

The President, as head of the national executive, appoints the other judges of the Constitutional Court after consulting the Chief Justice and the leaders of parties represented



in the NA.<sup>172</sup> These appointments take place in accordance with a more complicated procedure in which the JSC plays a more important, but ultimately not decisive, role.

The JSC must prepare a list of nominees with three names more than the number of appointments to be made and submit the list to the President.<sup>173</sup> The President may make appointments from the list, but can also initially refuse to appoint someone from the list provided by the JSC. However, if the President refuses to appoint a judge from the list of names provided by the JSC, he or she must provide the JSC with reasons for the decision. If this happens, the JSC is required to supplement the list with further nominees and the President must make the remaining appointments from the supplemented list.<sup>174</sup> This means if there is one vacancy in the Constitutional Court, the JSC must send a list of four nominees to the President. The President will then appoint one of the four nominees unless he or she believes one or more of the nominees are not acceptable or that the list should include a wider selection of names. For example, if a vacancy occurs on the Constitutional Court and the JSC sends the names of four white male candidates to the President, the President may refuse to appoint one of the four nominees, asking for the list to be augmented with black and female candidates. When making decisions about the appointment of ordinary judges to the Constitutional Court, the JSC and the President must keep in mind the requirement that at least four members of the Constitutional Court must at any given time be persons who were judges at the time they were appointed to the Constitutional Court.<sup>175</sup>

The JSC plays a decisive role in the appointment of all other judges to the SCA, High Courts and other specialised courts. This includes the various Judge Presidents who serve as leaders of each of the High Courts. In the appointment of such ordinary judges, the JSC selects candidates to fill any vacancies and the President is then required to appoint the judges ‘of all other courts on the advice of the Judicial Service Commission’.<sup>176</sup> Unlike with the appointment of the Constitutional Court judges and the leadership of the SCA and the Constitutional Court, in these cases the President has no discretion and is required to appoint the candidates selected by the JSC.

As we have seen, the JSC has not always been clear about the criteria used for the selection of judges for appointment. A starting point for an enquiry into the qualities a candidate should have for appointment to the bench is the text of the Constitution which spells out the formal criteria for selection as a judge.<sup>177</sup> Two essential criteria appear in section 174(1) of the Constitution. These criteria are that a person must be ‘appropriately qualified’ and ‘a fit and proper person’ to be appointed as a judge. A further criteria for a Constitutional Court judge is that the appointee must be a South African citizen. These criteria can be regarded as essential or necessary minimum criteria for appointment in the sense that a person who is not appropriately qualified or who is not a fit and proper person may not be appointed as a judicial officer.

However, the Constitution does not expressly detail the content of these criteria and we are therefore required to interpret them. The JSC itself has developed a set of criteria – over and above those mentioned in the Constitution – that it takes into account when considering appointments to the judiciary. These are as follows:

1. 1. Is the proposed appointee a person of integrity?
2. 2. Is the proposed appointee a person with the necessary energy and motivation?
3. 3. Is the proposed appointee a competent person? (a) Technically competent  
(b) Capacity to give expression to the values of the Constitution

4. 4. Is the proposed appointee an experienced person? (a) Technically experienced  
(b) Experienced in regard to values and needs of the community
5. 5. Does the proposed appointee possess appropriate potential?
6. 6. Symbolism. What message is given to the community at large by a particular appointment? [178](#)

Although somewhat vague, these criteria can serve as a starting point for a broader enquiry into the attributes of an ideal judge in South Africa's constitutional democracy. One way of engaging with this difficult question about the criteria for appointment is to take account of the characteristics of the ideal judge. In addition to the criteria formulated by the JSC, it has been argued that when considering the criteria for the appointment of the ideal judge, we should consider the nature of the judicial function and the powers that vest in judges. [179](#) The Constitution requires that the judiciary should be independent, must protect the Constitution and uphold rights, and must apply the law impartially and without fear, favour or prejudice. [180](#) Judicial nominees should display the qualities associated with these requirements for the judiciary. Chief Justice Mohamed made the following remarks about the qualities of an ideal judge:

‘[S]ociety is ... entitled to demand from Judges fidelity to those qualities in the judicial temper which legitimize the exercise of judicial power. Many and subtle are the qualities which define that temper. Conspicuous among them are scholarship, experience, dignity, rationality, courage, forensic skill, capacity for articulation, diligence, intellectual integrity and energy. More difficult to articulate but arguably even more crucial to that temper, is that quality called wisdom, enriched as it must be by a substantial measure of humility, and by an instinctive moral ability to distinguish right from wrong and sometimes the more agonising ability to weigh two rights or two wrongs against each other which comes from the consciousness of our own imperfection. [181](#)

More recently, the late Chief Justice Chaskalson described the qualities relevant to the appointment of a Chief Justice in the following terms:

Non-racism will not be an issue. Nor will commitment to transformation. (All will be committed to that.) The merits of the candidates, their qualities of leadership and institution-building, their commitment to the values of the Constitution, their independence and integrity, the impact their appointment might have on the standing of the Constitutional Court, and other relevant factors, will no doubt be considered. [182](#)

We contend that the commitment of a candidate to the values enshrined in the Constitution is pivotal. These values include respect for human dignity, the achievement of equality and the advancement of human rights. [183](#) It has been argued that this commitment to the values in the Constitution be encapsulated in the requirement that candidates must be committed to the transformative goals of the Constitution. As Cowen argues:

Although the executive and legislative branches are the primary architects of social change, judges – as we have seen – are entrusted to protect rights and they have the power to halt and guide government action. It would thus seem legitimate for selectors to enquire whether candidates for judicial selection are committed to the process of social change as the Constitution mandates. That may either entail assessing whether a judge might seek to exercise judicial power with a view to preserving the status quo (on the one hand) or by assuming the role of primary architect of social change (on the other). Either is arguably

inimical to the values of the Constitution. While assessing commitment to constitutional values and the Constitution's transformative project is a legitimate exercise for selectors, selectors must be cautious not to venture beyond assessing values to assessing political commitments. It might at times be a difficult line to draw, but it is an important one if we are to preserve the principle of judicial independence. As foreshadowed above, an understanding of theories of adjudication might helpfully inform selectors' approach.<sup>184</sup>

Apart from the personal values of judicial candidates, the JSC is also required to take into account another pivotal consideration, namely the need to transform the judiciary better to reflect the racial and gender composition of the broader South African community. These requirements are encapsulated by section 174(2) of the Constitution which states that:

The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.

There are at least two reasons why this section is important. First, as pointed out above, at the time of the transition to democracy the South African judiciary was almost exclusively male and white, a situation that potentially affects the credibility and legitimacy of the judiciary.<sup>185</sup> Special measures are therefore required to increase diversity on the bench to ensure that the judiciary more fairly reflects the composition of the South African public whom it serves. It would be difficult, if not impossible, for the judiciary to retain its legitimacy in the eyes of the public if the overwhelming majority of judges remain white and male.

Second, South Africa has an egregious history of 300 years of racial and gender discrimination in society at large as well as in the legal profession, and there remain ongoing racial and gender prejudices in society and in the legal profession.<sup>186</sup> This provision is important as it redresses these racial and gender prejudices and provides a fair opportunity to groups who did not enjoy the same privileges and opportunities for professional advancement as white men did to be appointed to the bench. The requirement therefore addresses possible lingering racial and gender discrimination in the appointment of judges and is intended to ensure a fair appointment process. In short, it is necessary to consider the racial and gender composition of the bench to eradicate patterns of unfair discrimination in the appointment of judges.<sup>187</sup>

Finally, it is argued that diversity on the bench can also improve the quality of justice meted out by the courts. In a diverse society, judges from different racial backgrounds and different genders and sexual orientations will often bring different perspectives to bear. This can improve the quality of jurisprudence and strengthen the intellectual output of the judiciary.<sup>188</sup> As can be seen from Table 6.2 below,<sup>189</sup> the JSC has done relatively well in ensuring the creation of a non-racial judiciary. However, the same cannot be said of gender representation as illustrated in Table 6.3.<sup>190</sup> Similarly, the commitment to anti-discrimination on the grounds of sexual orientation is debatable.<sup>191</sup>

Table 6.2 Statistics of judges per race group

Black	African	Coloured	Indian	White
74 (37%)	16 (8%)	19 (9%)	92 (46%)	

Table 6.3 Statistics as per gender composition

Black African male	Black African female	Coloured male	Coloured female	Indian male	Indian female	White male	White female
59 (29,5%)	15 (7,5%)	10 (5%)	6 (3%)	11 (5,5%)	8 (4%)	79 (39%)	13 (6,5%)

There is some disagreement about the exact manner in which section 174(2) of the Constitution should be interpreted. Should considerations of racial and gender representation trump any other considerations for appointment as set out above, or should race and gender be important, but not always decisive, factors in making decisions about judicial appointments? It appears that from time to time the JSC commences its enquiry by an examination of the racial and gender composition of the particular court and the importance of the appointment in so far as the racial composition is concerned. In such cases, representativity then becomes the key determinant for an appointment.<sup>192</sup> Whether this approach is correct is vigorously debated in South Africa.<sup>193</sup> Given our apartheid history, it is difficult to argue against an appointment policy that would strive for a bench that is composed primarily of judges of African descent. However, this needs to be done without frustrating non-racialism and without perpetuating apartheid's offensive racial practices.<sup>194</sup> The appointment policy also needs to ensure the appointment of judges fully committed to the values enshrined in the Constitution. How to strike this balance without impeding the rapid transformation of the judiciary remains a vexing question.

The selection of judges by the JSC is subject to judicial review. The JSC is a body created by the Constitution. As such, the JSC exercises public power and is hence controlled by what is prescribed in the Constitution and the law. In the case of *Judicial Service Commission and Another v Cape Bar Council and Another*,<sup>195</sup> the SCA affirmed that the decisions of the JSC – including decisions about the appointment or non-appointment of judges – could be reviewed by a court, based on the principle of legality and rationality.<sup>196</sup>

The judgment sets out the manner in which the members of the JSC ought to – but do not always – arrive at decisions about the appointment of judges. Apart from the requirement that the JSC can only make a valid decision if it is properly constituted,<sup>197</sup> the SCA also found that the JSC was obliged to provide reasons for a decision not to appoint a candidate. As the JSC is under a constitutional duty to exercise its powers in a way that is not irrational or arbitrary, and as the JSC is an organ of state, it is bound to the values of transparency and accountability. Without giving reasons, it would not be possible for the JSC to be held accountable and to act in a transparent manner.<sup>198</sup> The JSC is, therefore, as a general rule, obliged to give reasons for its decision not to recommend a particular candidate if properly called on to do so. Such reasons may not be restricted to a statement that the unsuccessful candidate failed to secure enough votes as this would amount to no reason at all.<sup>199</sup> However, the JSC is not under an obligation to give reasons under all circumstances for each and every one of the myriad potential decisions it has to take. It is, however, as a matter of general principle, obliged to give reasons for its decision not to appoint a candidate.

### CRITICAL THINKING

How being black or female ought to influence the selection process in a specific case

In discussing the way in which section 174(2) of the Constitution should be applied, Cowen suggests how being black or female ought to influence the selection process in a specific case, arguing that:

The easy case arises where two candidates who are similarly well-qualified are being considered for appointment. Subject to any special needs of a court, the appointment of a candidate to enhance racial or gender representativity would seem appropriate. The difficult case arises where two qualified candidates are being considered but the candidate who will not enhance racial or gender representativity is appreciably better qualified in an important respect. In that case, the consideration of the need for racial and gender representativity on the bench requires careful evaluation and cannot be the only relevant consideration. Importantly, whether the better qualified candidate should be appointed may depend on what qualities separate the two candidates and whether the qualities that stand out in the better qualified candidate are qualities that are needed to ensure a bench that is best able to perform the adjudicative functions entrusted to the judiciary by the Constitution. That evaluation cannot focus myopically on the relative merits of two candidates: rather, selectors require an appreciation of the overall needs of the judiciary and the court in question at the relevant time.

If that evaluation is to be conducted honestly and constructively, there is a real need to remove racist and sexist discourse from our discussions and to focus squarely on the detailed criteria for judicial selection. There is similarly a real need to be honest about mistakes we may have made in the past. The mistakes are many and will include engaging in discourse that assumes that more meritorious white candidates are being overlooked in favour of less meritorious black or female candidates. But they also include appointing judges for political favour or in circumstances where qualifications or fitness and propriety are in question. That much we know, at least, from our apartheid history.

In this regard, many express the view that being black, or being a woman, constitutes a valid criterion for judicial selection. This approach is misleading because the criteria for judicial selection are that a person be appropriately qualified and a fit and proper person. If a person is not appropriately qualified and is not a fit and proper person, it is irrelevant whether they are black or female. That person does not qualify for judicial office. It is also misleading because it encourages the thinking that being black or female somehow enhances a candidate's fitness and propriety for office. Yet, in a society committed to non-racialism and non-sexism, we should be vigilant not to assume that any qualities relevant to judging flow from membership of a group. As argued above in the context of the Sotomayor controversy, it may be that because a candidate is black or female, and has experienced discrimination, their capacity for empathy and compassion is enhanced, but that will depend on the person in question and does not flow automatically from their membership of a group. Similarly, a person's commitment to constitutional values or qualification to adjudicate questions of constitutional law does not flow from their race or gender, but from their humanity, what skills and experience they possess and how they have chosen to live their lives.

Finally, we ought not be too quick to assume that the legitimacy of the bench will be best enhanced if race and gender representativity is accelerated. We must obviously aim to meet the objective of racial and gender representativity with due expedition and treat it with priority, because the judiciary's legitimacy depends on it. But its legitimacy will ultimately depend on how well the judiciary is able to perform the functions the Constitution entrusts to it.[200](#)

### 6.3.3 The judicial oath of office

Before a South African judge takes office, he or she swears or affirms:

(to) be faithful to the Republic of South Africa, (to) uphold and protect the Constitution and the human rights entrenched in it, and (to) administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law.<sup>201</sup>

This oath requires each judge to decide a case on its legal merits in accordance with the Constitution and the law and without showing either favour or disfavour to any of the litigants. The oath therefore requires judges to promise that they will, as far as it is humanly possible, always act impartially and uphold the law.<sup>202</sup> The requirement represents a further formal safeguard of the impartiality of judges and the independence of the judiciary.

### 6.3.4 Security of tenure

The independence of judges depends, in part, on a guarantee that judges will not be dismissed or face the threat of dismissal from office for making a decision adverse to the interest of the government of the day or of powerful business or other societal interests aligned with the government. This is why the security of tenure of judges is entrenched in the Constitution.<sup>203</sup> There are two aspects to this guarantee of security of tenure. First, judges are appointed for a fixed term or until they reach a fixed age of retirement. They cannot be forced to retire before their term ends or before they reach the prescribed age of retirement. Second, judges can only be removed from office before the end of their tenure after following a special procedure that entrenches their position. We deal with these two aspects in turn.

Section 176 of the Constitution states that Constitutional Court judges hold office for a non-renewable term of 12 years or until they attain the age of 70, whichever occurs first except where an Act of Parliament extends the term of office of a Constitutional Court judge.<sup>204</sup> Section 4 of the Judges' Remuneration and Conditions of Employment Act <sup>205</sup> extends this term to 15 years of active service. Active service includes service performed as a judge on any other court. However, regardless of the period of active service of a Constitutional Court judge, the judge must retire when he or she reaches the age of 75. This means that a Constitutional Court judge who has been in active service on a High Court or on the SCA for three or more years, will usually serve a fixed term of 12 years on the Constitutional Court. This is unless the judge turns 75 before completing the 12-year term, in which case the judge will retire when reaching the age of 75. However, a judge who has not served on any other court before appointment to the Constitutional Court will normally serve a fixed term of 15 years on that court, provided, again, that he or she does not reach the age of 75 before the end of this 15-year period.

The provision in section 176 of the Constitution that an Act of Parliament could extend the term of office of a Constitutional Court judge was effected by an amendment of the Constitution in 2001. The provisions of the Judges' Remuneration and Conditions of Employment Act then purported to give effect to the provisions of section 176. These provisions were subjected to sustained criticism <sup>206</sup> on the basis that they watered down the security of tenure provisions and could influence the independence of the judiciary.

This criticism was even more sustained in relation to the position of the Chief Justice and the President of the SCA. Section 8 of the Judges' Remuneration and Conditions of Employment

Act authorised the President to request a Chief Justice or the President of the SCA at the end of their term of service ‘to continue to perform active service for a period determined by the President’ on the condition that this extension could not go beyond the date on which the Chief Justice or President of the SCA turned 75 years of age. Section 8 therefore granted the power to extend the term of office of the Chief Justice and the President of the SCA to the President who could extend the term for any period and for as many times as he or she wished. The section was ostensibly passed in accordance with the amended section 176(1) of the Constitution, which, as we have seen, authorises Parliament to extend the term of office of a Constitutional Court judge.

When President Jacob Zuma attempted to extend the term of office of then Chief Justice Sandile Ngcobo, relying on section 8 of the Act, the constitutionality of section 8 was challenged in the Constitutional Court. In *Justice Alliance of South Africa v President of Republic of South Africa and Others*, *Freedom Under Law v President of Republic of South Africa and Others*, *Centre for Applied Legal Studies and Another v President of Republic of South Africa and Others*,<sup>207</sup> the Court declared invalid section 8(a) of the Judges’ Remuneration and Conditions of Employment Act. The judgment affirmed and further elaborated on constitutional law principles relating to the independence of the judiciary, the rule of law and the separation of powers. The Court pointed out that section 8(a) was constitutionally problematic because it conferred on the President an executive discretion to decide whether to request a Chief Justice to continue to perform active service and, if he or she agrees, to set the period of the extension. The term of office could be extended if the President decided so and the Chief Justice acceded to the request. Deciding on the period of the extension was in the exclusive discretion of the President and was unfettered in the sense that the President was not required to consult anyone before extending the term of the Chief Justice.<sup>208</sup>

What made section 8(a) more problematic was that in its purported delegation, Parliament had not sought to furnish any, let alone adequate, guidelines for the exercise of the discretion by the President. The provision thus usurped the legislative power granted only to Parliament by section 176 of the Constitution and therefore constitutes an unlawful delegation of legislative power to the President.<sup>209</sup> In a constitutional democracy in which the separation of powers doctrine is respected, Parliament may not ordinarily delegate its essential legislative functions to the executive. Although section 176(1) of the Constitution creates an exception to the requirement that a term of a Constitutional Court judge is fixed, that authority, however, vests in Parliament and nowhere else. The Court noted that section 176(1) does not merely bestow a legislative power on Parliament, but by doing so also marks out Parliament’s significant role in the separation of powers and protection of judicial independence.<sup>210</sup> As the Court stated:

Accordingly, section 8(a) violates the principle of judicial independence. This kind of open-ended discretion may raise a reasonable apprehension or perception that the independence of the Chief Justice and by corollary the judiciary may be undermined by external interference of the Executive. The truth may be different, but it matters not. What matters is that the judiciary must be seen to be free from external interference.<sup>211</sup>

Focusing on the importance of a fixed term of office for judges to protect and safeguard the independence and impartiality of the judiciary, the Court stated:

It is well established on both foreign and local authority that a non-renewable term of office is a prime feature of independence. Indeed, non-renewability is the bedrock of security of tenure and a dyke against judicial favour in passing judgment. Section 176(1) gives strong warrant to this principle in providing that a Constitutional Court judge holds office for a non-renewable term. Non-renewability fosters public confidence in the institution of the judiciary as a whole, since its members function with neither threat that their terms will not be renewed nor any inducement to seek to secure renewal.[212](#)

However, the Constitutional Court went further, finding that it would be impermissible for the legislature to single out the office of the Chief Justice for an extension of his or her term of office. Despite section 176(1), Parliament was therefore not authorised to pass legislation that would extend the term of office of only the Chief Justice:

In approaching this question it must be borne in mind that the extension of a term of office, particularly one conferred by the Executive or by Parliament, may be seen as a benefit. The judge or judges upon whom the benefit is conferred may be seen as favoured by it. While it is true, as counsel for the President emphasised, that the possibility of far-fetched perceptions should not dominate the interpretive process, it is not unreasonable for the public to assume that extension may operate as a favour that may influence those judges seeking it. The power of extension in section 176(1) must therefore, on general principle, be construed so far as possible to minimise the risk that its conferral could be seen as impairing the precious-won institutional attribute of impartiality and the public confidence that goes with it.[213](#)

Although the Constitution specifically creates the office of the Chief Justice and that of Deputy Chief Justice, this does not allow for an extension of his or her term only. This is so because once appointed, the Chief Justice and Deputy Chief Justice take their place alongside nine other judges in constituting the membership of this Court. The Constitution provides that a matter before the Constitutional Court:

must be heard by at least eight judges ... Their high office and the extra-judicial duties they may be called upon to perform add nothing to the tally. ... Nor does their office count when this Court determines the cases and the matters before it. Their views count and their voices are heard equally with the respect and authority accorded every member of this Court.[214](#)

Section 176(1) of the Constitution therefore did not allow Parliament to single out any individual Constitutional Court judge by name. It is also plain that no individual may be singled out on the basis of an irrelevant individual characteristic or feature. It follows that the term 'a Constitutional Court judge' in section 176(1) does not permit singling out any one Constitutional Court judge on the basis of his or her individual identity or position in the Court. It also follows that in exercising the power to extend the term of office of a Constitutional Court judge, Parliament may not single out the Chief Justice.

It is important to note that the Court distinguished between section 8(a) and section 4 of the Judges' Remuneration and Conditions of Employment Act. It pointed out the amendment to section 8 differed from section 4 of the Act as section 4:

does not allow any member of the category of Constitutional Court judge to be singled out, whether on the basis of individual characteristic, idiosyncratic feature or the incumbency of office. Age is an indifferent criterion that may be applied in extending the term of office of a Constitutional Court judge. Age is an attribute that everyone attains. Previous judicial service



is another criterion that may be indifferently applied to all the judges of this Court. The Act provides that a Constitutional Court judge whose 12-year term of office expires before he or she has completed 15 years' 'active service' as a judge must, subject to attaining the age of 75, serve for 15 years in this Court.[215](#)

Ordinary judges (in other words, judges who do not serve on the Constitutional Court) hold office until they are discharged from active service in terms of an Act of Parliament.[216](#) Section 3(2) of the Judges' Remuneration and Conditions of Employment Act regulates this matter. This section states that other judges will normally hold office until the date on which they attain the age of 70 years if they have on that date completed a period of active service of not less than 10 years. If they have on that date not yet completed a period of 10 years' active service, the term of office will end after serving for 10 years. However, judges have a further discretion provided by section 4(4) of the Act. This section allows a judge who on attaining the age of 70 years has not yet completed 15 years' active service to continue to perform active service to the date on which he or she completes a period of 15 years' active service or attains the age of 75 years, whichever occurs first.

The requirement that the security of tenure of judges should be guaranteed has another important consequence: judges should only be removed from office as a last resort and then only for serious and objectively determinable reasons. Thus, section 177 of the Constitution determines that a judge may only be removed from office if the JSC finds that the judge:

- • suffers from an incapacity
- • is grossly incompetent
- • is guilty of gross misconduct.

Once the JSC has made such a finding, this is not the end of the matter as the judge in question will only be removed from office if the NA calls for that judge to be removed by a resolution adopted with a supporting vote of at least two-thirds of its members. Once the NA has passed such a resolution, the President must remove the judge from office. The President has the power, on the advice of the JSC, to suspend a judge who is the subject of an investigation by the JSC to remove him or her from office.[217](#) Section 177 of the Constitution ensures that a judge cannot be arbitrarily removed from the bench for political or other reasons unrelated to the ability of that judge to perform his or her functions or the integrity of the judge.

The JSC Act determines the procedure to be followed by the JSC when dealing with complaints against judges. A Judicial Conduct Committee (a subcommittee of the JSC) is required to receive, consider and deal with complaints against judges. The Judicial Conduct Committee comprises the Chief Justice, who is the Chairperson of the Committee, the Deputy Chief Justice and four judges, at least two of whom must be women, designated by the Chief Justice in consultation with the Minister.[218](#) The Committee can deal with both serious complaints, which may lead to the dismissal of a judge, or less serious complaints which will not lead to the dismissal of a judge. However, a lesser complaint can also be referred to the head of the court in which the judge complained of serves.[219](#)

A complaint must be dismissed if it is not of a serious nature or is solely related to the merits of a judgment or order, if it is frivolous or lacking in substance, or if it is hypothetical.[220](#) If the Chairperson of the Conduct Committee is satisfied that in the event of a valid complaint being established, it is likely to lead to a finding by the JSC that the judge being accused

suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct, the Chairperson must refer the complaint to the Conduct Committee. The Committee must then consider whether it should recommend to the JSC that the complaint should be investigated and reported on by a Judicial Conduct Tribunal. The Committee must also consider whether the complaint, if established, will prima facie indicate incapacity, gross incompetence or gross misconduct by the judge. Non-impeachable complaints can be dealt with by the Committee without referral to the Tribunal which will only be appointed in the case of impeachable offences.[221](#)

Impeachable offences must be referred to a Judicial Conduct Tribunal, which consists of two judges, one of whom must be designated by the Chief Justice as the Tribunal President, and one layperson.[222](#) The Tribunal will then, in effect, try the judge against whom a serious complaint had been lodged: witnesses will be called and those making the allegations as well as the judge being accused will be cross-examined. The Tribunal will then make the appropriate findings of fact, including the cogency and sufficiency of the evidence and the demeanour and credibility of any witness, as well as its findings as to the merits of the allegations in question. It will then submit a report to the JSC.[223](#) The JSC will decide whether to recommend impeachment of the judge to the NA. When considering a complaint against a judge, the JSC is obliged to decide the matter.

### CRITICAL THINKING

The duty of the JSC when considering complaints against judges

In the case of *Freedom Under Law v Acting Chairperson: Judicial Service Commission and Others*,[224](#) the SCA declared invalid a decision of the JSC to dismiss a complaint lodged by the then judges of the Constitutional Court against Judge President John Hlophe. The SCA found that the JSC was required to investigate serious complaints and could not abdicate its constitutional duty to investigate the complaint properly. Such an abdication in this case was therefore unlawful and invalid.

The JSC had previously found that the evidence in respect of the complaint by the Constitutional Court against Judge President John Hlophe did not justify a finding that the Judge President was guilty of gross misconduct and that the matter accordingly be 'treated as finalised'.[225](#) The JSC had assumed that because there were two versions of what happened – one presented by Hlophe and another presented by Justices Jafta and Nkabinde of the Constitutional Court – that cross-examination of the witnesses who presented these conflicting versions would serve no purpose. Hence, no further and proper investigation was required. The JSC had thus decided that because there were conflicting versions of events, they would not judge the merits of the case at all. The SCA rejected this argument, stating:

It cannot be in the interests of the judiciary, the legal system, the country or the public to sweep the allegation under the carpet because it is being denied by the accused judge, or because an investigation will be expensive, or because the matter has continued for a long time.[226](#)

The SCA therefore found that the decision not to proceed with a full investigation was irrational.[227](#)

The problem for the JSC was that in the absence of cross-examination of the witnesses, its finding and reasons for the finding could not be justified. As the SCA pointed out, the JSC had applied the criminal standard applicable at the end of a criminal trial, namely proof beyond reasonable doubt, to dismiss the complaint at a stage when neither of the conflicting versions of the judges accusing Judge President Hlophe on the one hand and Hlophe JP on the other hand had been tested by cross-examination. Although the finding that it could not reject Hlophe JP's version was quite correct, this did not mean that no cross-examination was required:

By disallowing cross-examination that result was made inevitable. It would have been highly irregular to reject his evidence without having given him an opportunity to cross-examine his accusers. Utilising this procedure for the final resolution of a complaint of misconduct by a judge will always lead to a dismissal of the dispute where the conduct alleged by the accuser is disputed by the judge because the judge's version can never be rejected without having given him an opportunity to cross-examine his accusers. The procedure adopted was therefore not appropriate for the final determination of the complaint.[228](#)

This case, read with the other SCA cases dealing with the procedure to be followed by the JSC when appointing and disciplining judges, suggests that the JSC does not only have an obligation to act rationally when it makes these decisions. It also has a duty to make some kind of decision and cannot decide not to make a decision at all in cases where a decision is required.

#### 6.3.5 Financial security

The independence of the judiciary can be eroded if judges are not secure in making decisions without fear, favour or prejudice. This security can be threatened if judges are not financially secure and if they believe they can be 'punished' (or if, in fact, they can be punished) for making an unpopular decision by having their salaries and other benefits reduced by the state. It is for this reason that the Constitution states that the 'salaries, allowances and benefits of judges may not be reduced'.[229](#) The conditions of service of judges are regulated by the Judges' Remuneration and Conditions of Employment Act. The Act provides that a judge shall be paid a monthly salary to be determined each year by the President by proclamation after taking into consideration the recommendations of the Independent Commission for the Remuneration of Public Office-bearers.[230](#) A proclamation setting out judges' salaries must be submitted to Parliament after its publication. Parliament may reject the proclamation or any provision of it, the effect of which will be to make the proclamation invalid. To emphasise that judges are not employees of the executive, judge's salaries are not included in the allocation of revenue to any government department, but are paid directly from the state revenue fund.[231](#)

#### 6.3.6 Limitation of civil liability

By its very nature, the job of a judge is to make judgments about people. Such judgments – about the credibility of a witness or the guilt of an accused – can fundamentally affect the status and dignity of an individual. Such individuals wrongly impugned by a judge may therefore wish to revert to the law of defamation to claim damages from a judge who has impugned his or her reputation.

However, to carry out their functions, judges must be secure in the knowledge that they will not incur civil liability for what they say or do in the course of carrying out their duties.<sup>232</sup> Thus, in *Penrice v Dickenson*,<sup>233</sup> the Court held that delictual damages will not be awarded against a judicial officer, whether a judge or a magistrate, unless it is shown that he or she acted with malice. This common law rule was applied in *May v Udwin* <sup>234</sup> where it was held that a judicial officer can raise the defence of qualified privilege to a defamation action.

A judge or magistrate will therefore be liable for defamatory statements only if it can be proved that he or she made those statements out of personal spite, ill will or an improper, unlawful or ulterior motive. The reason for this rule is obvious. The judicial task would be made impossible if a judge could be sued for defamation every time in the course of giving judgment he or she expressed unfavourable views about a litigant or made an adverse finding regarding the credibility of a witness.<sup>235</sup> Without protection from defamation suits, judges could be exposed to endless litigation by disgruntled litigants, witnesses or accused persons.

Before the adoption of the Superior Courts Act,<sup>236</sup> section 25(1) of the Supreme Court Act afforded Supreme Court judges a further protection against defamation claims. The section prohibited the issuing of a civil summons or subpoena against a judge without the permission of the court out of which the process was to be served.<sup>237</sup> Currie and de Waal speculate that the reason why it was thought that this permission was needed may have been to protect judges from becoming the victims of frivolous proceedings or to prevent the disruption of the work of the court.<sup>238</sup>

A similar process was required in the case of judges of the Constitutional Court. The Supreme Court Act prohibited any civil proceedings from being instituted against or subpoena issued for the Chief Justice or other judges of the Constitutional Court without the consent of the Chief Justice. Again, where consent had been obtained, the date on which the judge was to appear had to be determined in consultation with the Chief Justice (in matters involving the President) or the President of the Court (in matters involving the other judges).<sup>239</sup> Similar provisions did not find their way into the Superior Courts Act.

## 6.4 Independence of the lower courts and traditional courts

### 6.4.1 The lower courts under the interim Constitution

Before 1993, the magistrates' courts in South Africa enjoyed little if any independence. In fact, judicial officers in lower courts had the status of ordinary public servants.<sup>240</sup> Magistrates and regional magistrates were employees of the Department of Justice and were usually promoted from the ranks of public prosecutors once they had passed the relevant examinations.<sup>241</sup> As Currie and De Waal point out, like other public servants, magistrates were subject to the disciplinary measures contained in the Public Service Act.<sup>242</sup> Following a departmental enquiry, they could be demoted or discharged on grounds of misconduct or inefficiency.<sup>243</sup> These factors exposed magistrates to being influenced by the executive and cast suspicion on their independence. This close relationship between magistrates and the executive was seen as incompatible with the doctrine of separation of powers.

The 1983 Hoexter Commission of Inquiry recommended legislative steps designed to shore up the independence of magistrates and to reduce the possibility of influence or control by the executive.<sup>244</sup> The independence of the magistrates' courts was then enhanced by the adoption in 1993 by the last apartheid Parliament of the Magistrates Act.<sup>245</sup> The Act

removed magistrates from the ambit of the public service and created a Magistrates Commission to deal with the conditions of service, appointment and dismissal of magistrates. The Magistrates Act was passed prior to the adoption of the interim Constitution ‘at a time when the great majority of the population of this country had no representation in Parliament’ and when the ‘power to appoint judges and magistrates was then vested in the executive’.<sup>246</sup> The Magistrates Act gave the Magistrates Commission an advisory function in the appointment of magistrates, but there was no obligation on the executive to consult any person or institution in respect of the appointment of judges. The Magistrates Commission was not a representative body and all but two of its members were designated by bodies controlled by white judicial officers and lawyers. The existence and functions of the Magistrates Commission were then constitutionalised by section 109 of the interim Constitution. According to section 109, the Commission had ‘to ensure that the appointment, promotion, transfer or dismissal of, or disciplinary steps against magistrates take place without favour or prejudice ... and to ensure that no victimization or improper influencing of magistrates occurs’.

#### 6.4.2 Independence of the lower courts under the 1996 Constitution

The 1996 Constitution vests judicial authority in the courts which, according to section 166(d), includes the magistrates’ courts. Section 174(7) of the Constitution governs the appointment of magistrates. This section requires an Act of Parliament to be passed to ‘ensure that the appointment, promotion, transfer or dismissal of, or disciplinary steps against, these judicial officers take place without favour or prejudice’. The 1996 Constitution does not explicitly mention that a Magistrates Commission should fulfil this task.

During the certification proceedings objection was made to the fact that there was no provision in the 1996 Constitution for a similar Magistrates Commission. There were also no express provisions governing the appointment, term of office, remuneration and removal from office of magistrates. The Constitutional Court held that it was sufficient that section 165 guaranteed the independence of the courts. The Act of Parliament governing the appointment of magistrates referred to in section 174(7) is subject to constitutional control. If the Act undermines the independence and impartiality of the courts specifically protected by section 165, it will not be valid.<sup>247</sup>

In 1996, changes were made to the composition of the Magistrates Commission. The change in the composition of the Magistrates Commission effected by the 1996 amendment brought the composition of that Commission closer to that of the JSC.<sup>248</sup> The Constitution itself recognises the JSC as a body appropriately constituted for the purpose of matters concerned with the appointment and impeachment of judges.<sup>249</sup>

The Constitutional Court held in the Van Rooyen case that the changes made in 1996 are consistent with and reflect the change that has taken place in our country since 1993 – a transformation required by the Constitution itself:

The Magistrates Commission is now more broadly representative of South African society as a whole. This was important particularly at this stage of our history. The overwhelming majority of the population is black and at least half the population is female. Yet the great majority of the legal profession and senior judicial officers are still white and male. In the light of our history and the commitment made in the Constitution to transform our society, these racial and gender disparities cannot be ignored. The recomposition of the Magistrates

Commission viewed thus by an objective observer, could not fairly be seen as an attempt to exert executive control over the magistracy. There was a pressing need for the racial and gender disparities within the Commission to be changed, and for the Commission to be re-composed so as to become more representative of South African society. The changes made facilitated this, and that would have been understood by an objective observer taking a balanced view of all the relevant circumstances.[250](#)

Currently, the Commission consists of a judge, six magistrates, four legal practitioners, a teacher of law, eight Members of Parliament and five nominees of the executive. In addition, the Minister and the head of Justice College are members of the Commission.[251](#) According to the Constitutional Court:

[o]n its face this is a diverse body of persons, nearly half of whom consist of members of the judiciary and the legal profession. The rest are nominees of Parliament and the executive. To some extent this is similar to the composition of the Judicial Service Commission which has a central role in the appointment of judges and the composition of which is dealt with in the Constitution itself.[252](#)

In practice, the Commission does not conduct interviews but compiles a list of appointees who have undergone the required training and passed the examinations. The appointees are drawn from the ranks of public prosecutors. The same Commission that determines the salaries of judges also determines the remuneration of magistrates.

#### 6.4.3 Independence of traditional courts

As the South African Law Commission (SALC) pointed out in its Report on Traditional Courts,[253](#) the administration of justice in rural South Africa is predominantly carried out by chiefs' courts. These courts administer justice largely on the basis of customary law and on the basis of authority granted by several apartheid-era laws.[254](#) Traditional courts gain their authority from sections 12 and 20 of the Black Administration Act (BAA),[255](#) read with section 16 of Schedule 6 of the Constitution.[256](#) This is seemingly authorised by Chapter 12 of the Constitution which requires the law to recognise the 'institution, status and role of traditional leadership according to customary law', but subject to other provisions in the Constitution.[257](#) The Constitution allows national legislation further to provide for this role.[258](#) It is surprising that traditional courts are still regulated by the BAA while most other provisions of this Act have been scrapped. The BAA has been described by the Constitutional Court as 'an egregious apartheid law which anachronistically has survived our transition to a non-racial democracy'.[259](#)

The relevant sections of the BAA that apply here and are still in operation empower the Minister to confer civil and criminal jurisdiction on chiefs, headmen or chiefs' deputies. The BAA does not prescribe any hierarchy of customary courts and neither does it provide for appeals from the headman's court to a chief's court.[260](#) According to the SALC, in many traditional communities the practice is that claims or complaints start at the level of the family council. If a matter is not resolved at that level, it is taken to the headman who, together with his advisers, attempts to dispose of the matter. If it is still not resolved, the matter is taken on appeal to the chief. It is from the chief's court that the case is normally appealed to the magistrates' court.[261](#) As we have noted in a previous chapter, chiefs are not elected but obtain their positions on a hereditary basis.[262](#)

The BAA does not prescribe the composition of the chiefs' or customary courts. The Act merely provides for the conferment of jurisdiction on a chief, headman or chief's deputy to hear civil matters and to try certain criminal matters.<sup>263</sup> However, under customary law, the court formally consists of the chief and his councillors or the headman and his advisers (the chief or headman will very seldom be female). In most cases, the chief will not normally preside over the proceedings. Instead, a trusted councillor will be appointed to preside.<sup>264</sup> This situation differs from community to community. The flexible nature of customary law, along with its ability to develop to adapt to changing circumstances, means that it is not possible to identify a unified system according to which traditional courts operate. However, the Centre for Law and Society summarises the nature of traditional courts in South Africa as follows:

Customary courts are essentially non-professional institutions. Rather, they are community forums in which mature members of the community participate. The notion of a presiding officer who acts as a judge and is the single decision-maker has no real place in these forums as they are shared discussion spaces in which all present can participate in the hearing, questioning, deliberation and decision. Also, the variability between different communities (even within a single cultural group or locality) in the extent of the chief's participation in the court – ranging from non-participation to active participation – makes the notion of presiding officer an untenable notion to adopt and impose on all communities. The notion of a presiding officer, derived from western court systems, is misleading in the context of these forums. Several studies detail that, even where the chief formulates and pronounces the decision in a customary court, he is bound by what the council and/or community has found in hearing that case.<sup>265</sup>

Because traditional leaders are also involved in the exercise of legislative and executive powers, it has been argued that traditional courts cannot be independent as required by the Constitution. However, different High Courts have reached different conclusions on this matter <sup>266</sup> and the Constitutional Court has not given its opinion on whether a system of traditional courts can be squared with the requirements of judicial independence.

We contend that it would be difficult to answer this question in the abstract as different customary courts operate differently and deal differently with disputes. Bennett also argues that a distinction should be drawn between traditional courts dealing with criminal matters and traditional courts dealing with civil matters. The requirements for independence would not arise as sharply in civil matters as in criminal matters where the presiding officer could also be the complainant, prosecutor and judge. Moreover, the question of whether traditional courts are compatible with the Constitution should be weighed against considerations of access to justice as those traditional courts that work well, provide immediate and effective access to justice for many citizens living in rural areas. Thus, argues Bennett, traditional courts should retain their civil jurisdiction, while not being awarded jurisdiction to try criminal matters.<sup>267</sup>

## 6.5 The National Prosecuting Authority

The 1996 Constitution established a single National Prosecuting Authority (NPA) for South Africa.<sup>268</sup> The NPA has the power to institute criminal proceedings on behalf of the state and to carry out any necessary functions incidental to instituting criminal proceedings.<sup>269</sup> One of the most vexing constitutional law issues is the question of where the NPA fits into the structure of government within the system of separation of powers. It is neither part of the

legislature or the executive nor is it part of the judiciary. Yet, it is supposed to play a pivotal role in the effective and impartial functioning of the criminal justice system. Section 179 of the Constitution establishes the framework within which the NPA should operate, but requires the details of its structure to be provided for in an Act of Parliament.

The constitutional framework provides for a National Director of Public Prosecutions (the NDPP) to head the prosecuting authority,<sup>270</sup> a position that is equivalent to that of Attorney-General in most other Anglo-American dispensations. The President in his or her capacity as head of the national executive appoints the NDPP. The National Prosecuting Authority (NPA) Act <sup>271</sup> also provides for the removal of the NDPP by the President in certain circumscribed circumstances. Although the President has some discretion in who to appoint as NDPP, this discretion is not unfettered. The NPA Act prescribes objective criteria regarding the qualifications and abilities of the NDPP and a court can determine whether the President has complied with these criteria when selecting and appointing a new NDPP.<sup>272</sup> This is a necessary consequence of the wording of section 179 which requires that the NDPP must be appropriately qualified. The Constitution, read with the NPA Act, does not leave it open to the President to determine whether a candidate is appropriately qualified to be appointed as NDPP, but rather determines that the legislature must set out the criteria for appointment. The NPA Act thus requires the NDPP to possess legal qualifications that would entitle him or her to practise in all courts in the Republic, and must 'be a fit and proper person, with due regard to his or her experience, conscientiousness and integrity, to be entrusted with the responsibilities of the office concerned'.<sup>273</sup> The NDPP must also be a South African citizen.<sup>274</sup>

The NPA Act further states that the NDPP holds office for a non-renewable term of 10 years.<sup>275</sup> Although the NDPP serves a non-renewable term of 10 years and enjoys some security of tenure, this security is not absolute. The NPA Act also provides for the NDPP to be suspended and removed from office under certain circumstances. The President may provisionally suspend the NDPP from his or her office after instituting an enquiry into his or her fitness to hold office. This enquiry can be conducted by anyone appointed by the President,<sup>276</sup> but the enquiry must be aimed at determining whether the NDPP is guilty of misconduct, suffers from continued ill health, is incapable of carrying out his or her duties of office efficiently, or is no longer a fit and proper person to hold the office concerned. The NDPP can only be removed if the enquiry finds that, based on one or more of these objective criteria, there are reasons to dismiss him or her. Even then, the recommendation to dismiss the NDPP will only take effect if this is confirmed by the adoption of a motion to that effect in the NA.<sup>277</sup> These provisions relating to the appointment and the dismissal of the NDPP are all aimed at giving effect to the constitutional injunction in section 179(4) that requires the adoption of national legislation to ensure that the prosecuting authority exercises its functions without fear, favour or prejudice to ensure its independence. It provides a degree of protection to the NDPP to ensure his or her structural independence.

However, at first glance, this independence of the NPA and its head is not set out in as clear a manner in the Constitution as we would have thought necessary. Thus, section 179(6) of the Constitution states that the Cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority. Until recently, it was therefore unclear to what extent the NPA was truly independent from the executive and whether the Minister of Justice or the President could ever intervene in decisions taken by the NPA to prosecute or not to prosecute an accused. This is an important question that goes to the heart of the credibility and effectiveness of the NPA. Where the NPA has to decide on whether to



prosecute or not to prosecute a politician or a politically well-connected individual or business leader, it is important that such a decision will be above suspicion and that a perception does not arise that the NPA makes decisions based on political or financial considerations.

However, in many Anglo-American countries there is no generally accepted rule that the prosecuting authority ought to be free from executive or political control. In many Anglo-American countries the Attorney-General (the equivalent of the NDPP) is a political appointee – often at ministerial level. Nevertheless, in most of these jurisdictions the Attorney-General would be required by convention to make prosecutorial decisions without regard to political considerations and is not supposed to subject his or her discretionary authority to that of government. He or she is also usually not responsible to government to justify the exercise of his or her discretion because this political office has judicial attributes.[278](#)

In South Africa, the role of the Attorney-General in the pre-democratic era was not without controversy. The Union of South Africa Act, 1909 established the power of the Attorney-General to make prosecutorial decisions although he or she was always viewed as a civil servant. The position changed in 1926 when all powers, authorities and functions relating to the prosecution of crimes and offences were vested in the Minister of Justice despite the fact that the decision to prosecute or not to prosecute remained with the Attorneys-General. The Minister exercised an appeal or review function only. As from 1935, Attorneys-General had to exercise their authority and perform their functions under the relevant legislation [279](#) subject to the control and directions of the Minister who could reverse any decision.[280](#) As South Africa moved towards a democratic dispensation, this position was reversed and the independence of the Attorneys-General regarding prosecutorial decisions was reinstated in 1992. However, the Minister had to co-ordinate their functions and could request information from them or ask them to report on any matter, and they had to submit annual reports to the Minister.[281](#)

Until recently, the prosecution and prosecutorial authority did not receive much attention in South African constitutional jurisprudence. As pointed out above, this is important because if controversial prosecutions can be stopped before they reach the courts, even the most independent tribunal cannot guarantee equal treatment for all.[282](#) The independence of the NPA is therefore linked to that of the judicial system as a whole. Although at first there was some uncertainty about the nature of the independence of the NPA under the 1996 Constitution, the Constitutional Court and the SCA have since cleared up any confusion about the question.

Following precedent from the Namibian Supreme Court, the SCA found that the provision requiring that members of the NPA act without fear, favour or prejudice and the provision stating that the Minister of Justice must exercise final responsibility over the NPA are not incompatible.[283](#) A balance can be struck as follows. The Minister may not instruct the NPA to prosecute or to decline to prosecute or to terminate a pending prosecution, in other words interfere with individual prosecutorial decisions, because that would interfere with the independence of the NPA. However, the Minister is entitled to be kept informed in respect of all prosecutions initiated or to be initiated which might arouse public interest or involve important aspects of legal or prosecutorial authority.[284](#)

The Constitutional Court has confirmed that the Constitution requires the NPA to act independently from the executive and, as such, the NDPP must be viewed as a ‘non-political chief executive officer directly appointed by the President’.<sup>285</sup> This is significant as it underscores the fact that the office of the NDPP ‘must be non-political and non-partisan’, and that its role ‘is closely related to the function of the judiciary’.<sup>286</sup> In affirming the need to appoint an independent NDPP in accordance with the Constitution and the NPA Act, the Constitutional Court set out a list of goals which the President must aim to achieve when he or she appoints the NDPP. The purpose of empowering the President to appoint the NDPP, stated the Court, is to ensure that the person appointed as NDPP is sufficiently conscientious and has the integrity required to be entrusted with the responsibilities of the office and, in particular, to ensure, among other things, that:<sup>287</sup>

- the prosecuting authority performs its functions honestly and without fear, favour or prejudice
- decisions to institute criminal prosecution are taken honestly, fairly and without fear, favour or prejudice
- any improper interference, hindrance or obstruction of the prosecuting authority by any organ of state is not tolerated.

## CRITICAL THINKING

A critical analysis of the Ginwala Report on the dismissal of the NDPP, Vusi Pikoli

The former head of the NPA, Vusi Pikoli, was suspended from his job as NDPP and was then dismissed by the President on the basis of a report prepared by Frene Ginwala. This was after she had conducted the requisite enquiry mentioned above in accordance with the provisions of the NPA Act. It is unclear whether this removal from office was legally valid or not. De Vos provided the following critical analysis of the Ginwala Report: <sup>288</sup>

At the heart of the Ginwala Commission of Enquiry Report and the decision by President Kgalema Motlanthe to recommend the removal from office of Vusi Pikoli, the National Director of Public Prosecutions, is a rather troubling interpretation of what is required to safeguard the constitutionally protected independence of the NPA. The Report correctly points out that the Constitutional Court had held that section 179(4) of the Constitution, providing that national legislation must ensure that the prosecuting authority exercises its functions ‘without fear, favour or prejudice’, amounted to ‘a constitutional guarantee of independence’. It also points out that the Court had further noted that ‘any legislation or executive action inconsistent therewith would be subject to constitutional control by the courts’ and concludes that ‘[a]ny attempt by the Minister of Justice to influence prosecutorial discretion in individual cases would therefore be contrary to the Constitution’. But, the Report then states:

Sufficient attention has not been paid to the requirement of democratic accountability of the prosecuting authority. In focusing only on independence from political interference they have erred in conflating freedom from control with freedom from accountability. Further, scant attention has been paid to the nature, content and ambit of the ‘final responsibility’ of the Minister, and even less to the relationship between this responsibility and the prosecutorial independence of the NDPP.

The Report then refers to Chapter 3 of the Constitution, which deals with the principle of co-operative government between the national, provincial and local spheres of government and all organs of state within those spheres. It argues that the NDPP has an extraordinarily onerous duty to co-operate with the President, the relevant Minister and other organs of state such as the South African Police Service.

If this interpretation is correct, it would place a very heavy burden on the NPA to co-operate with the executive when deciding to issue warrants for the arrest of high-ranking state officials or to prosecute them. In the case of Selebi, the Commission found that its own interpretation of the Constitution and the NPA Act required the NPA boss not only to have informed the Minister and the President before requesting that a warrant of arrest be issued for the National Police Commissioner, but also to have acquiesced to a request by the President not to proceed with executing the arrest until such time as the President had taken the steps he deemed necessary for what he deemed to be in the interest of 'national security'.

The interpretation of the NPA Act and the Constitution referred to seems controversial as the NPA Act does not explicitly require the NDPP to inform the Minister – let alone the President – of any actions to arrest anyone unless he or she explicitly asks for such information. It is not clear that the NPA's constitutional independence, safeguarded in the Constitution (as developed by the SCA and the Constitutional Court), can be squared with this interpretation that, in effect, gives the President a veto power over decisions to issue arrest warrants against high placed government officials merely because the President cites issues of 'national security'. It is also not clear that Chapter 3 of the Constitution applies to an independent body like the NPA as this Chapter deals with relations between the three spheres of government. It is my opinion that the heavy reliance placed by the Ginwala Commission on Chapter 3 of the Constitution completely misconstrues the nature of Chapter 3 as well as the constitutional requirements for an independent NPA. Her interpretation of the Constitution acknowledges the independence of the NPA on the one hand, then takes it away with the other. Moreover, there is a good reason that 'national security' is sometimes called the last refuge of scoundrels. It is such a vague concept that it would potentially give the President or the Minister extraordinary power to intervene in the decisions of the NDPP and may well place the NDPP in the untenable position of always having to worry whether his or her decision may be construed by the politicians as having national security implications on their say-so. Given the fact that Ginwala did not find that Pikoli's actions did indeed hold any threat for national security, the decision by the President to fire Pikoli seems like setting a dangerous precedent as a future President will now be able to pressure the NDPP when he or she embarks on a course of action not favoured by the President by making vague assertions of national security being at stake. It is also worrying that Ginwala expressed concern that Pikoli had not fully appreciated the sensitivities of the 'political environment' in which the NPA needs to operate and his responsibility to manage this environment. An appreciation of the 'political environment' does not seem to sit easily with a duty to exercise one's duties without fear, favour or prejudice.

Ginwala then continues:

Adv Pikoli needs to always recognise the final responsibility of the Minister and should have proactively made her aware of all matters of a sensitive nature that the NPA became aware of in the course of its functions, and fully and regularly briefed her on the progress of high-profile investigations and prosecutions.

This obligation on the part of the NDPP is not found in the Constitution or the NPA Act and was invented by Ginwala. It stems from her view that the Minister has to exercise final responsibility over the NPA and that this means more than set out in the Act. If an NDPP could be fired for not informing the Minister of something she or he thought was important, the NDPP would be busy all day long writing reports to the Minister. This is not what the Act requires and, I would submit, it could not have been intended to require this as the Act must be read in the context of the Constitution that guarantees the independence of the NPA. Ginwala's interpretation would make the Act unconstitutional. The report does contain rather devastating findings although these findings are not followed to their logical conclusion. Thus, Ginwala analyses the letter signed by the then Minister of Justice a few days before Pikoli was suspended and states that:

the letter conveys a meaning that Adv Pikoli was to stop any plan to arrest and prosecute the National Commissioner of Police until the Minister was satisfied that there was sufficient information and evidence to do so. The Minister has since on affidavit said that it was not her intention to stop Adv Pikoli from discharging his duties or performing his functions as the NDPP. Assuming this is correct, the conduct of the DG: Justice in drafting the document in the manner it reads was reckless to say the least. The DG: Justice should have been acutely aware of the constitutional protection afforded to the NPA to conduct its work without fear, favour or prejudice. The contents of the letter were tantamount to executive interference with the prosecutorial independence of the NPA, which is recognised as a serious offence in the Act.

So, Ginwala in effect found that there was an illegal and criminal order to Pikoli to stop the prosecution of Selebi. This order was drafted by the DG and signed by the Minister. Yet she also finds that there was no reason to believe that the President suspended Pikoli because of the prosecution of Selebi. What I wonder is: who decided that this letter had to be written? Was the President or his advisers involved? Would Ginwala have been forced to come to a different conclusion if the question was posed differently, namely whether the government wanted to fire Pikoli because he had issued an arrest warrant for Selebi? These questions are not answered in the Report. Could this be because the answers would not have favoured the man who appointed Ginwala and belonged to the same political party of which they are both disciplined members?

## SUMMARY

The judiciary is the third, but distinct and most independent, branch of government within the system of separation of powers.

At the pinnacle of the superior courts is the Constitutional Court which now has the jurisdiction not only to hear any constitutional matter, but also any other matter that raises an arguable point of law of general importance which, in the opinion of the Constitutional Court, ought to be considered by it. The Constitutional Court ordinarily acts as a court of appeal, considering constitutional and other matters of legal doctrine on appeal from any of the High Courts or from the Supreme Court of Appeal (SCA). However, when a High Court declares invalid provisions of an Act of Parliament, the provisions of a provincial legislature or an act of the President, the matter automatically goes to the Constitutional Court which is required to confirm the order of invalidity before such an order has any force.

In addition, the Constitutional Court has exclusive jurisdiction to decide:

- • on disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state
- • on the constitutionality of any parliamentary or provincial Bill
- • on the constitutionality of Bills referred to it by the NA or provincial legislatures
- • on the constitutionality of any amendment to the Constitution
- • that Parliament or the President has failed to fulfil a constitutional obligation
- • or to certify a provincial constitution.

The SCA is an appeal court that can hear appeals from High Courts on any matter except matters exclusively reserved for the Constitutional Court. The SCA is the final court on matters relating to findings of fact and to the application of facts to law. The High Courts can hear constitutional matters, except those matters exclusively reserved for the Constitutional Court, and often sit as courts of first instance.

The judiciary (and, in South Africa, most pertinently the superior courts,) is tasked with interpreting and enforcing the Constitution and thus as acting as the referee to ensure that members of the other branches of government act in accordance with the Constitution. It is therefore important that special safeguards are put in place to secure its independence. During the apartheid era, the independence of the judiciary was not adequately guaranteed. With the advent of democracy, the Constitution created additional mechanisms to safeguard the independence of the judiciary.

The Judicial Service Commission (JSC), composed of a combination of lawyers, judges and politicians, now plays an important role in the appointment of all superior court judges. When the President appoints the Chief Justice or Deputy Chief Justice and the President and Deputy President of the SCA, this role of the JSC is only advisory. With all other High Court judges, the JSC selects the appointees who are then merely formally appointed by the President. There is much controversy about the criteria for the appointment of judges, but the need for the judiciary to reflect broadly the racial and gender composition of South Africa does play a pivotal role in the consideration of suitable candidates for appointment.

Apart from the appointment of impartial and independent judicial officers, the independence of the judiciary is formally guaranteed by requiring judges to take an oath of office, by safeguarding the security of tenure of judges, by protecting the financial security of judges and by limiting the civil liability of judges. Lower courts and traditional courts are less independent but it is assumed that the superior courts will protect these courts and will ensure that their decisions comply with the requisite impartiality and independence.

The National Prosecuting Authority (NPA) is neither part of government nor of the judiciary but it does play a pivotal role in the operation of the criminal justice system as it is tasked with making decisions on the prosecution of criminal suspects. The NPA has a duty to act without fear, favour or prejudice. This means that it must act independently from the government of the day although it is legally and constitutionally required to report to the Minister of Justice on its activities and decisions. The NPA is headed by the National Director of Public Prosecutions (NDPP) whose independence is safeguarded by the NPA Act. The President appoints the NDPP but the appointee must comply with the objective criteria set out in the NPA Act.

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1Van Zyl, D (2009) The judiciary as a bastion of the legal order in challenging times Potchefstroom Electronic Law Journal 12(2):1–13 at 2.

2See Choudhry, S (2009) ‘He had a mandate’: The South African Constitutional Court and the African National Congress in a dominant party democracy Constitutional Court Review 2:1–86 at 1.

3S 172(1)(a).

4S v Mamabolo (CCT 44/00) [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) (11 April 2001) para 18:

Therefore courts have over the centuries developed a method of functioning, a self-discipline and a restraint which, although it differs from jurisdiction to jurisdiction, has a number of essential characteristics. The most important is that judges speak in court and only in court. They are not at liberty to defend or even debate their decisions in public. It requires little imagination to appreciate that the alternative would be chaotic. Moreover, as a matter of general policy judicial proceedings of any significance are conducted in open court, to which everybody has free access and can assess the merits of the dispute and can witness the process of its resolution. This process of resolution ought as a matter of principle to be analytical, rational and reasoned. The rules to be applied in resolving the dispute should either be known beforehand or be debated and determined openly. All decisions of judicial bodies are as a matter of course announced in public; and, as a matter of virtually invariable practice, reasons are automatically and publicly given for judicial decisions in contested matters. All courts of any consequence are obliged to maintain records of their proceedings and to retain them for subsequent scrutiny. Ordinarily the decisions of courts are subject to correction by other, higher tribunals, once again for reasons that are debated and made known publicly.

5Mahomed, I (1998) The role of the judiciary in a constitutional state South African Law Journal 115(1):111–15 at 112. See also Mamabolo para 16:

In our constitutional order the judiciary is an independent pillar of state, constitutionally mandated to exercise the judicial authority of the state fearlessly and impartially. Under the doctrine of separation of powers it stands on an equal footing with the executive and the legislative pillars of state; but in terms of political, financial or military power it cannot hope to compete. It is in these terms by far the weakest of the three pillars; yet its manifest independence and authority are essential. Having no constituency, no purse and no sword, the judiciary must rely on moral authority. Without such authority it cannot perform its vital function as the interpreter of the Constitution, the arbiter in disputes between organs of state and, ultimately, as the watchdog over the Constitution and its Bill of Rights – even against the state.

6(CCT 59/09) [2010] ZACC 6; 2012 (4) SA 618 (CC); 2010 (5) BCLR 457 (CC) (9 March 2010) paras 92–3.

7See generally Roux, T (2009) Principle and pragmatism on the Constitutional Court of South Africa International Journal of Constitutional Law 7(1):106–38.

[8](#)For a discussion of the role of the judiciary during apartheid, see Forsyth, CF (1985) *In Danger for Their Talents: A Study of the Appellate Division of the Supreme Court of South Africa from 1950–1980*; Dyzenhaus, D (1991) *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy*; Ellman, SJ (1992) *In a Time of Trouble: Law and Liberty in South Africa's State of Emergency*.

[9](#)Mtshaulana, PM 'The history and role of the Constitutional Court in South Africa' in Andrews, P and Ellmann, S (2001) *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law* 525.

[10](#)See Klug, H (2010) *The Constitution of South Africa: A Contextual Analysis* 225–30. See also Dugard, J (1978) *Human Rights and the South African Legal Order*.

[11](#)Klug (2010) 226. See generally Haysom, N and Kahanovitz, S 'Courts and the State of Emergency' in Moss, G and Obery, I (eds) (1987) *South African Review* 4 192.

[12](#)See Basson, D (1987) *Judicial activism in a State of Emergency: An examination of recent decisions of the South African courts* *South African Journal on Human Rights* 3(1):28–43 at 28.

[13](#)See Madala, T (2001) *Rule under apartheid and the fledgling democracy in post-apartheid South Africa: The role of the judiciary* *North Carolina Journal of International Law and Commercial Regulation* 26(3):743–66 at 748. See also *Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others* (CCT17/96) [1996] ZACC 16; 1996 (8) BCLR 1015; 1996 (4) SA 672 (25 July 1996) para 1 where Mahommed states: 'The legitimacy of law itself was deeply wounded as the country haemorrhaged dangerously in the face of this tragic conflict which had begun to traumatise the entire nation.'

[14](#)Ellmann, S (1995) *Law and legitimacy in South Africa* *Law and Social Inquiry* 20(2):407–79 at 425.

[15](#)Ellmann (1995) 409.

[16](#)See Madala (2001) 745.

[17](#)See Madala (2001) 748; Higginbotham, FM (1994) *Sins from the past and lessons for the future: Eliminating apartheid in South African public accommodation and the challenge to an enlightened judiciary* *Boston University International Law Journal* 12(1):1–56 at 1.

[18](#)See the report by Gordon, A and Bruce, D (2006) *Transformation and independence of the judiciary in South Africa*, Centre for Study of Violence and Reconciliation (CSVR) 1–57 at 13.

[19](#)See Dyzenhaus, D (1998) *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* 16, quoted in Gordon and Bruce (2006), indicating that this approach means that the 'judges hold that the judiciary duty when interpreting a statute is always to look to those parts of public record that make clear what the legislators as a matter of fact intended [and] in this way, the judges merely determined the law as it is, without permitting their substantive convictions about justice to interfere'.

[20](#)See Dugard (1978) 369.

[21](#)See Govindjee, A and Olivier, M 'Finding the boundary: The role of the courts in giving effect to socio-economic rights in South Africa' in Osode, PC and Glover, G (eds) (2010) *Law and Transformative Justice in Post-Apartheid South Africa* 79.

[22](#)Corder, H (2004) *Judicial authority in a changing South Africa* *Legal Studies* 24(2):253–74 at 255.

[23](#)See *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995) para 301 where Mokgoro J stated that:

... due to the sovereignty of parliament, the supremacy of legislation and the absence of judicial review of parliamentary statutes, courts engaged in simple statutory interpretation, giving effect to the clear and unambiguous language of the legislative text – no matter how unjust the legislative provision.

[24](#)See Gordon and Bruce (2006) 11.

[25](#)See Wesson, M and Du Plessis, M (2008) *Fifteen years on: Central issues relating to the transformation of the South African judiciary* *South African Journal on Human Rights* 24(2):187–213 at 190.

[26](#)Act 59 of 1959.

[27](#)Wesson and Du Plessis (2008) 190.

[28](#)Wesson and Du Plessis (2008) 190. See also Cameron, E (1982) *Legal chauvinism, executive-mindedness and justice: LC Steyn's impact on South African law* *South African Law Journal* 99(1):38–75 at 40, detailing the 'meteoric' rise of LC Steyn to the position of Chief Justice, largely on the basis of his political affiliation.

[29](#)See Madala (2001) 759.

[30](#)Madala (2001) 759.

[31](#)Mokgoro, Y (2010, December) *Judicial appointments* *Advocate* 43–8. See also Davis, DM (2010, December) *Judicial appointments in South Africa* *Advocate* 40–3.

[32](#)Moerane, M (2003) *The meaning of transformation of the judiciary in the new South African context* *South African Law Journal* 120(4):708–18 at 712.

[33](#)Moerane (2003) 712. See also Dugard, J (2007) *Judging the judges: Towards an appropriate role for the role of the judiciary in South Africa's transformation* *Leiden Journal of International Law* 20(4):965–81 at 968.

[34](#)See, for example, the Income Tax Act 58 of 1962 which created a special court for hearing income tax appeals.



35Currie, I and De Waal, J (2001) *The New Constitutional and Administrative Law*, Vol 1 Constitutional Law 273.

36See generally the Black Administration Act 38 of 1927 (BAA).

37Policy Framework on the Traditional Justice System under the Constitution, Department of Justice and Constitutional Development 10, available at <http://www.pmg.org.za/policy-documents/2009/03/02/policy-framework-traditional-justice-system-under>.

38Vani, MS ‘Customary law and modern governance of natural resources in India: Conflicts, prospects for accord and strategies’ in Pradham, R (ed) (2002) *Legal Pluralism and Unofficial Law in Social, Economic and Political Development* 419.

39Vani 419.

40(CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (15 October 2004).

41(CCT 03/07) [2008] ZACC 9; 2008 (9) BCLR 914 (CC); 2009 (2) SA 66 (CC) (4 June 2008).

42Vani 419.

43Vani 419.

44Vani 419.

45Vani (2002) 419.

46(CCT 40/ 03) [2004] ZACC 14; 2004 (5) SA 331 (CC); 2004 (7) BCLR 735 (CC) (11 March 2004) para 74.

47See the Traditional Courts Bill B 1–2012 available at <http://www.justice.gov.za/legislation/bills/2012-b01tradcourts.pdf>. The Bill has been heavily criticised. See, for example, the submission made to Parliament by the Law, Race and Gender Institute, now the Centre for Law and Society, available at [http://www.cls.uct.ac.za/usr/lrg/docs/TCB/2012/lrg\\_feb2012\\_ncopsubmission.pdf](http://www.cls.uct.ac.za/usr/lrg/docs/TCB/2012/lrg_feb2012_ncopsubmission.pdf).

48 S 167(1) read with s 165(6) of the Constitution as well as s 4(1) of the Superior Courts Act 10 of 2013. See also *Justice Alliance of South Africa v President of Republic of South Africa and Others*, *Freedom Under Law v President of Republic of South Africa and Others*, *Centre for Applied Legal Studies and Another v President of Republic of South Africa and Others* (CCT 53/11, CCT 54/11, CCT 62/11) [2011] ZACC 23; 2011 (5) SA 388 (CC); 2011 (10) BCLR 1017 (CC) (29 July 2011) para 78.

49S 167(1) of the Constitution read with s 4(2) of the Superior Courts Act.

50Justice Alliance para 78.

51Justice Alliance para 78.

[52](#)Justice Alliance para 78.

[53](#)Justice Alliance para 79.

[54](#)S 4(1)(b) of the Superior Courts Act.

[55](#)S 166(b) of the Constitution. See also Currie and De Waal (2001) 278.

[56](#)S 168(1) of the Constitution.

[57](#)S 4(2)(b) of the Superior Courts Act.

[58](#)S 5(1)(b) of the Superior Courts Act.

[59](#)S 169.

[60](#)S 169(2) of the Constitution.

[61](#)S 6(2) of the Superior Courts Act.

[62](#)S 8(4)(c) of the Superior Courts Act.

[63](#)S 6 of the Superior Courts Act. Most sections of the Act came into operation in August 2013.

[64](#)See ss 10–16 of the Magistrates Act 90 of 1993.

[65](#)Act 66 of 1995 as amended by Act 127 of 1998.

[66](#)Act 22 of 1994 as amended by Act 48 of 2003.

[67](#)Act 58 of 1962.

[68](#)Children’s Act 38 of 2005.

[69](#)Act 99 of 1998.

[70](#)Act 116 of 1998.

[71](#)Berman G, and Feinblatt, J (2001) Problem-solving courts: A brief primer Law and Policy 23(2):125–40 at 125.

[72](#)See Currie and De Waal (2001) 279–80.

[73](#)See Klug (2010) 237–8.

[74](#)S 168(3).

[75](#)S 167(3).

76However, the Constitution Seventeenth Amendment Act, 2012, available at <http://www.info.gov.za/view/DownloadFileAction?id=184794>, changes this state of affairs.

77See s 167(3) before it was amended.

78S 167(3)(b) of the Constitution. See *Alexkor Ltd and Another v Richtersveld Community and Others* (CCT19/03) [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) (14 October 2003) para 24 where the Court had to deal with the interpretation of the Restitution of Land Rights Act 22 of 1994 in dealing with questions about the Richtersveld community's rights to the land, but stated that it would also be necessary to deal with non-constitutional matters:

A more difficult question is to determine whether this Court has jurisdiction to deal with all issues bearing on or related to establishing the existence of these matters. For example, the question might be asked whether the issue concerning the existence of the Community's rights in land prior to the colonisation of the Cape, or the content or incidence of such rights, constitute in themselves 'constitutional matters'; the same might be asked concerning the continued existence of such rights after the British Crown's annexation of the Cape in 1806, or after the 1847 Proclamation or the subsequent statutory and other acts thereafter.

79S 167(7) of the Constitution.

80(CCT31/99) [2000] ZACC 1; 2000 (2) SA 674; 2000 (3) BCLR 241 (25 February 2000) para 44.

81*Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* (CCT1/00) [2000] ZACC 12; 2000 (10) BCLR 1079; 2001 (1) SA 545 (CC) (25 August 2000) para 24.

82See Currie, I and De Waal, J (2005) *The Bill of Rights Handbook* 5th ed 66.

83*Carmichele v Minister of Safety and Security* (CCT 48/00) [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) (16 August 2001) para 33; see also para 36. See also *Thebus and Another v S* (CCT36/02) [2003] ZACC 12; 2003 (6) SA 505 (CC); 2003 (10) BCLR 1100 (CC) (28 August 2003) para 25; *K v Minister of Safety and Security* (CCT52/04) [2005] ZACC 8; 2005 (6) SA 419 (CC); 2005 (9) BCLR 835 (CC); [2005] 8 BLLR 749 (CC) (13 June 2005) para 15; *Masiya v Director of Public Prosecutions Pretoria (The State) and Another* (CCT54/06) [2007] ZACC 9; 2007 (5) SA 30 (CC); 2007 (8) BCLR 827 (10 May 2007) para 33; *Barkhuizen v Napier* (CCT72/05) [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) (4 April 2007) para 35. Some commentators have wrongly taken issue with this interpretation, arguing that the Constitution accords the spirit, purport and object of the Bill of Rights only a secondary role to serve as a tie-breaker when the rights in the Bill of Rights, justice and the rules of the common law are indeterminate. See Fagan, A (2010) *The secondary role of the spirit, purport and objects of the Bill of Rights in the common law's development* *South African Law Journal* 127(4):611–27. Fagan has been criticised by Davis, who argues that the Constitution intended that the common law reflect the normative value system as found in a holistic reading of the text of the Constitution. This means that the trigger that propels judges to make the decision to develop the common law is to be found in a judicial engagement with the constitutional value system. See Davis, D

(2012) How many positivist legal philosophers can be made to dance on the head of a pin? A reply to Professor Fagan South African Law Journal 129(1):59–72.

[84](#)See *S v Boesak* (CCT25/00) [2000] ZACC 25; 2001 (1) BCLR 36; 2001 (1) SA 912 (1 December 2000) para 14.

[85](#)*Pharmaceutical Manufacturers* para 20.

[86](#)*Carmichele* para 54.

[87](#)See ss 172(1) and 167(4)(a) of the Constitution. See also *Boesak* para 14.

[88](#)*National Education Health & Allied Workers Union (NEHAWU) v University of Cape Town and Others* (CCT2/02) [2002] ZACC 27; 2003 (2) BCLR 154; 2003 (3) SA 1 (CC) (6 December 2002) para 14; *Alexkor* para 23; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* (CCT 27/03) [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) (12 March 2004) para 25.

[89](#)Act 4 of 2000.

[90](#)*MEC for Education: Kwazulu-Natal and Others v Pillay* (CCT 51/06) [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) (5 October 2007).

[91](#)S 167(3)(b) of the Constitution.

[92](#)S 167(3)(c) of the Constitution.

[93](#)*Boesak* para 15.

[94](#)(CCT25/00) [2000] ZACC 25; 2001 (1) BCLR 36; 2001 (1) SA 912 (1 December 2000).

[95](#)*S v Boesak* (105/99) [2000] ZASCA 24 (12 May 2000).

[96](#)*Boesak* para 15.

[97](#)S 167(5) of the Constitution.

[98](#)(CCT13/09) [2009] ZACC 20; 2009 (6) SA 94 (CC) (22 July 2009) para 15.

[99](#)S 167(4)(a) of the Constitution.

[100](#)S 167(4)(b) of the Constitution.

[101](#)S 167(4)(c) of the Constitution.

[102](#)S 80(2)(a) of the Constitution.

[103](#)S 122(2)(a) of the Constitution.

[104](#)Ss 80(2)(b) and 122(2)(b) of the Constitution.

[105](#)S 167(4)(d) of the Constitution.

[106](#)(CCT23/02) [2002] ZACC 21; 2003 (1) SA 495; 2002 (11) BCLR 1179 (4 October 2002) para 12.

[107](#)UDM para 12.

[108](#)(CCT36/95) [1995] ZACC 10; 1995 (12) BCLR 1561; 1996 (1) SA 769 (29 November 1995) para 47.

[109](#)S 167(4)(e) of the Constitution.

[110](#)President of the Republic of South Africa and Others v South African Rugby Football Union and Others (SARFU I) (CCT16/98) [1998] ZACC 21; 1999 (2) SA 14; 1999 (2) BCLR 175 (2 December 1998) para 25.

[111](#)Women's Legal Trust para 11.

[112](#)Women's Legal Trust para 12.

[113](#)See generally *Doctors for Life International v Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) (17 August 2006).

[114](#)See *Certification of the Kwazulu-Natal Constitution* (CCT15/96) [1996] ZACC 17; 1996 (11) BCLR 1419; 1996 (4) SA 1098 (6 September 1996); *Certification of the Constitution of the Western Cape, 1997* (CCT6/97) [1997] ZACC 8; 1997 (12) BCLR 1653; 1998 (1) SA 655 (2 September 1997); *Certification of the Amended Text of the Constitution of the Western Cape, 1997* (CCT29/97) [1997] ZACC 15; 1997 (12) BCLR 1653; 1998 (1) SA 655 (18 November 1997).

[115](#)*Bruce and Another v Fleecytex Johannesburg CC and Others* (CCT1/98) [1998] ZACC 3; 1998 (2) SA 1143; 1998 (4) BCLR 415 (24 March 1998) para 9. See also *Van der Spuy v General Council of the Bar of South Africa* (CCT48/01) [2002] ZACC 17; 2002 (5) SA 392; 2002 (10) BCLR 1092 (18 July 2002) para 6; *National Gambling Board v Premier of KwaZulu-Natal and Others* (CCT32/01) [2001] ZACC 8; 2002 (2) BCLR 156; 2002 (2) SA 715 (21 December 2001) para 29; *Moseneke and Others v Master of the High Court* (CCT51/00) [2000] ZACC 27; 2001 (2) BCLR 103; 2001 (2) SA 18 (6 December 2000) paras 18–9; *Dormehl v Minister of Justice and Others* (CCT10/00) [2000] ZACC 4; 2000 (2) SA 825; 2000 (5) BCLR 471 (CC) (14 April 2000) para 5; *Christian Education South Africa v Minister of Education* (CCT13/98) [1998] ZACC 16; 1999 (2) SA 83; 1998 (12) BCLR 1449 (14 October 1998) paras 3–4; *Minister of Justice v Ntuli* (CCT15/97, CCT17/95) [1997] ZACC 7; 1997 (6) BCLR 677; 1997 (3) SA 772 (5 June 1997) para 4; *Transvaal Agricultural Union v Minister of Land Affairs and Another* (CCT21/96) [1996] ZACC 22; 1996 (12) BCLR 1573; 1997 (2) SA 621 (18 November 1996) para 16; *Brink v Kitshoff NO* (CCT15/95) [1996] ZACC 9; 1996 (4) SA 197; 1996 (6) BCLR 752 (15 May 1996) para 3; *Besserglik v Minister of Trade Industry and Tourism and Others* (Minister of Justice intervening) (CCT34/95) [1996] ZACC 8; 1996 (6) BCLR 745; 1996 (4) SA 331 (14 May 1996) paras 4–6; *Luitingh v Minister of Defence* (CCT29/95) [1996] ZACC 5; 1996 (4) BCLR 581; 1996 (2) SA 909 (4 April 1996) para 15; *S v Mbatha, S v Prinsloo* (CCT19/95,

CCT35/95) [1996] ZACC 1; 1996 (3) BCLR 293; 1996 (2) SA 464 (9 February 1996) para 29; Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others (CCT27/95) [1995] ZACC 8; 1995 (10) BCLR 1289; 1995 (4) SA 877 (22 September 1995) paras 15–7; S v Zuma and Others (CCT5/94) [1995] ZACC 1; 1995 (2) SA 642; 1995 (4) BCLR 401 (SA); 1995 (1) SACR 568; [1996] 2 CHRLD 244 (5 April 1995) para 11.

[116](#)S v Bequinet (CCT24/95) [1996] ZACC 21; 1996 (12) BCLR 1588; 1997 (2) SA 887 (18 November 1996) para 15; See also Carmichele para 50.

[117](#)Bruce para 8.

[118](#)Transvaal Agricultural Union para 20.

[119](#)AParty and Another v The Minister for Home Affairs and Others, Moloko and Others v The Minister for Home Affairs and Another (CCT 06/09, CCT 10/09) [2009] ZACC 4; 2009 (3) SA 649 (CC); 2009 (6) BCLR 611 (CC) (12 March 2009) para 30.

[120](#)Bruce para 9. See also Van der Spuy para 6; National Gambling Board para 29; Moseneke paras 18–19; Dormehl para 5; Christian Education paras 3–4; Ntuli para 4; Transvaal Agricultural Union para 16; Brink para 3; Besserglik paras 4–6; Luitingh para 15; Mbatha, Prinsloo para 29; Executive Council of the Western Cape Legislature paras 15–17; Zuma para 11.

[121](#)(CCT1/98) [1998] ZACC 3; 1998 (2) SA 1143; 1998 (4) BCLR 415 (24 March 1998) paras 7–8. See also Aparty para 29.

[122](#)S 167(3)(c) of the Constitution.

[123](#)Currie and De Waal (2005) 111.

[124](#)S 168(3).

[125](#)See Islamic Unity Convention v Independent Broadcasting Authority and Others (CCT13/99) [2000] ZACC 3; 2002 (4) SA 294 (CC) 2002 (5) BCLR 433 (11 April 2002) para 17; De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others (CCT5/03) [2003] ZACC 19; 2004 (1) SA 406 (CC); 2003 (12) BCLR 1333 (CC) (15 October 2003) para 4.

[126](#)See Amod v Multilateral Motor Vehicle Accidents Fund (CCT4/98) [1998] ZACC 11; 1998 (4) SA 753; 1998 (10) BCLR 1207 (27 August 1998) para 33.

[127](#)(CCT54/06) [2007] ZACC 9; 2007 (5) SA 30 (CC); 2007 (8) BCLR 827 (10 May 2007) para 17.

[128](#)National Gambling Board para 38; Wallach v High Court of South Africa (Witwatersrand Local Division) and Others (CCT2/03) [2003] ZACC 6; 2003 (5) SA 273 (CC) (4 April 2003) para 7.

129(CCT4/98) [1998] ZACC 11; 1998 (4) SA 753; 1998 (10) BCLR 1207 (27 August 1998) para 33.

130S 169(1)(a).

131S 167(5) of the Constitution.

132See Currie and De Waal (2005) 122.

133Act 32 of 1944.

134Wesson and Du Plessis (2008) 191.

135See also O'Regan, K (2004) Human rights and democracy – a new global debate: Reflections on the first ten years of South Africa's Constitutional Court International Journal of Legal Information 32(2):200–16 at 202.

136See S and Others v Van Rooyen and Others (General Council of the Bar of South Africa Intervening) (CCT21/01) [2002] ZACC 8; 2002 (5) SA 246; 2002 (8) BCLR 810 (11 June 2002) para 27.

137See Constitution of Kenya (2010) item 23 in Schedule 6, which states:

1. (1) Within one year after the effective date, Parliament shall enact legislation ... establishing mechanisms and procedures for vetting, within a timeframe to be determined in the legislation, the suitability of all judges and magistrates who were in office on the effective date to continue to serve in accordance with the values and principles set out in [the Constitution]...
2. (2) A removal, or a process leading to the removal, of a judge, from office by virtue of the operation of legislation contemplated under subsection (1) shall not be subject to question in, or review by, any court.

138De Lange, R and Mevis, PAM (2007) Constitutional guarantees for the independence of the judiciary Electronic Journal of Comparative Law 11(1):1–17 at 7.

139See Ntlama, N (2009, 16–20 July) The Hlophe saga: the question for the institutional integrity of the judiciary, Paper presented at the Law Teachers Conference in Pietermaritzburg, available at <http://wenku.baidu.com/view/6c6473f0fab069dc50220111.html>.

140Zuma para 17.

141See also s 39(1)(b) and (c) of the Constitution which requires the court to take into account international law and allows the court to take into account foreign case law when interpreting the provisions of the Bill of Rights.

142De Vos, P (2001) A bridge too far? History as context in the interpretation of the South African Constitution South African Journal on Human Rights 17(1):1–33 at 6.

143(CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995).

144Klare, K (1998) Legal culture and transformative constitutionalism South African Journal on Human Rights 14(1):146–88 at 173. See also Makwanyane para 207, per Kriegler J.

145Makwanyane para 321, per O’Regan J; para 207, per Kriegler J; para 266, per Mahomed J; para 382, per Sachs J.

146See Klare (1998) 172–87 for examples of this kind of reasoning by the judges of the Constitutional Court.

147(CCT16/98) [1999] ZACC 9; 1999 (4) SA 147; 1999 (7) BCLR 725 (4 June 1999) para 48.

148(CCT21/01) [2002] ZACC 8; 2002 (5) SA 246; 2002 (8) BCLR 810 (11 June 2002).

149Van Rooyen para 19. See also De Lange v Smuts NO and Others (CCT26/97) [1998] ZACC 6; 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (28 May 1998)(CC) para 71.

150Van Rooyen para 22.

151Van Rooyen para 32.

152Van Rooyen para 33.

153Van Rooyen para 32.

154See by Lewis, C (2008, 14 October) The troubled state of South Africa’s judiciary, Paper presented at the South African Institute of Race Relations, available at <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=106544&sn=Detail>. See also Currie and De Waal (2001) 300.

155See Larkins, CM (1996) Judicial independence and democratization: A theoretical and conceptual analysis American Journal of Comparative Law 44(4):605–25 at 611.

156Larkins (1996) 611.

157Van Rooyen paras 22 and 31.

158For example, after Judge Chris Nicholson found that there was political interference in the decision to charge Jacob Zuma for corruption in Zuma v National Director of Public Prosecutions (8652/08) [2008] ZAKZHC 71; [2009] 1 All SA 54 (N); 2009 (1) BCLR 62 (N) (12 September 2008), the NEC of the ANC decided to ‘recall’ then President Thabo Mbeki as President of South Africa. The judgment therefore had a profound and immediate effect on who headed up the executive and thus who governed the country.

159Wesson and Du Plessis (2008) 191.

160Wesson and Du Plessis (2008) 192.



161Act 9 of 1994.

162See Malleson, K (1999) Assessing the performance of the Judicial Service Commission South African Law Journal 116(1):36–49 at 38.

163S 178(1)(a)–(j) of the Constitution. See generally Davis (2010, December) 41 and Mgkoro (2010, December) 43.

164For an extensive discussion about the political influence on the JSC, see Powell, C and Franco, J (2004) The meaning of institutional independence in Van Rooyen v S South African Law Journal 121(3):562–79 at 562.

165S 178(1) of the Constitution.

166Acting Chairperson: Judicial Service Commission and Others v Premier of the Western Cape Province (537/10) [2011] ZASCA 53; 2011 (3) SA 538 (SCA); [2011] 3 All SA 459 (SCA) (31 March 2011) para 12 where Harms AJ stated that:

it would be inconsistent and illogical for the Constitution to provide for a Premier to participate in the appointment of a high court judge – and, as I have said, the JSC agrees that a Premier is included for this purpose – but not in a decision to remove such a judge. Both affect the composition of the bench of a particular high court.

167Davis (2010, December) 41; Wesson and Du Plessis (2008) 193; Kentridge, S (2003) The highest court: Selecting the judges Cambridge Law Journal 62(1):55–71 at 55.

168See, for example, McKaiser, E (2009, 6 August) Tragicomedy revealed more about JSC than about judges Business Day in which the author takes the JSC to task for its inability to probe any of these key questions when the JSC last year conducted interviews for four vacancies on the Constitutional Court. See also De Vos, P (2013, 21 January) Judicial appointments: The JSC’s transformation problem Constitutionally Speaking available at <http://constitutionallyspeaking.co.za/judicial-appointments-the-jscs-transformation-problem/>.

169S 174(3) of the Constitution.

170S 174(3) of the Constitution.

171See Gauntlett, J and Du Plessis, M (2011, 25 August) Ex Parte: Freedom under Law, In re: The Appointment of the Chief Justice Memorandum 10–11 Constitutionally Speaking available at <http://constitutionallyspeaking.co.za/ful-proposes-changes-to-appointment-of-chief-justice/>.

172S 174(4) of the Constitution.

173S 174(4)(a) of the Constitution.

174S 174(4)(b) and (c) of the Constitution.

175S 174(5) of the Constitution.

176S 174(6) of the Constitution.

177S 174(1) and 174(2).

178See Judicial Service Commission, Summary of the Criteria Used by the Judicial Service Commission when Considering Candidates for Judicial Appointments, available at <http://constitutionallyspeaking.co.za/criteria-used-by-jsc-when-considering-judicial-appointments/>.

179Cowen, S (2010) Judicial selection in South Africa, Democratic Governance Rights Unit (DGRU) Paper, available at <http://www.dgru.uct.ac.za/usr/dgru/downloads/Judicial%20SelectionOct2010.pdf>.

180S 165(2).

181In an address to the International Commission of Jurists in Cape Town on 21 July 1998 5.

182Chaskalson, A (2009, 25 June) Does Hlophe approve of campaign on his behalf? Cape Times.

183See section 1(a) of the Constitution.

184Cowen (2010) 47.

185Forsyth, C (1991) Interpreting a bill of rights: The future task of a reformed judiciary South African Journal on Human Rights 7(1):1–23 at 15–17.

186See generally Pruitt, LR (2002) No black names on the letterhead? Efficient discrimination and the South African legal profession Michigan Journal of International Law 23(3):545–676.

187See, for example, Davis, RPB (1914) Women as advocates and attorneys South African Law Journal 31(4):383–86 at 384 for an example of early discriminatory attitudes towards women in the legal profession in South Africa:

We cannot but think the common law wise in excluding women from the profession of law ... the law of nature destines and qualifies the female sex for the bearing and nurture of children and our race and for the custody of the world ... all life-long callings of women, inconsistent with these radical and sacred duties of their sex, as is the profession of law, are departures from the order of nature and when voluntary treason against it. The cruel chances of life sometime baffle both sexes and may leave women free from peculiar duties of their sex ... but it is public policy to provide for the sex not for its superfluous members; and not to tempt women from the proper duties of their sex by opening to them duties peculiar to ours.

188See De Vos, P (2013, 11 April) The JSC must redefine merit to advance judicial transformation Constitutionally Speaking available at <http://constitutionallyspeaking.co.za/the-jsc-must-redefine-merit-to-advance-judicial-transformation/>.

[189](#)See Lewis (2008, 14 October) 2.

[190](#)See De Vos, P (2013, 21 January) Judicial appointments: The JSC's transformation problem Constitutionally Speaking available at <http://constitutionallyspeaking.co.za/judicial-appointments-the-jscs-transformation-problem/>.

[191](#)Cowen (2010) 53.

[192](#)Davis (2010, December) 42.

[193](#)For divergent perspectives, see Mkhabela, M (2011, 19 August) Judiciary must be de-politicised The Sowetan available at <http://www.sowetanlive.co.za/columnists/2011/08/19/judiciary-must-be-de-politicised>; Hoffman, P (2011, 2 December) To judge the judgments Mail & Guardian available at <http://mg.co.za/article/2011-12-02-to-judge-the-judgments>.

[194](#)Cowen (2010) 57.

[195](#)(818/2011) [2012] ZASCA 115; 2012 (11) BCLR 1239 (SCA); 2013 (1) SA 170 (SCA); [2013] 1 All SA 40 (SCA) (14 September 2012), affirming the decision of the Western Cape High Court in Cape Bar Council v Judicial Service Commission and Others (11897/2011) [2011] ZAWCHC 388; 2012 (4) BCLR 406 (WCC); [2012] 2 All SA 143 (WCC) (30 September 2011).

[196](#)Cape Bar Council paras 20–2.

[197](#)Cape Bar Council para 36.

[198](#)Cape Bar Council paras 43–4.

[199](#)Cape Bar Council para 45.

[200](#)Cowen (2010) 59–60.

[201](#)S 174(8) of the Constitution states: 'Before judicial officers begin to perform their functions, they must take an oath or affirm, in accordance with Schedule 2, that they will uphold and protect the Constitution.'

[202](#)Currie and De Waal (2001) 305.

[203](#)See ss 176 and 177.

[204](#)Section 176 was amended by the Constitution Sixth Amendment Act of 2001.

[205](#)Act 47 of 2001.

[206](#)The amendment was widely seen as a move to extend the term of office of then Chief Justice Arthur Chaskalson who was coming to the end of his term of office. See Du Bois, F (2002) Tenure on the Constitutional Court South African Law Journal 119(1):1–17 who criticised the amendment of section 176 of the Constitution as well as the provisions of the

Judges' Remuneration and Conditions of Employment Act and referred to a submission made to Parliament at the time when it was debating this issue. The article also notes critical comments made by then Chief Justice Chaskalson about moves to extend his term.

[207](#)(CCT 53/11, CCT 54/11, CCT 62/11) [2011] ZACC 23; 2011 (5) SA 388 (CC); 2011 (10) BCLR 1017 (CC) (29 July 2011).

[208](#)Justice Alliance para 50.

[209](#)Justice Alliance para 51.

[210](#)Justice Alliance para 57.

[211](#)Justice Alliance para 58.

[212](#)Justice Alliance para 73.

[213](#)Justice Alliance para 75.

[214](#)Justice Alliance paras 79–80.

[215](#)Justice Alliance para 91.

[216](#)S 176(2) of the Constitution.

[217](#)S 177(3) of the Constitution.

[218](#)S 8 of the JSC Act.

[219](#)Ss 14 and 15 of the JSC Act.

[220](#)S 15(2) of the JSC Act.

[221](#)S 17 of the JSC Act.

[222](#)S 22 of the JSC Act.

[223](#)S 33 of the JSC Act.

[224](#)(2011 (3) SA 549 (SCA); [2011] 3 All SA 513 (SCA)) [2011] ZASCA 59; 52/2011 (31 March 2011).

[225](#)Freedom Under Law para 7.

[226](#)Freedom Under Law para 63.

[227](#)Freedom Under Law para 42.

[228](#)Freedom Under Law para 45.

[229](#)S 176(3).

[230](#)Established under s 2 of the Independent Commission for the Remuneration of Public Office-bearers Act 92 of 1997.

[231](#)Ss 2(6) and 14 of the Judges' Remuneration and Conditions of Employment Act.

[232](#)See generally Currie and De Waal (2001) 307.

[233](#)1945 AD 6.

[234](#)1981 (1) SA 1 (A).

[235](#)Currie and De Waal (2001) 307.

[236](#)Act 10 of 2013.

[237](#)If it is sought to serve process out of a magistrates' court, then the litigant must obtain the prior permission of that division of the Supreme Court which has appeal jurisdiction over the magistrates' court in question.

[238](#)Currie and De Waal (2001) 308.

[239](#)S 5 of the Constitutional Court Complementary Act 13 of 1995.

[240](#)See generally Currie and De Waal (2001) 308–10.

[241](#)See s 9(1)(b) of the Magistrates' Courts Act which sets out the necessary qualifications for appointment as a magistrate. See generally Van Rooyen.

[242](#)Act 111 of 1984.

[243](#)Currie and De Waal (2001) 308.

[244](#)Hoexter Commission of Inquiry into the Structure and Functioning of the Courts (1983) RP 78/83 Part IV para 4.2.1 (g).

[245](#)Act 90 of 1993.

[246](#)Van Rooyen para 49.

[247](#)Certification of the Constitution of the Republic of South Africa, 1996 (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996) para 136.

[248](#)See s 3 of the Magistrates Act.

[249](#)Van Rooyen para 57.

[250](#)Van Rooyen para 61.

[251](#)S 3(1)(a) of the Magistrates Act.

[252](#)Van Rooyen para 48.

[253](#)South African Law Commission (2003) Customary Law: Report on Traditional Courts and the Judicial Function of Traditional Leaders Project 90 1 available at [http://www.justice.gov.za/salrc/reports/r\\_prj90\\_tradlead\\_2003jan.pdf](http://www.justice.gov.za/salrc/reports/r_prj90_tradlead_2003jan.pdf) (accessed on 25 January 2013).

[254](#)See, for example, the Black Administration Act 38 of 1927, the Bophuthatswana Traditional Courts Act 29 of 1979, the KwaNdebele Traditional Authorities Act 8 of 1984, the Chiefs Courts Act 6 of 1993 (Transkei) and the KwaZulu Amakhosi and Iziphakanyiswa Act 9 of 1990.

[255](#)Act 38 of 1927. Most sections of this law have been repealed, but these sections are some of the few that were retained and continue to be in operation.

[256](#)Section 16 of Schedule 6 of the Constitution reads as follows:

Every court, including courts of traditional leaders, existing when the new Constitution took effect, continues to function and to exercise jurisdiction in terms of legislation applicable to it and anyone holding office as a judicial officer continues to hold office in terms of legislation applicable to that office, subject to any amendment or repeal of that legislation, and consistency with the new Constitution.

[257](#)S 211(1) states: ‘The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.’

[258](#)S 212(1).

[259](#)Western Cape Provincial Government and Others In Re: DVB Behuising (Pty) Limited v North West Provincial Government and Another (CCT22/99) [2000] ZACC 2; 2000 (4) BCLR 347; 2001 (1) SA 500 (2 March 2000) para 1. See also Moseneke paras 20–1 where the Constitutional Court described the BAA as follows:

The Act systematised and enforced a colonial form of relationship between a dominant white minority who were to have rights of citizenship and a subordinate black majority who were to be administered. ... It is painful that the Act still survives at all. The concepts on which it was based, the memories it evokes, the language it continues to employ, and the division it still enforces, are antithetical to the society envisaged by the Constitution. It is an affront to all of us that people are still treated as ‘blacks’ rather than as ordinary persons seeking to wind up a deceased estate, and it is in conflict with the establishment of a non-racial society where rights and duties are no longer determined by origin or skin colour.

[260](#)S 12(4) of the BAA provides for appeals from judgments of a chief, headman or chief’s deputy in a civil matter, while s 20(6) provides for appeals from a chief, headmen or chief’s deputy in a criminal matter. In each case the appeal goes to the magistrates’ court. See also Bennett, TW (2004) Customary Law in South Africa 127.

[261](#)SALC (2003) Report on Traditional Courts and the Judicial Function of Traditional Leaders 5.

[262](#)See s 28(1) of the Traditional Leadership and Governance Framework Act 41 of 2003 (TLGFA).

[263](#)Ss 12 and 20 of the BAA.

[264](#)SALC (2003) Report on Traditional Courts and the Judicial Function of Traditional Leaders 6.

[265](#)See Law, Race and Gender Unit (now Centre for Law and Society) Submission on the Traditional Courts Bill (B1–2012) available at [http://www.lrg.uct.ac.za/usr/lrg/docs/TCB/2012/lrg\\_feb2012\\_ncopsubmission.pdf](http://www.lrg.uct.ac.za/usr/lrg/docs/TCB/2012/lrg_feb2012_ncopsubmission.pdf)17.

[266](#)S 165(2) of the Constitution. See Bennet (2004) 117. This argument was rejected in *Bangindawo v Head of the Nyanda Regional Authority*; *Hlantlalala v Head of the Western Tembuland Regional Authority* (1998) 3 BCLR 314 (Tk). However, in *Mhleka & Feni v Head of the Western Tembuland Regional Authority* 2000 (9) BCLR 979 (Tk) 1017–18, the Court held that the fact that there is a fusion of judicial and administrative functions does not necessarily denote an absence of judicial independence. Some of the functions performed by chiefs are such that they may potentially involve him or her in controversial public issues and may create a perception of an unduly close relationship with the executive branch of government. The Court implored the legislature to address this problem.

[267](#)Bennet (2004) 128.

[268](#)S 179(1).

[269](#)S 179(2) of the Constitution.

[270](#)S 179(1)(a) of the Constitution.

[271](#)Act 32 of 1998.

[272](#)*Democratic Alliance v President of South Africa and Others* (CCT 122/11) [2012] ZACC 24; 2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC) (5 October 2012) paras 14–26.

[273](#)S 9(1).

[274](#)S 9(2) of the NPA Act.

[275](#)S 12(1).

[276](#)This suggests that the President need not appoint a judge to head this enquiry although the appointment must be rational. Given the fact that the purpose of the appointment is to enquire into whether – objectively speaking – the NDPP is fit to continue with his or her work, it may well be that a court would declare invalid the appointment of a person to head this enquiry if that person is manifestly not capable of bringing an independent mind to bear on the enquiry.

[277](#)S 12(6) and 12(7) of the NPA Act.

[278](#)See generally *National Director of Public Prosecutions v Zuma* (573/08) [2009] ZASCA 1; 2009 (2) SA 277 (SCA); 2009 (1) SACR 361 (SCA); 2009 (4) BCLR 393 (SCA); [2009] 2 All SA 243 (SCA) (12 January 2009) paras 28–30 for a history of the role of Attorneys-General in commonwealth countries. See also Scott, IG (1987) *The role of the Attorney-General and the Charter of Rights Criminal Law Quarterly* 29(2):187–99 at 187; Wade, ECS and Bradley, AW (1993) *Constitutional and Administrative Law* 11th ed 402–4; *Ex parte Attorney-General: In Re Constitutional Relationship between the Attorney-General and the Prosecutor-General* SA 7/93 [1995] NASC 1; 1995 (8) BCLR 1070 (Nm5) (13 July 1995); *Githunguri v Republic of Kenya* [1986] LRC (Const) 618 (HC); *Proulx v Quebec (Attorney-General)* 2001 SCC 66, [2001] 3 SCR 9. For the constitutional crisis about the independence of the Attorney-General in 1924 in the UK, see De Smith, SA (1981) *Constitutional and Administrative Law* 4th ed 380–1.

[279](#)General Law Amendment Act 46 of 1935.

[280](#)See *NDPP v Zuma* para 29.

[281](#)See s 5 of the Attorney-General Act 92 of 1992.

[282](#)See also Nicholson J in *Zuma v NDPP*.

[283](#)*NDPP v Zuma* para 32. For the Namibian jurisprudence, see *Ex parte Attorney-General: In Re Constitutional Relationship between the Attorney-General and the Prosecutor-General* SA 7/93 [1995] NASC 1; 1995 (8) BCLR 1070 (Nm5) (13 July 1995).

[284](#)*NDPP v Zuma* para 32. This is made clear by the NPA Act. S 32(1)(a) of the NPA Act requires members of the prosecuting authority to serve ‘impartially’ and to exercise, carry out or perform their powers, duties and functions ‘in good faith and without fear, favour or prejudice’ and subject only to the Constitution and the law. S 32(1)(b) further provides that no one may interfere ‘improperly’ with the NPA in the performance of its duties and functions. S 33(2) reaffirms that the Minister must exercise final responsibility over the NPA and obliges the NDPP, at the request of the Minister, to furnish the latter with information or a report with regard to any case and to provide the Minister with reasons for any decision taken. S 22(2)(c) states that, in exercising the review power to prosecute or not to prosecute, the NDPP may advise the Minister ‘on all matters relating to the administration of justice’. The SCA decision stands in sharp contrast to the decision of the High Court in the matter. In *Zuma v NDPP* para 89, Judge Nicholson stated that there must not be a hint of a relationship between the Minister of Justice and the NDPP.

[285](#)*Democratic Alliance* para 16.

[286](#)*Democratic Alliance* para 26.

[287](#)*Democratic Alliance* para 49.

[288](#)De Vos, P (2008, 8 December) *National security, the last refuge of scoundrels? Constitutionally Speaking* available at <http://constitutionallyspeaking.co.za/national-security-the-last-refuge-of-scoundrels/>.



## **CHAPTER 7**

Separation of powers and Chapter 9 institutions

[7.1 Introduction](#)

[7.2 Independence of Chapter 9 institutions](#)

[7.3 The Public Protector](#)

[7.4 The Auditor-General](#)

[Summary](#)

7.1 Introduction

Figure 7.1 Separation of powers and Chapter 9 institutions

Chapter 9 of the Constitution establishes certain institutions that are designed to support and strengthen constitutional democracy. These institutions are: [1](#)

- • the Public Protector
- • the South African 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
- • the Electoral Commission.

Chapter 9 institutions ‘share two roles: that of checking government (or, in the language of the Constitution, of contributing to accountable government or ‘monitoring’ government), and that of contributing to the transformation of South Africa into a society in which social justice prevails’ [2](#) These institutions are independent non-judicial institutions and do not play the same role as the judiciary in enforcing the Constitution. It is therefore not clear how these institutions fit into the traditional separation of powers model: while they are independent from the other branches of government, [3](#) they are also accountable to the National Assembly (NA), one of the other branches of government. [4](#) The institutions can make findings and recommendations but, unlike the judiciary, they do not have the power to review and set aside legislation or the actions of the executive. However, they are ‘important tools to monitor the state’s realisation of individuals’ rights in terms of its constitutional obligations’ [5](#)

Regardless of this uncertain position in the separation of powers architecture, the role of these institutions is essential in the democracy emerging from a history of discrimination, oppression and lack of accountability as they assist the various organs of state to adhere to the values and principles of the new constitutional dispensation. [6](#) To fulfil this task, it is important that these institutions should enjoy a degree of independence.

## 7.2 Independence of Chapter 9 institutions

Institutions set up to safeguard and promote democracy (and the rights required to safeguard that democracy) can only do their work if they enjoy a certain level of independence from the legislative and executive branches of government.<sup>7</sup> However, these institutions are not judicial in nature and usually do not enjoy the same kind of institutional independence as that enjoyed by the judiciary in a democratic state. In South Africa – as elsewhere – these institutions therefore find themselves in a precarious situation. On the one hand, they have to act as watchdogs to prevent the abuse of power, often by state entities,<sup>8</sup> and are required to act in a scrupulously fair and impartial manner. On the other hand, these institutions are often also required to work with the legislature and the executive and may have to rely on their co-operation ‘to get things done’. Such institutions are therefore often caught between Scylla and Charybdis, having to please the executive and the legislature while also having to act independently from them.<sup>9</sup>

This tension is reflected in the constitutional provisions regulating these institutions. The Constitution clearly guarantees the independence of these institutions and proclaims that they are independent and ‘subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice’.<sup>10</sup> Moreover, section 181(3) of the Constitution requires other organs of state to ‘assist and protect these institutions’ to ensure their ‘independence, impartiality, dignity and effectiveness’. Section 181(4) furthermore states that ‘[n]o person or organ of state may interfere with the functioning of these institutions’.<sup>11</sup> At the same time, section 181(5) of the Constitution states that these ‘institutions are accountable to the National Assembly, and must report on their activities and the performance of their functions to the Assembly at least once a year’. It is therefore far from clear how the independence of these organisations can be squared with their responsibility to be accountable to the legislature.

In the two Constitutional Court judgments dealing directly with Chapter 9 institutions,<sup>12</sup> and another decision dealing with the concept of independence in more general terms,<sup>13</sup> the Constitutional Court provided some helpful guidelines for looking at the notion of independence of these institutions. We contend that an analysis of these judgments provides insight into the correct balance to be struck between the need for such institutions to account to the legislature on the one hand while safeguarding their independence on the other.

Because Chapter 9 institutions are required to account to the NA, this is sometimes wrongly taken to mean that they are subservient to the NA. However, if independence means anything, it means that the NA cannot interfere in the day-to-day running of the Chapter 9 institutions. This occurs where these institutions are viewed as part of the government instead of as independent institutions with their unique place in the separation of powers architecture set up by the Constitution.

The independence of institutions supporting and safeguarding democracy is often negatively affected by the fact that they are perceived and function in practice as institutions that form part of the government. Where, for example, the Human Rights Commission or the Electoral Commission is seen as being part of the government, this will place pressure on such institutions to co-operate with the government of the day and to align themselves with the interests of the government. This, in turn, means that it would become more difficult for such institutions to act without fear, favour or prejudice to hold the government accountable. Institutions called on to make findings against the government or to act against its interest

will only be able to do so if they are really capable of acting impartially and independently. This becomes difficult where such institutions are seen as part of the very institution from which they have to be independent.

In principle, if not always in practice, Chapter 9 institutions in South Africa do enjoy constitutionally and legally protected independence from the government. The Constitutional Court pointed out in *Independent Electoral Commission v Langeberg Municipality* <sup>14</sup> that although a Chapter 9 institution such as the Electoral Commission is an organ of state as defined in section 239 of the Constitution,<sup>15</sup> these institutions cannot be said to be a department or an administration in the national sphere of government over which Cabinet exercises authority. These institutions are state institutions and are not part of the government. Independence of the institution refers to independence from the government. According to the Court, these institutions cannot be independent from the national government, yet be part of it.<sup>16</sup> The Court thus affirmed the institutional independence of these institutions. The logic of this view is that Chapter 9 institutions are not subject to the co-operative government provisions set out in Chapter 3 of the Constitution. These institutions perform their functions in terms of national legislation, but ‘are not subject to national executive control’.<sup>17</sup> There is a need for these institutions to ‘manifestly be seen to be outside government’.<sup>18</sup>

The Langeberg case suggests that a clear and sharp distinction must be drawn between these institutions and the executive authority. Any action by the executive that would create an impression that the institution is not manifestly outside government would be constitutionally unacceptable. There is little room for manoeuvre here. More leeway exists regarding the relationship between Parliament and the Chapter 9 institutions because these institutions are accountable to the NA. As we shall see below, in practice, these institutions have not always operated at sufficient arms-length from either the executive or Parliament. This may have affected the effectiveness of these institutions in fulfilling their mandates.

Another aspect of independence can be found in section 181(3) of the Constitution. This section states that other organs of state, through legislative and other measures, must assist and protect these institutions to ensure their independence, impartiality, dignity and effectiveness. Section 181(4) states that no person or organ of state may interfere with the functioning of these institutions.

From these provisions we may draw a few conclusions. First, independence is not synonymous with impartiality. Just because a body is able to exercise its duties impartially does not mean that its independence has been safeguarded. Independence is, in essence, a more encompassing concept than impartiality. Second, other organs of state have a constitutional duty to ensure the dignity of the Chapter 9 institutions. In various judgments dealing with dignity in other contexts, the Constitutional Court has argued that dignity will be impaired when an action sends a signal that the institution is not worthy of respect.<sup>19</sup> Action by the legislature or executive that undermines respect for Chapter 9 institutions would thus be in contravention of the provisions mentioned above. This does not mean institutions should not and cannot be criticised and subjected to questioning, but such questioning should be done with due regard for the independence of these institutions. Lastly, organs of state have a duty to ensure the effectiveness of these institutions, which relates to accountability set out below.

The Constitutional Court affirmed the basic principle that Chapter 9 institutions must have some degree of financial independence to function independently and to be able to exercise their duties without fear, favour or prejudice. At the same time, the Constitutional Court made it clear that this does not mean that these institutions can set their own budgets. What is required is for Parliament to provide a reasonable amount of money that would enable the institutions to fulfil their constitutional and legal mandates. In discussing the financial independence of the Electoral Commission, the Constitutional Court explained in *New National Party v Government of the Republic of South Africa and Others*:

This implies the ability to have access to funds reasonably required to enable the Commission to discharge the functions it is obliged to perform under the Constitution and the Electoral Commission Act. This does not mean that it can set its own budget. Parliament does that. What it does mean, however, is that Parliament must consider what is reasonably required by the Commission and deal with requests for funding rationally, in the light of other national interests. It is for Parliament, and not the executive arm of government, to provide for funding reasonably sufficient to enable the Commission to carry out its constitutional mandate. The Commission must accordingly be afforded an adequate opportunity to defend its budgetary requirements before Parliament or its relevant committees.<sup>20</sup>

It is important to note that this task is clearly one to be exercised by Parliament. The Court accepted that there inevitably would be a tension between the government/Parliament on the one side and the independent institution on the other about the reasonableness of the amount of money to be given to ensure the effective fulfilment of its constitutional mandate. It is incumbent on the parties to make every effort to resolve that tension and to reach an agreement by negotiation and good faith. This, according to the Constitutional Court, would no doubt entail considerable meaningful discussion, exchange of relevant information, a genuine attempt to understand the respective needs and constraints, and the mutual desire to reach a reasonable conclusion.<sup>21</sup> However, when Parliament engages in this process, it must deal with requests rationally in the light of other national interests. This means the institutions must be afforded an adequate opportunity to defend their budgetary requirements before Parliament or its relevant committees. Thus '[n]o member of the executive or the administration should have the power to stop transfers of money to any independent constitutional body without the existence of appropriate safeguards for the independence of that institution'.<sup>22</sup>

In addition, in *New National Party*, the Constitutional Court stated that the independent bodies supporting democracy require more than financial independence. For these institutions to operate independently and for them to fulfil their respective tasks without fear, favour or prejudice, the Constitutional Court said that the administrative independence of these institutions should be safeguarded.<sup>23</sup> This implies that these institutions must have control over those matters directly connected with their functions under the Constitution and the relevant legislation. No matter what arrangements Parliament or the executive may make, it is important that the institutions must retain the ability to maintain operational control over their core business. What is required is that any arrangements must not interfere with the constitutional mandate of the bodies to perform their duties impartially. In *New National Party*, the Constitutional Court made it clear that section 181(3) of the Constitution requires the executive to engage with the bodies in a manner that would ensure that the efficient functioning of the Commission is not hampered.<sup>24</sup>

The Constitutional Court further indicated that a failure on the part of the executive to comply with such obligations ‘may seriously impair the functioning and effectiveness of those State institutions supporting constitutional democracy and cannot be condoned’ [25](#) This means that Parliament or the executive cannot interfere directly in the day-to-day running of these institutions. They also cannot instruct the institutions on a micro level regarding their programmes and implementation thereof, and cannot get directly involved in the employment or management of staff. At the same time, Parliament and the executive have a duty to support these institutions. If institutional problems are of such magnitude or seriousness that they make it difficult or impossible for an institution to fulfil its constitutional and legislative tasks, Parliament can, and indeed must, assist such an institution to resolve these problems. Such assistance must not, however, have the effect of removing control over matters directly connected with an institution’s functions and must not hamper the efficient functioning of an institution. In short, while Parliament and the executive can engage with these institutions to assist them to improve their performance, they cannot do so in a way that would remove final control over administration from the institutions or that results in interference in the efficient functioning of these institutions.

Thus, the Constitutional Court ruled that the Department of Home Affairs cannot tell the Electoral Commission how to conduct registration, whom to employ, and so on. [26](#) However, if the Commission asks the government to provide personnel to assist in the registration process, government must provide such assistance if it is able to do so. If not, the Commission must be provided with adequate funds to enable it to do what is necessary. As a general rule, there has been no direct interference by the executive with the day-to-day running of Chapter 9 institutions. Some may argue that this has not been necessary because the appointments process has been skewed in such a way as to ensure that those appointed to many of the Chapter 9 institutions would not be overtly critical of the executive or the legislature. While it is impossible to state categorically that this is indeed the case, it is important to investigate the appointments procedure of Chapter 9 bodies and it is to this which we now turn.

## PAUSE FOR REFLECTION

The appointments procedure of Chapter 9 bodies

The independence of the various Chapter 9 bodies is further operationalised in legislation. If we take the Electoral Commission as an example, section 3 of the Electoral Commission Act [27](#) confirms that the Electoral Commission ‘is independent and subject only to the Constitution and the law’ and ‘shall be impartial and shall exercise its powers and perform its functions without fear, favour or prejudice’.

Section 6 of the Electoral Commission Act helps to entrench the independence of the Commission by providing for a complicated appointments process. This section provides that the Commission shall consist of five members, one of whom shall be a judge, appointed by the President. However, the President has no discretion in the appointment. This is because section 6(2) also provides that no person can be appointed as a member of the Commission unless he or she:

- is a South African citizen
- does not at that stage have a high party-political profile
- has been recommended by the NA by a resolution by a majority of its members

- • has been nominated by a committee of the NA from a list of recommended candidates submitted to it by an independent panel. This committee must consist of members of all of the parties represented in the NA in proportion to the number of seats they hold.

The independent panel is made up of the Chief Justice as chairperson, a representative of the Human Rights Commission, a representative of the Commission on Gender Equality and the Public Protector. It must submit a list of no fewer than eight recommended candidates to the committee of the NA and it must act in a transparent and open manner.<sup>28</sup>

Section 7(3) of the Electoral Commission Act entrenches the institutional independence of the Commission by providing some security of tenure for members of the Commission who serve for a period of seven years. This tenure of Commissioners is protected in that the section states that a commissioner may only be removed from office by the President:

- • on the grounds of misconduct, incapacity or incompetence
- • after a finding to that effect by a committee of the NA
- • on the recommendation of the Electoral Court
- • the adoption by a majority of the members of the NA of a resolution calling for that commissioner's removal from office.

This means that the process to remove a commissioner cannot be initiated by any politician. Only the Electoral Court can initiate the process of the removal of a Commissioner and only after the Electoral Court has made a finding as to the misconduct, incapacity or incompetence of a Commissioner and has referred the matter to the NA. It is only at this point that politicians get involved in the process.

The Public Protector and the Auditor-General are of great significance for the monitoring of the exercise of state authority. They play a fundamental role in the monitoring, investigation and reporting on government conduct.

### 7.3 The Public Protector

The Public Protector has the power to investigate any conduct of the government or administration that is alleged or suspected to be improper or to result in any impropriety or prejudice. It also has the power to report on that conduct and to take appropriate remedial action.<sup>29</sup> It is an independent and impartial institution.<sup>30</sup> It must report to the NA at least once a year.<sup>31</sup> This means that the Public Protector does not only report on public maladministration but also, indirectly, protects and enforces constitutional obligations as the government is required to act on the recommendations made although these recommendations are not binding. Then Chief Justice Sandile Ngcobo emphasised the importance of the Public Protector as he correctly pointed out that the role of the institution is critical particularly in countries emerging from the atrocities of the past because: 'good governance and the equitable distribution of resources is the only way for our people to enjoy the [benefits that are associated with the attainment of the democracy in 1994]'.<sup>32</sup>

The report released by the Public Protector on 'an investigation into complaints and allegations of maladministration, improper and unlawful conduct by the Department of Public Works and the South African Police Service relating to the leasing of office accommodation in Pretoria' attests to the significant role of the institution in curbing the abuse of state

authority.<sup>33</sup> Without pronouncing on the merits of the investigation, the report fingered the National Commissioner of Police, Bheki Cele, for having abused his authority and failed to ensure that the signing of the lease was done in accordance with the requirements of the Constitution and other related legislation.<sup>34</sup>

#### 7.4 The Auditor-General

The Auditor-General must audit and report on the accounts, financial statements and financial management of state departments and administrations.<sup>35</sup> He or she must submit audit reports to any legislature, such as Parliament or the provincial legislatures, which has a direct interest in the audit.<sup>36</sup> Like the Public Protector, the Auditor-General is an independent and impartial institution.<sup>37</sup> Conradie emphasises, ‘the Auditor-General plays a crucial role in the public sector where the greatest number of stakeholders, the whole population in effect, is dependent on the Auditor to vigorously audit and report on accountability information as well as other functions of independence’.<sup>38</sup> It is, therefore, deduced from the powers vested in the Auditor-General that his or her primary purpose is to ensure the credibility of the flow of information in the accountability process.

#### SUMMARY

The Constitution creates a set of Chapter 9 institutions, including the Human Rights Commission, the Public Protector, the Auditor-General and the Electoral Commission, to promote and safeguard democracy. These institutions are not easily slotted into the traditional separation of powers model. While the institutions are independent and have their independence constitutionally guaranteed and further enhanced in legislation, they are also constitutionally required to report on their activities and the performance of their functions to the NA at least once a year and to account to the NA.

The Constitutional Court has nevertheless confirmed that these institutions are not part of government and enjoy both institutional and administrative independence from government. Although the institutions are independent, they are not in the same position as the judiciary as they do not usually make binding findings that can be enforced in a similar manner to that of the courts. They usually help to hold the government and officials accountable and make recommendations about remedial action.

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<sup>1</sup>S 181(1) of the Constitution.

<sup>2</sup>Murray, C (2006) The Human Rights Commission et al: What is the role of South Africa’s Chapter 9 institutions? Potchefstroom Electronic Law Journal 9(2):122–47 at 125.

<sup>3</sup>S 181(2) of the Constitution.

<sup>4</sup>S 181(5) of the Constitution.

<sup>5</sup>See Holness, D and Vrancken, P ‘Non-judicial enforcement of human rights’ in Govindjee, A and Vrancken, P (eds) (2009) Introduction to Human Rights Law 240.

[6](#)See Ntlama, N (2005) *Unlocking the future: Monitoring court orders in respect of socio-economic rights* Tydskrif vir Hedendaags Romeins-Hollandse Reg 68(1):81–9 at 83.

[7](#)See generally De Vos, P ‘Balancing independence and accountability: The role of Chapter 9 institutions in South Africa’s constitutional democracy’ in Chirwa, DM and Nijzink, L (eds) (2012) *Accountable Government in Africa: Perspectives from Public Law and Political Studies* 160–77.

[8](#)The Human Rights Commission and the Public Protector are two such institutions.

[9](#)De Vos (2009) 163.

[10](#)S 181(2).

[11](#)The Constitution also guarantees the independence of other institutions such as the Public Service Commission (s 196(2)–(3)); the Broadcasting Authority (s 192) and the Financial and Fiscal Commission (s 220(2)). There is no explicit provision for the independence of the Pan South African Language Board which is established in s 6 of the Constitution. Furthermore, legislation that creates these institution also provides for further protection of the independence of these institutions. Thus, s 9(1)(b) of the Public Protector Act 23 of 1994 prohibits any person from insulting the Public Protector or the Deputy Public Protector and from doing anything in connection with an investigation ‘which, if the said investigation had been proceeding in a court of law, would have constituted contempt of court’.

[12](#)*Independent Electoral Commission v Langeberg Municipality* (CCT 49/00) [2001] ZACC 23; 2001 (3) SA 925 (CC); 2001 (9) BCLR 883 (CC) (7 June 2001) and *New National Party v Government of the Republic of South Africa and Others* (CCT9/99) [1999] ZACC 5; 1999 (3) SA 191; 1999 (5) BCLR 489 (13 April 1999).

[13](#)*S and Others v Van Rooyen and Others (General Council of the Bar of South Africa Intervening)* (CCT21/01) [2002] ZACC 8; 2002 (5) SA 246; 2002 (8) BCLR 810 (11 June 2002).

[14](#)(CCT 49/00) [2001] ZACC 23; 2001 (3) SA 925 (CC); 2001 (9) BCLR 883 (CC) (7 June 2001).

[15](#)S 239(2) defines an organ of state as follows:

1. (a) any department of state or administration in the national, provincial or local sphere of government; or any other functionary or institution–
2. (b) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer.

[16](#)*Langeberg Municipality* paras 28–9.

[17](#)*Langeberg Municipality* para 31. See also Parliament of the Republic of South Africa (2007) *Report of the Ad Hoc Committee on the Review of Chapter 9 and Associated Institutions*, A report to the National Assembly of the Parliament of South Africa, Cape



Town, South Africa, 9 available at [http://www.parliament.gov.za/content/chapter\\_9\\_report.pdf](http://www.parliament.gov.za/content/chapter_9_report.pdf).

[18](#)Langeberg Municipality para 31.

[19](#)See generally Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others (CCT35/99) [2000] ZACC 8; 2000 (3) SA 936; 2000 (8) BCLR 837 (7 June 2000).

[20](#)(CCT9/99) [1999] ZACC 5; 1999 (3) SA 191; 1999 (5) BCLR 489 (13 April 1999) para 98. See also Langeberg para 29.

[21](#)New National Party para 97.

[22](#)New National Party para 96.

[23](#)New National Party para 99.

[24](#)New National Party para 99:

The second factor, administrative independence, implies that there will be control over those matters directly connected with the functions which the Commission has to perform under the Constitution and the Act. The executive must provide the assistance that the Commission requires to ensure [its] independence, impartiality, dignity and effectiveness. The department cannot tell the Commission how to conduct registration, whom to employ, and so on; but if the Commission asks the government for assistance to provide personnel to take part in the registration process, government must provide such assistance if it is able to do so. If not, the Commission must be put in funds to enable it to do what is necessary.

[25](#)New National Party para 95.

[26](#)New National Party para 99.

[27](#)Act 51 of 1996.

[28](#)S 6(3)–(5) of the Electoral Commission Act.

[29](#)S 182(1) of the Constitution.

[30](#)S 182(2) of the Constitution.

[31](#)S 182(5) of the Constitution.

[32](#)See the report by Segalwe, O (2011, 16 March) Chief Justice Ngcobo highlights the importance of the Public Protector available at <http://www.pprotect.org>.

[33](#)See Report No 33 (2010/2011) Against the rules available at <http://www.pprotect.org>.

[34](#)Report No 33 (2010/2011) 85.

35S 188(1) of the Constitution.

36S 188(3) of the Constitution.

37S 181(2) of the Constitution.

38Conradie, J (2011, April) The evolution of accounting standards in the public sector, Unpublished paper available at <http://www.accountancysa.org.za>.

## **CHAPTER 8**

### Multilevel government in South Africa

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### 8.1 The division of powers between spheres of government: general principles

#### 8.1.1 Introduction

An important characteristic of the Constitution is that it not only divides power vertically between the legislative, executive and judicial branches of government in terms of the

separation of powers doctrine. It also divides power horizontally between the national, provincial and local spheres of government, thus establishing a quasi-federal system of government. Section 40(1) of the Constitution provides in this respect that '[i]n the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated'. In this chapter we deal with this horizontal division of power. We identify the exact powers allocated to each sphere of government, address the relationship between the different spheres of government and explore the constitutional management of conflicts between the various spheres of government.

It is important to understand that in a federal or quasi-federal system, the division of power between different spheres of government may be based either on a divided model of federalism or an integrated model of federalism.

In a divided model of federalism, the subject matters in respect of which policies and laws may be made are strictly divided between the different levels or spheres of government. Each level or sphere, therefore, has its own exclusive powers and there are very few, if any, concurrent or shared powers. In this model, the policies and laws made by each level or sphere will also be implemented and administered by their own separate civil services and departments of state. Australia, Canada and the United States are examples of a divided model of federalism.<sup>1</sup>

In an integrated model of federalism, some subject matters are allocated exclusively to one level or sphere of government, but most are concurrent or shared. The subject matters in respect of which policies and laws may be made, therefore, are not strictly divided between the different levels or spheres of government. In this model, the framework policies and laws made by the central level or sphere of government may be complemented by provincial or local policies and laws and must be implemented and administered by the provincial or local spheres of government. Germany and South Africa are examples of an integrated model of federalism.<sup>2</sup>

When we say that South Africa broadly adheres to an integrated model of federalism, we are not saying that South Africa is a fully fledged federal state. Throughout this chapter we will raise questions about the nature of the relationship between the three spheres of government. We contend that while the South African system displays several characteristics of a federal system, it could probably best be described as a quasi-federal system. In a quasi-federal system, the national government retains more power and influence over law making and policy formulation than is usually the case in a fully fledged federal system.

### 8.1.2 Historical background

Although we contend that South Africa could probably best be described as a quasi-federal state, it is important to note that the Constitution itself studiously avoids describing the system of governance in South Africa as federal or quasi-federal.<sup>3</sup> This is partly because there was profound antipathy towards the notion of a federal state among the African National Congress (ANC) and other liberation organisations and this manifested in positions assumed during the negotiations process.

The antipathy displayed by the ANC towards the notion of a federal state may be traced back, at least in part, to the 'grand design' of the apartheid government. This involved the fragmentation of the country into so-called 'self-governing' and later 'independent' entities

based on ethnic, group or tribal affiliations. The ultimate goal of grand apartheid, therefore, was that black South Africans would be stripped of their South African citizenship and be afforded the citizenship of one of these 'independent' entities in which they would exercise their civil and political rights.[4](#)

The ANC and its allies were concerned that a federal system would result in the resurrection of the despised homeland system in a different guise. There were also concerns that a rigid division of powers between the national sphere of government and the various provincial spheres would inhibit and frustrate the developmental and egalitarian objectives of the new state seeking to improve the quality of life of all.

During the process of negotiations, however, the ANC leadership started seeing the benefit and advantages of strong regional government for the delivery of services and the political empowerment of the citizens. It seems that exposure to models of federalism such as the German Constitution assisted in convincing the liberation organisations that effective regional government could be combined with strong central leadership and this was the model that was eventually adopted.[5](#)

Some of the political groups such as the predominantly Zulu party, the Inkatha Freedom Party (IFP), favoured a strong federal arrangement and advocated an asymmetrical arrangement with maximum devolution of original power to the Kwazulu-Natal (KZN) region. It was the inability to reach consensus on this and other issues that caused them to boycott the constitutional drafting process for the interim Constitution.[6](#)

#### PAUSE FOR REFLECTION

Should the number of provinces be reduced?

South Africa currently has a national government, nine provinces, six metropolitan councils together with a number of district and local municipalities. At the time of the transition, the provincial system allowed parties which had strong regional support but limited national support to participate meaningfully in the political process. This contributed to the stabilisation of the democratic order.

The IFP boycotted the initial constitutional drafting process in the run-up to the 1994 elections, but eventually participated in the elections and was the dominant party in the KZN provincial legislature for about 10 years. This contributed to the ending of the civil strife in the province as the IFP, despite their limited national support, played an important role in the provincial legislature. In this sense, the system accommodated diverse political aspirations.

There is now some thinking, particularly within the ANC, that we should reduce the number of provinces and emphasise strong national and local governments.[7](#) Part of the argument is that the costs do not justify the benefits derived from having nine provincial governments. In addition, there are concerns about whether all the regions possess the capacity to function effectively and to implement wide-ranging policies devised by the national sphere of government. On the other hand, the argument is that provincial government has the potential to secure a closer link between voters and their democratically elected representatives. If all decisions are taken in Cape Town or Pretoria, the quality of democracy would suffer. However, the question remains: should the number of provinces be reduced, say, from nine to

five? If this is reduced, will it enhance the efficiency and democratic accountability of government?

### 8.1.3 The constitutional principles

As we saw in chapter 2, the transition to democracy in South Africa took place in two stages. An important aspect of this two-stage process was that the final Constitution had to be consistent with 34 Constitutional Principles agreed to by the various parties at the multiparty negotiating process and enshrined in Schedule 4 of the interim Constitution. A significant number of these principles dealt with the structure of government. They provided in this respect that:

- government shall be structured at national, provincial and local levels [8](#)
- the powers and functions of the various spheres had to be defined in the final Constitution and that they could not be substantially less or substantially inferior to those provided for in the interim Constitution [9](#)
- the functions of the national and provincial levels of government had to include exclusive and concurrent powers [10](#)
- the allocation of a competence to either the national or provincial spheres had to be in accordance with listed criteria [11](#)
- the national sphere was precluded from exercising its powers so as to encroach on the geographical, functional and institutional integrity of the provinces [12](#)
- disputes concerning legislative powers allocated by the Constitution concurrently to the national and provincial spheres had to be resolved by a court of law. [13](#)

A framework dealing with powers, function and structures of local government also had to be set out in the Constitution. [14](#) In addition, every sphere of government had to be guaranteed an equitable share of revenue collected nationally to ensure that provinces and local government were able to provide basic services and execute the functions allocated to them. [15](#)

In Certification of the Constitution of the Republic of South Africa, 1996, the Constitutional Court held that the question of whether the powers and functions allocated to the provinces were substantially less or substantially inferior to those provided for in the interim Constitution was the most difficult question it had to deal with. [16](#) After evaluating the allocation of the powers to various spheres of government and assessing the breadth of the override clause that allows for national legislation to prevail over provincial legislation in certain instances, the Court concluded that the diminution in provincial power was substantial and that this was inconsistent with Constitutional Principle XVIII. [17](#) This required the drafters to reorder the arrangements, afford more powers to the provinces and restrict the scope of the override clause before it met the approval of the Court. In Certification of the Amended Text of the Constitution of The Republic Of South Africa, 1996, the Constitutional Court found that the revised override clause (section 146) was more stringently drafted and removed any presumption in favour of national legislation. [18](#) This, together with the adjustment of the allocation of powers to the provinces, satisfied the Court that the amended text complied with Constitutional Principle XVIII.

We discuss the exact allocation of powers to the various spheres of government and the override clauses applying when there is a conflict between the spheres of government in detail below.

#### 8.1.4 The principles of co-operative government

As we noted in the introduction to this chapter, an important characteristic of the Constitution is that it not only divides power vertically between the legislative, executive and judicial branches of government, but also horizontally between the national, provincial and local spheres of government and that this horizontal division of power follows an integrated model.[19](#)

An important consequence of the integrated model adopted by the drafters of the Constitution is that mechanisms must be put in place to regulate the overlap of power between the various spheres of government. The principle of co-operative government plays an important role in regulating the overlap of power between the various spheres of government.

To understand fully this principle of co-operative government, it is necessary to set out the basic structure according to which power is divided between the three spheres of government. It is to this basic structure that we now turn.

First, the nine provincial governments share the power to make laws on a wide range of important matters with the national government. Schedule 4 of the Constitution sets out these shared or concurrent matters that include important matters such as education, the environment, health, housing and policing.[20](#)

Second, in so far as the concurrent powers of the national and provincial governments are concerned, the national and provincial governments have equal law-making powers. If the laws made by the national and provincial governments conflict with each other, the national law will override the provincial law, but only if the national law satisfies the criteria set out in section 146 of the Constitution.[21](#)

Third, apart from their concurrent powers, provincial governments also have the exclusive power to make laws on the matters set out in Schedule 5 of the Constitution. These exclusive powers deal with relatively unimportant matters such as abattoirs, ambulance services and libraries other than national libraries. Despite the fact that these Schedule 5 powers have been exclusively reserved for provinces, section 44(2) of the Constitution provides that the national government may intervene and pass a law on a Schedule 5 matter if it is necessary to achieve the objectives set out in section 44(2) itself.

Fourth, local government has been given the authority to make by-laws for the effective administration of the matters they have the power to administer. These local government matters are set out in Part B of Schedule 4 and Part B of Schedule 5. By-laws which conflict with national or provincial laws are invalid.[22](#)

Fifth, the laws that are made by the national government and that fall into the broad areas of concurrent competence must be implemented and administered by provincial and local governments. The primary role of provincial and local governments, therefore, is the implementation and administration of national laws.[23](#)

Last, the national government has the plenary power to pass laws and administer laws on any other topic or subject matter not mentioned in either Schedule 4 or 5. This means that the powers of provinces are explicitly restricted to those functional areas set out in either

Schedule 4 or 5, while the powers of the national government are not restricted and can encompass any matter not mentioned in Schedule 4 or 5.

### PAUSE FOR REFLECTION

When the principles of co-operative government become pivotal

This system that allocates important service delivery powers to both the national sphere and the provincial spheres of government can create governance challenges. For example, the national government department is required to oversee the basic education system and to ensure the smooth running of schooling in the country. However, each of the nine provincial departments of education has to implement the broad policy objectives set out by the national department and the national South African Schools Act.<sup>24</sup> But what happens if a provincial department of education fails to implement these broad policy objectives? What can a national Minister of Education do if a provincial education department fails to deliver textbooks to schools on time or when it fails to spend its capital budget to eradicate mud schools and pit latrines which still exist in many schools in South Africa?

As we shall see, in extreme cases, the national government can take over the running of a provincial department if it fails to fulfil its constitutional and legal obligations.<sup>25</sup> But short of this, it is not clear how much power the national Minister and his or her department will have to ensure that the money allocated for basic education to each province is spent effectively and in accordance with the broad policy directives set out by the national department. It is for this reason that the principles of co-operative government set out in Chapter 3 of the Constitution become pivotal as they require the national government department and the provincial government departments to meet regularly and to co-operate with one another. Even when different political parties govern nationally and in some of the provinces, these governments at national and provincial level are required by these provisions to co-operate with one another to ensure the effective implementation of national policies.

Given the overlap between the legislative and executive authority of the national, provincial and local spheres of government, the Constitution makes provision for a system of intergovernmental co-ordination to manage any potential conflict between the various spheres exercising concurrent competences. This forms the heart of the system of co-operative government. The most important rules governing this system are set out in Chapter 3 of the Constitution. Chapter 3 of the Constitution entrenches the notion of co-operative government which recognises the distinctiveness, interdependence and interrelatedness of the national, provincial and local spheres of government.<sup>26</sup>

All spheres of government – national, provincial and local – are required to observe and adhere to the principles of co-operative government set out in Chapter 3 of the Constitution.<sup>27</sup> Particularly important in this context are the principles set out in section 41. This section provides, inter alia, that ‘[a]ll spheres of government and all organs of state within each sphere’ must:

- respect the constitutional status, institutions, powers and functions of government in the other spheres <sup>28</sup>
- not assume any power or function except those conferred on them in terms of the Constitution <sup>29</sup>



- • exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere [30](#)
- • co-operate with each other in mutual trust and good faith. [31](#)

In addition, Chapter 3 of the Constitution also provides that an organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all remedies before approaching a court of law to settle the dispute. [32](#) There has been some confusion about which bodies are bound by these provisions. Do they apply only to those organs of state that exercise legislative and executive power in the national, provincial and local spheres of government or do they also apply to those organs of state that are supposed to be independent such as the Electoral Commission, the National Prosecuting Authority (NPA) and the South African Human Rights Commission (SAHRC)?

After some ambivalence, there is now relative certainty as to the bodies bound by Chapter 3. In *Independent Electoral Commission v Langeberg Municipality*, [33](#) the Constitutional Court held that the Independent Electoral Commission (IEC) is an organ of state as defined in section 239 of the Constitution. However, it is not part of government as it is not an organ of state in the national sphere of government. Chapter 9 entrenches the independence of the institutions identified in this Chapter and hence these institutions cannot simultaneously be independent of and yet part of government. [34](#) Thus, a dispute between a Chapter 9 institution and an organ of government cannot be regarded as an intergovernmental dispute requiring compliance with Chapter 3. The Court stated that while it is preferable for organs of state not to litigate against each other readily, there was no obligation on Chapter 9 institutions to follow the prescripts of Chapter 3. [35](#)

In *Uthukela District Municipality and Others v President of the Republic of South Africa and Others*, the Constitutional Court confirmed that municipalities are organs of state in the local sphere of government while the President and the national Ministers are organs of state in the national sphere. [36](#) Thus, a dispute involving these spheres would, prior to being referred to court, have to comply with Chapter 3. For these purposes, the provincial executive cannot be distinguished from the national executive and the provincial executive will be regarded as an organ of state in the provincial sphere.

The essence of Chapter 3 was described by the Constitutional Court as requiring that disputes 'where possible be resolved at a political level rather than through adversarial litigation'. [37](#) In *Uthukela*, the Court held that it will rarely decide an intergovernmental dispute 'unless the organs of State involved in the dispute have made every reasonable effort to resolve it at a political level.' [38](#) The Court held that the duty to avoid legal proceedings placed a two-fold obligation on all organs of state. They had to make every reasonable effort to settle the dispute through the mechanisms provided and to exhaust all other remedies before they approached the courts. [39](#) The Court will decline to hear the matter if there is a failure to comply with this obligation. In effect, the matter will be referred back to the parties to comply with their obligations in terms of Chapter 3.

#### 8.1.5 Intergovernmental co-ordination

To avoid conflicts between the national, provincial and local spheres of government, especially in so far as their concurrent powers are concerned, the Constitution establishes or

provides for the establishment of co-ordinating bodies. Some of these bodies are responsible for co-ordinating the legislative activities of the three spheres of government and others for co-ordinating the executive activities of government.

The responsibility for co-ordinating the legislative activities of the different spheres of government has been vested in the National Council of Provinces (NCOP). This is because each province, as well as organised local government, is represented in the NCOP. Given that we have already discussed the NCOP, however, we will not dwell on the manner in which it co-ordinates the legislative activities of the three spheres of government here. Instead, we will focus on those bodies that have been established by the Intergovernmental Relations Framework Act (IGRFA) [40](#) to co-ordinate the executive activities of the different spheres of government.

The IGRFA was passed to establish structures to promote and facilitate intergovernmental relations and to provide mechanisms to settle intergovernmental disputes. The provisions of the IGRFA do not apply to conflicts between the national and provincial legislatures.[41](#) These conflicts have to be resolved in accordance with section 146 of the Constitution. As a consequence of the Langeberg case, all Chapter 9 institutions and other independent institutions fall outside the scope of the Act. Finally, as the courts are independent, they too are not bound by the provisions of the IGRFA.

The purpose of the IGRFA is to provide a framework for the various spheres of government and organs of state within those spheres to facilitate co-ordination in the implementation of policy and legislation.[42](#) These include the provision of coherent government, the effective provision of services, the monitoring of implementation of policy and the realisation of national priorities.[43](#) To help achieve this purpose, the IGRFA creates a number of co-ordinating forums. Among the most important of these are the President's Co-ordinating Council,[44](#) National Intergovernmental Forums,[45](#) the Premiers' Intergovernmental Forum [46](#) and District Intergovernmental Forums.[47](#)

#### PAUSE FOR REFLECTION

Co-operative intergovernmental relations or coercive intergovernmental relations?

Steytler draws a distinction between co-operative intergovernmental relations and coercive intergovernmental relations.[48](#) He argues that while the Constitution envisages a system of co-operative intergovernmental relations, statutes such as the IGRFA lean more in the direction of a system of coercive intergovernmental relations dominated by the national sphere of government. This leads him to the conclusion that South Africa currently operates as an integrated federal state that utilises a coercive form of intergovernmental relations. In other words, while the national sphere is obliged to co-operate with the other spheres, it also dominates them.

In some instances, organs of state have to act in conjunction with other organs of state to carry out their statutory and constitutional responsibilities or to provide effective service delivery. The IGRFA requires that in these instances, implementation protocols must be agreed on by the various participating organs of state.[49](#) Among various objectives, the implementation protocols must:

- • identify the roles and responsibilities of each organ of state in implementing policy and carrying out its statutory functions
- • provide for aims and objectives of the project
- • determine indicators to measure the attainment of the objectives
- • provide for monitoring and evaluation mechanisms
- • provide for dispute-resolving procedures
- • determine the duration of the protocol.[50](#)

One of the most important objectives of the IGRFA is to set in place mechanisms to deal with intergovernmental disputes. The IGRFA does not apply to disputes concerning interventions in terms of sections 100 and 139 of the Constitution.[51](#) Any intervention in terms of these sections must satisfy the procedural and substantive constraints built into these sections.

An intergovernmental dispute is defined as a dispute between different spheres of government or between organs of state from different spheres concerning matters arising from statutory powers or functions assigned to them or from an agreement between the parties regarding the implementation of their statutory powers. In addition, the issue must be justiciable in a court of law.[52](#)

The definition is wide and covers disputes that arise as a consequence of the various parties exercising their statutory power. This would include disputes about which party is responsible for paying for the services provided and which party should provide particular services. In addition, disputes may arise as a consequence of an agreement entered into by the parties in furtherance of a joint mandate. The IGRFA imposes a direct duty to avoid intergovernmental disputes.[53](#) This duty involves taking reasonable steps both to avoid intergovernmental disputes and to settle intergovernmental disputes that arise without resorting to judicial proceedings. The IGRFA prescribes various steps which must be followed as a prerequisite to taking legal proceedings.

As a first step, the parties must try to settle the dispute through direct negotiations or through an intermediary. If this is unsuccessful, then one of the parties may declare a formal intergovernmental dispute by notifying the other party of this in writing.[54](#)

After a formal intergovernmental dispute has been declared, the parties are obliged to convene a meeting to determine the precise issues that are in dispute, the material issues that are not in dispute and any mechanisms and procedures, other than judicial proceedings, that are in place and which can resolve the dispute. The parties are also required to agree on appropriate mechanisms to settle the dispute and to designate a person to act as a facilitator.[55](#)

If the meeting is not convened and if the dispute involves a national organ of state, the Minister responsible for provincial and local government must convene the meeting.[56](#) Similar responsibilities rest on the MEC for local government in respect of disputes involving provincial organs of state and local government or municipal organs of state.

The IGRFA assigns specific responsibilities to the facilitator.[57](#) The main mandate is to settle the dispute in any manner necessary and to provide progress reports to the relevant parties. The attempts to settle and the contents of the progress reports are deemed to be privileged documents and may not be used in judicial proceedings. Importantly, no organ of state may institute proceedings to settle an intergovernmental dispute unless it has been declared a

formal intergovernmental dispute and efforts made to settle the dispute have proved to be unsuccessful.

## 8.2 The division of legislative and executive power between the national and provincial spheres of governments

### 8.2.1 Introduction

The division of legislative and executive authority between the three spheres of government is one of the key features of the system of multisphere government adopted in the Constitution. In this part of the chapter, we discuss the division of legislative and executive authority between the national and provincial spheres of government. Although there is a large overlap between the matters over which each sphere has, first, legislative authority and, second, executive authority, these matters are not necessarily identical. For example, additional administrative powers may be delegated to provincial executives by the national legislature.<sup>58</sup> This would empower provincial executives to exercise administrative powers in terms of such legislation even though the provincial legislatures may not be empowered to legislate on that matter. Nevertheless, to a large degree, provincial executives have authority over the same subject matter as provincial legislatures. Unless indicated otherwise, we will deal with these matters as if they overlap. Before discussing this further, however, it will be helpful to discuss briefly the objectives and structure of provincial government.

### 8.2.2 The objectives and structure of provincial government

South Africa is divided into nine provinces, namely the Eastern Cape, Free State, Gauteng, KwaZulu-Natal, Mpumalanga, Northern Cape, Northern Province, North West and Western Cape.<sup>59</sup> The Constitution regulates the governance of the provinces in Chapter 6 and sets out the structure, powers and functions of the provincial legislatures <sup>60</sup> as well as the provincial executive authorities.<sup>61</sup> Judging from the structure and powers bestowed by the Constitution on the nine provinces, provinces are required to fulfil at least three important interrelated but distinct functions:

- First, provinces provide a close link between voters and their government to ensure that the government addresses the particular concerns and unique challenges and needs of discrete geographical areas.
- Second, provinces are required to implement national policies and plans relating to important service delivery areas such as housing, health care, policing and education.
- Third, provinces must oversee the smooth running of the local sphere of government within the boundaries of the province.

To a large extent the structures and functions of the nine provinces mirror one another. Each province is entitled to pass a provincial constitution,<sup>62</sup> and the Western Cape Province has indeed done so.<sup>63</sup> However, such a constitution cannot bestow substantially more powers on a province or deviate from the basic structure of governance of the province as set out in the national Constitution.<sup>64</sup> The constitution-making power is not a power to constitute a province with powers, functions or attributes in conflict with the overall constitutional framework established by the national Constitution. The provinces remain creatures of the national Constitution and cannot, through their provincial constitution-making power, alter their character or their relationship with the other levels of government.<sup>65</sup> When discussing

the structure and functioning of provinces, we shall therefore focus on the provisions of the 1996 Constitution only.

The legislative authority of each province is vested in its provincial legislature. The provincial legislature has the legislative power to pass a provincial constitution and to pass legislation for its province with regard to any matter:

- • within a functional area listed in Schedule 4 [66](#)
- • within a functional area listed in Schedule 5 [67](#)
- • outside those functional areas and that is ‘expressly assigned’ to the province by national legislation [68](#)
- • for which a provision of the Constitution ‘envisages’ the enactment of provincial legislation. [69](#)

A provincial legislature may also assign any of its legislative powers to a municipal council in that province. [70](#) In addition, the legislature of a province may change the name of that province by adopting a resolution with a supporting vote of at least two-thirds of its members, requesting Parliament to change the name of that province. [71](#)

Apart from the legislative powers set out above, the Constitution also provides that provincial legislation with regard to any matter that is reasonably necessary for, or incidental to, the effective exercise of a power concerning any matter listed in Schedule 4, is for all purposes legislation with regard to a matter listed in Schedule 4. [72](#)

The members of provincial legislatures are elected in accordance with the same electoral system that applies to the election of members of the National Assembly (NA). The size of each of the legislatures is determined in terms of a formula prescribed by national legislation relating to the population size of that province, but cannot be smaller than 30 and no larger than 80 members. [73](#) The Western Cape legislature’s size is determined by the Western Cape Constitution. [74](#) The requirements for membership of provincial legislatures, as well as the loss of membership, are identical to those prescribed for the NA. [75](#) Provincial legislatures are also elected for a term of five years and can be dissolved before the expiry of that term for exactly the same reasons as those that apply to the NA. [76](#)

As we may recall, a province’s permanent delegates to the NCOP are not members of the provincial legislature. However, such permanent delegates to the NCOP may attend and may speak in their provincial legislature and its committees, but may not vote. The legislature may require a permanent delegate to attend the legislature or its committees. [77](#) The rules regarding the functioning of provincial legislatures also mirror those prescribed for the NA.

The executive authority of a province is vested in the Premier of that province, whose role mirrors that of the President at national level. Obviously, though, Premiers do not enjoy the head of state powers bestowed on the President by section 84 of the Constitution. The Premier exercises executive authority, together with the other members of the Executive Council, by:

- • implementing provincial legislation in the province
- • implementing all national legislation in the functional areas listed in Schedule 4 or 5 except where the Constitution or an Act of Parliament provides otherwise

- • administering in the province national legislation outside the functional areas listed in Schedules 4 and 5, the administration of which has been assigned to the provincial executive in terms of an Act of Parliament
- • developing and implementing provincial policy
- • co-ordinating the functions of the provincial administration and its departments
- • preparing and initiating provincial legislation
- • performing any other function assigned to the provincial executive in terms of the Constitution or an Act of Parliament.[78](#)

Over and above the explicit powers bestowed on the Premier and his or her executive, they also enjoy any additional powers that have been bestowed on them by the national legislature.

A province has executive authority in terms of those functional areas listed in Schedules 4 and 5 of the Constitution, but ‘only to the extent that the province has the administrative capacity to assume effective responsibility’.[79](#) The Constitution enjoins the national government to assist provinces to develop the administrative capacity required for the effective exercise of their powers and performance of their functions through legislative and other measures.[80](#) Any dispute concerning the administrative capacity of a province in regard to any function must be referred to the NCOP for resolution within 30 days of the date of the referral to the Executive Council.[81](#) A member of the Executive Council of a province may assign any power or function that is to be exercised or performed in terms of an Act of Parliament or a provincial Act to a municipal council. An assignment must be in terms of an agreement between the relevant Executive Council member and the municipal council. It must be consistent with the Act in terms of which the relevant power or function is exercised or performed, and it takes effect on proclamation by the Premier.[82](#)

Premiers are elected by the provincial legislature.[83](#) Premiers can also be removed in two ways:

- • First, Premiers can be impeached in terms of section 130(3) of the Constitution for a serious violation of the Constitution or the law, serious misconduct or inability to perform the functions of office.
- • Second, in terms of section 141 of the Constitution, a provincial legislature may remove a Premier for purely political reasons by instituting a motion of no confidence in the Premier.

#### PAUSE FOR REFLECTION

The division and demarcation of legislative competences between the national and provincial spheres

Unlike Parliament, which has plenary legislative powers, the provincial legislatures have limited legislative powers. The limited nature of the provincial legislatures’ legislative powers was highlighted by the Constitutional Court in its judgment in Premier: Limpopo Province v Speaker of the Limpopo Provincial Legislature and Others.[84](#)

The facts of this case were as follows. In 2009, the Limpopo Provincial Legislature passed the Financial Management of the Limpopo Provincial Legislature Bill, 2009. The purpose of this Bill was to regulate the financial management of the Limpopo Provincial Legislature itself. After the Limpopo Provincial Legislature had passed this Bill, it was referred to the

Premier of Limpopo for his assent and signature. The Premier, however, had reservations about the constitutional validity of the Bill and refused to assent to it. Acting in terms of section 121 of the Constitution, the Premier referred the Bill back to the Provincial Legislature and, after the Provincial Legislature had failed to address his concerns, to the Constitutional Court for a decision on its constitutional validity.<sup>85</sup>

The Premier's reservations were based on the fact that the financial management of a provincial legislature is not listed as a functional area in either Schedule 4 or Schedule 5 of the Constitution. This meant he argued that the Bill fell outside the Provincial Legislature's legislative competence.

The Provincial Legislature accepted that financial management of a provincial legislature is not listed as a functional area in either Schedule 4 or Schedule 5. It argued, however, that the Bill did fall into its legislative competence because the power to pass legislation regulating the financial management of a provincial legislature has been 'expressly assigned' to the provinces by the Financial Management of Parliament Act.<sup>86</sup> In addition, the Provincial Legislature argued further, the power to pass legislation regulating the financial management of a provincial legislature was 'envisaged' by sections 195, 215 and 216 the Constitution.<sup>87</sup> Section 195 deals with the basic values and principles governing public administration. Section 215 deals with the national, provincial and municipal budgets and section 216 indicates the nature of treasury controls that must be implemented.

A majority of the Constitutional Court rejected both these arguments and came to the conclusion that the Bill did not fall into the legislative competence of the Limpopo Provincial Legislature. It was, therefore, unconstitutional and invalid.

In arriving at this conclusion, the Constitutional Court pointed out that the defining feature of our constitutional scheme for the allocation of legislative powers between Parliament and the provinces is that the legislative powers of the provinces are enumerated and clearly defined, while those of Parliament are not.<sup>88</sup> The plenary power that resides in Parliament is therefore contrasted with the limited powers that have been given to provincial legislatures.<sup>89</sup> An important consequence of this feature, the Constitutional Court pointed out further, is that a provincial legislature may pass legislation only on:

- those matters set out in Schedule 4
- those matters set out in Schedule 5
- those that have been 'expressly assigned' to the provinces by national legislation
- those in respect of which a provision of the Constitution 'envisages' the enactment of provincial legislation.<sup>90</sup>

The general scheme of the Constitution, the Constitutional Court went on to point out, was aimed at ensuring that the legislative authority of the provinces is clearly identified.<sup>91</sup> In addition to the competences directly articulated in Schedules 4 and 5, the Constitution specifically requires that additional competences are 'expressly assigned' by national legislation to the provinces or are 'envisaged' by a provision of the Constitution.<sup>92</sup>

After setting out these principles, the Constitutional Court turned to consider whether the Financial Management of Parliament Act has expressly assigned the financial management of a provincial legislature to the provinces. In this respect, the Constitutional Court noted that the word 'expressly' must be interpreted as part of the objective to ensure that provincial

competences are clearly identified. This meant, the Court noted further, that the national legislation assigning the additional powers must leave no doubt of its intent and must clearly stipulate the nature and scope of the powers assigned. The reason why the national legislation assigning the additional powers must leave no doubt of its intent, the Constitutional Court went on to note, is because it will provide reasonable certainty as to the areas of competence of the provincial legislatures.[93](#)

Clarity as to the nature and extent of the power assigned will advance co-operative government which has, as one of its guiding principles, that no sphere will assume any power or function except those conferred in terms of the Constitution. This clarity, the Constitutional Court also held, would prevent disputes and inform the public as to which sphere has competence over the particular matter.[94](#)

The Court suggested that the preamble and the objectives of the enabling legislation should make the intent clear and unequivocal.[95](#) The Court concluded that if the assignment is merely implied as opposed to express, it will fail to comply with the requirements of the Constitution regarding the assignment of legislative authority.[96](#)

Having found that the Financial Management of Parliament Act did not expressly assign the financial management of a provincial legislature to the provinces, the Constitutional Court turned to consider whether the power to pass legislation regulating the financial management of a provincial legislature was 'envisaged' by sections 195, 215 and 216 of the Constitution.[97](#) In keeping with the theme of maximum clarity in respect of the allocation of legislative powers to the various spheres, the Constitutional Court also adopted a restrictive approach to this argument. It held that only those provisions of the Constitution which in clear, unequivocal and express terms sanctioned the enactment of provincial legislation fell under this section.[98](#) The Constitutional Court stated that the power had to be expressly assigned and not merely implied. To do otherwise would, in the view of the Court, undermine the principle of certainty and adversely affect the constitutional scheme.[99](#) The Court identified section 155(5) of the Constitution as an example of such express assignment. This section provides that provincial legislation must determine the different types of municipalities to be established in the province.[100](#) On the facts, the Constitutional Court concluded that the sections of the Constitution relied on by the provincial legislature did not in clear and unmistakable terms envisage the enactment by the provincial legislature of this law.[101](#)

In their dissenting judgments, the minority of the Constitutional Court disagreed with the manner in which the majority interpreted the word 'envisages'. The word 'envisages', the minority reasoned, must mean something different from the phrase 'expressly assigned'.[102](#) If they meant the same thing, the drafters of the Constitution would not have used different words. The word 'envisages', the minority reasoned further, means something less than 'expressly assigned', but not much less.[103](#) 'It must appear that the relevant provisions of the Constitution read in context lead to no conclusion but that the Constitution contemplates the exercise of the power by the provincial legislature and that the Constitution could mean nothing else'.[104](#) After setting out these principles, the minority turned to apply them to the facts and found that the power to pass legislation regulating the financial management of a provincial legislature was 'envisaged' by sections 195, 215 and 216 of the Constitution.[105](#)

The case represents an attempt to have reasonable certainty in respect of the division and demarcation of legislative competences between the national and provincial spheres. The



constitutional scheme vests the residual legislative powers in the national sphere and makes specified allocations to the provincial legislatures. The Court did not permit the boundaries to be blurred and insisted that the provinces can only legislate in respect of functional areas falling within Schedules 4 and 5, or if national laws clearly assign further function to the provinces, or if the Constitution expressly assigns power to the provinces to legislate on specified matters.<sup>106</sup>

### 8.2.3 Determining legislative competence

As we have already seen, the legislative powers bestowed on Parliament overlap to some degree with the legislative powers bestowed on provincial legislatures. One of the more difficult questions of South African constitutional law is the exact relationship between the legislative powers of the national Parliament in relation to the legislative powers of the provincial legislatures. There are two distinct issues at play here:

- First, when dealing with concurrent competences listed in Schedule 4, both the national legislature and the provincial legislatures are empowered to pass legislation on a particular topic. When both the national legislature and a provincial legislature have passed legislation on a particular concurrent competence set out in Schedule 4, both the national and the provincial legislation will have been validly passed. However, as we shall see, where there is a direct conflict between the provisions of national legislation and provincial legislation, the provisions of the provincial legislation will prevail unless one or more of the requirements of section 146 of the Constitution is met in which case the national legislation will prevail.<sup>107</sup> We shall deal with the rules relating to such clashes below.
- Second, usually only provincial legislatures can pass legislation dealing with one or more of the exclusive competences listed in Schedule 5. However, in exceptional cases set out in section 44(2) of the Constitution, the national Parliament may intervene and pass legislation listed in Schedule 5. We shall deal with this below.

At this point it is important to note that the division of legislative authority between the national, provincial and local spheres of government imposes important federalist limits on the power of each sphere of government to legislate. At the heart of these limits lies the principle that each sphere may not adopt legislation that falls outside its legislative authority. Legislation passed by a legislature in a particular sphere, therefore, may be challenged on the ground that it does not fall into the legislature's authority. Whenever a person challenges legislation on the ground that it does not fall into a legislature's authority, a court will have to determine whether the legislature in question was competent to pass the legislation. There are two distinct questions that arise whenever there is uncertainty whether the legislature of one sphere of government is competent to pass legislation on a specific topic:

- First, there is a need to decide whether the impugned legislation deals with a topic listed in Schedule 4 or Schedule 5. Our courts have developed a special test for this which we will discuss below.
- Second, once we have determined whether the legislation falls within Schedule 4 or 5, we must ask whether the relevant legislature was authorised to pass the legislation as a matter of course or in terms of section 44(2) or section 146 of the Constitution.

The Constitutional Court considered the manner in which a court must determine whether a piece of legislation has been competently enacted by either the national legislature or by one

of the provincial parliaments (or both) in several cases, including in *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill*.[108](#)

In this case, the national legislature passed the Liquor Bill which sought to regulate comprehensively the liquor industry. The Bill divided the economic activity of the liquor industry into three categories: manufacture, distribution and retail sales. The Bill treated manufacture and distribution as national issues and retail sales as provincial issues to be dealt with by provincial liquor authorities. However, even in respect of retail sales, the Bill prescribed detailed mechanisms as to how the provincial legislatures should establish their retail licensing systems.

The Western Cape government, then controlled by the New National Party, challenged the constitutionality of the Bill by arguing that it exhaustively regulated issues concerning manufacture and distribution and that even in the retail sphere, it relegated the provinces to the role of funders and administrators. Parliament contended that the Bill primarily dealt with trade, economic and social welfare issues, which are concurrent competences. The Western Cape provincial government argued that the Bill dealt with liquor licences, an exclusive competence of the province in terms of Schedule 5. The Bill, in fact, affected both concurrent and exclusive provincial competencies.

The Constitutional Court emphasised that under the post-apartheid constitutional developments, governmental power is not located in the national sphere alone.[109](#) Legislative authority is vested in Parliament for the national sphere, in the provincial legislature for the provincial sphere and in municipal councils for the local sphere.[110](#) Any interpretation must recognise and promote the philosophy of co-operative government at various levels.[111](#) However, given the breadth of the competencies listed in the various Schedules, their parameters of operation will, of necessity, overlap.[112](#)

The Constitutional Court pointed out (as we have done above) that the Constitution allows for provincial exclusivity in respect of matters falling within Schedule 5, subject to an intervention by the central sphere that is justified in terms of section 44(2) of the Constitution. This, argued the Court, meant that the functional competencies in Schedule 4 should be interpreted as being distinct from, and excluding, Schedule 5 competencies.[113](#) The Court found that the primary purpose of Schedule 4 is to enable the national government to regulate various issues interprovincially (between all the provinces).[114](#) Conversely, the provinces, whose jurisdiction is confined to their geographical territory, are accorded exclusive powers in respect of matters that may be regulated intraprovincially (exclusively within the province).[115](#)

The main substance and character of the legislation determines the field of competence in which it falls. A single piece of legislation may have various parts and more than one substantive character.[116](#) According to this reasoning, the Court concluded that the national sphere has the power to regulate the liquor trade in all respects other than liquor licensing. The manufacture and distribution segments of the legislation affect interprovincial as opposed to intraprovincial competencies.[117](#) This would suggest that the competence of liquor licensing in Schedule 5 was not intended to encompass the manufacturing and distribution of liquor.[118](#) In any event, the Court was prepared to conclude that even if the provincial competence in respect of liquor licences extends to licensing, production and distribution, 'its ( the central spheres) interest in maintaining economic unity authorises it to intervene under section 44(2) of the Constitution'.[119](#)

However, the Court adopted a much stricter approach to the national regulation in respect of retail sales. A relatively uniform approach to liquor licensing in the country may be desirable but this did not amount to a necessity that justified an intrusion into the exclusive provincial competence. Thus, the Court deemed those aspects of the law that regulated the manufacture and distribution of liquor constitutional and the segment of the national law regulating the retail industry unconstitutional.[120](#)

## CRITICAL THINKING

The substantial measure test versus the pith and substance test for Bills

It is important to recall what we stated in chapter 3, namely that there is a distinction between the test to determine whether a Bill should be tagged and then passed as a section 75 Bill not affecting provinces or a section 76 Bill affecting provinces, and the test to determine whether a Bill deals with a concurrent competence in terms of Schedule 4 or an exclusive provincial competence in terms of Schedule 5. There is an important difference between the substantial measure test used to decide how to tag a Bill and the pith and substance test used to determine whether the subject matter of a Bill falls within Schedule 4 or Schedule 5.

In terms of the pith and substance test, those provisions of a Bill that fall outside its substance are treated as incidental. In contrast, the tagging test is distinct from the question of legislative competence. It focuses on all the provisions of the Bill to determine the extent to which they substantially affect functional areas listed in Schedule 4 and not on whether any of its provisions are incidental to its substance. The more it affects the interests, concerns and capacities of the provinces, the more say the provinces should have on its content.[121](#)

Importantly, the Court endeavoured to remain faithful to the structure of the Constitution. Had the Court interpreted the competence of 'trade' very broadly, this would have provided an opportunity for the national legislature to intervene in a variety of matters that fall under Schedule 5 such as liquor licensing, control of undertakings that sell liquor, licensing and control of undertakings that sell food to the public, markets and street trading. By demarcating the boundary by reference to intra- and interprovincial activities, the Court ensured that national intervention in respect of Schedule 5 matters that apply intraprovincially must comply with section 44(2) of the Constitution. A broad interpretation of the competences listed in Schedule 4 would have ultimately negated the exclusive competence of the provinces to legislate in respect of matters listed in Schedule 5.[122](#)

Given that subject matter or the substance of legislation determines the field of competence in which it falls, it is important to be able to identify the subject matter or the substance of a law. The Constitutional Court discussed the manner in which this may be done in *Abahlali Basemjondolo Movement SA and Another v Premier of the Province of Kwazulu-Natal and Others*.[123](#)

In this case, the applicants, an association representing residents of informal settlements, applied for an order declaring the Elimination and Prevention of the Re-emergence of Slums Act,[124](#) which had been passed by the KZN Provincial Legislature, to be unconstitutional and invalid. They based their application on a number of grounds, one of which was that the KZN Provincial Legislature lacked the competence to pass this law. The KZN Provincial Legislature lacked the competence to pass the Act, the applicants argued, because it did not deal with housing. Housing is a functional area of concurrent national and provincial

competences listed in Schedule 4. They argued that the Act dealt with land tenure and access to land which, in terms of section 25 of the Constitution, is a functional area of exclusive national competence.[125](#)

The key question the Constitutional Court had to determine, therefore, was whether the subject matter or substance of the Act was housing, in which case it would fall into the legislative competence of the KZN Provincial Legislature, or whether it was land tenure and access to land, in which case it would not fall into the legislative competence of the KZN Provincial Legislature. When it comes to determining the subject matter or substance of a law, the Constitutional Court held that two important principles must be taken into account:

- First, the substance of the law does not depend on its form, but rather on the true purpose, effect and essence of what the law is about.
- Second, no national or provincial legislative competence is watertight and it is therefore important to determine the main substance of the legislation in order to ascertain whether the provincial legislature has legislative competence.[126](#)

After setting out these principles, the Constitutional Court applied them to the facts. In this respect, the Court held that in determining the substance of the Act it had to be considered as a whole.[127](#) The preamble of the Act identified the purpose of the legislation as being to eliminate and prevent the re-emergence of slums in a manner that protects and promotes the housing construction programmes of provincial and local governments.[128](#) The Court found that the overall strategy of the Act was to eliminate slums and to make provision for the progressive realisation of adequate housing by improving service delivery and by generally improving the conditions under which people are housed. It was not simply about eviction with no regard for the consequences of rendering people homeless.[129](#)

The Court concluded that the Act was primarily about improving the housing conditions of those living in slums in KZN.[130](#) It was therefore about housing and fell within the legislative competence of the province.[131](#) However, the majority of the court found that section 16 of the Elimination and Prevention of the Re-emergence of Slums Act obliged owners to institute eviction proceedings when directed to do so by the MEC even if to do so would not be in accordance with the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE Act).[132](#) The majority found this to be inconsistent with section 25 of the Constitution which seeks to provide greater security of tenure to communities whose tenure is legally insecure as a result of past racially discriminatory laws.[133](#)

Thus, a full and complete appraisal of the law is required to determine the substance of the legislation. This, in turn, assists with assessing whether the law deals with a matter that falls under Schedule 4 or 5 or within the exclusive competence of Parliament. Once this determination has been made, then clarity can be obtained as to which legislative body has competence over the matter.

#### 8.2.4 The resolution of conflicts between the national and provincial spheres

##### 8.2.4.1 Conflicts related to concurrent competences set out in Schedule 4

As stated earlier, both the national and provincial legislatures possess power to legislate concurrently over the functional areas contained in Schedule 4. Affording concurrent

legislative responsibilities over the same functional areas to different legislatures can lead to conflicting laws being enacted over the same subject matter. For instance, education is a concurrent function and thus both the national and provincial legislatures have jurisdiction to pass laws in respect of this competence. Provisions of a law passed by the national legislature on education may conflict with provisions of a law passed by a provincial legislature on the same subject matter. It is thus imperative for the Constitution to anticipate such conflicts and to include provisions that seek to resolve conflicts between laws dealing with the same subject matter and which are passed by the different legislatures. Section 146 of the Constitution provides a framework in terms of which these conflicts are to be resolved. It has been suggested that conflicts between central and provincial laws are dealt with by reference to the following enquiries: [134](#)

- Does the central legislature have the legislative competence to pass its law?
- Does the provincial legislature have the legislative competence to pass its law?
- If both legislatures have the legal competence to pass the laws, then the issue would be whether the different laws can be reconciled.
- If there is an irreconcilable conflict, then the central law will prevail if the provisions of section 146 of the Constitution are satisfied.
- If the provisions of section 146 of the Constitution are not met, then the provincial law will prevail.

Thus, the first question is whether the legislative body possesses the constitutional power to legislate over the matter. If the response is that the provincial legislature, as in the case of the Premier: Limpopo, or Parliament, as in Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others, [135](#) does not possess the authority to legislate, then that is the end of the enquiry. The legislative body lacking the power cannot constitutionally legislate and therefore there is no need to determine whether national law should prevail or provincial law or vice versa. It is only if both national and provincial legislatures have the power to legislate and do so that attempts must be made to reconcile the laws. If the laws cannot be reconciled, section 146 of the Constitution must then be applied to determine which law should prevail.

If any one of the criteria listed in section 146 is met, the national law will prevail. [136](#) The provisions of section 146 can only be resorted to in respect of conflicting laws dealing with a functional area listed in Schedule 4. [137](#) Criteria permitting the central override are divided into two categories. If one of the criteria listed either in section 146(2) or 146(3) is satisfied, then the conflicting provincial law is rendered inoperative for the period of the conflict. [138](#) If, for some reason, the conflicting national law is repealed, the provincial law that had been rendered inoperative as a result of the application of section 146 will again be operative. All the criteria listed in section 146(2) are subject to the additional requirement that the central legislation must apply uniformly to the country as a whole. Thus, a national law that targets a particular province will not prevail in terms of section 146(2).

In terms of section 146(2), central law will prevail if any one of the following three conditions is established:

- The central legislation deals with a matter that cannot be regulated effectively by legislation enacted by the respective provinces individually. [139](#)

- The central legislation deals with a matter that, to be dealt with effectively, requires uniformity across the nation, and national legislation provides that uniformity by establishing norms and standards, frameworks or national policies.[140](#)
- The central legislation is necessary for the maintenance of national security; the maintenance of economic unity; the protection of the common market in respect of the mobility of goods, services, capital and labour; the promotion of economic activities across provincial boundaries; the promotion of equal opportunities or equal access to government services; or the protection of the environment.[141](#)

In *Mashavha v President of the Republic of South Africa and Others*,[142](#) the Constitutional Court had to consider the constitutionality of the President assigning to the provinces the administration of the Social Assistance Act [143](#) in its entirety. In terms of the interim Constitution, the President could only assign the administration of the Act to the provinces if the provisions of section 126(3) of the interim Constitution [144](#) were not applicable.

The Court found that the assignment was invalid as the administration dealt with a matter that could not be regulated effectively by separate provincial legislation. For the administration of social welfare grants to be administered fairly and equitably, it needed to be regulated or coordinated by uniform norms or standards that applied throughout the Republic.[145](#) To achieve equity and effectiveness, it was necessary to set minimum standards across the nation.[146](#) The primary objection of the Court was that if Gauteng, the richest province in the country, paid a higher old-age pension than Limpopo, then the dignity of people in Limpopo would be offended as different classes of citizenship would be created.[147](#) Thus, to prevent inequality and unfairness in the provision of social assistance to people in need, uniform norms and standards had to be applicable throughout the country.[148](#)

In terms of section 146(3) of the Constitution, national law will prevail over provincial law if it is aimed at preventing unreasonable action by a province that is prejudicial to the economic, health or security interests of another province or the country as a whole, or impedes the implementation of national economic policy.

#### PAUSE FOR REFLECTION

When is section 146 invoked?

It is important to note that conflicts only arise and section 146 will only be invoked when one or more of the specific legal provisions in a provincial Act cannot be obeyed at the same time as one or more of the provisions in a national Act. It is also important to remember that as both the national and provincial spheres have legislative competence over these matters, the provisions that conflict do not become invalid. All that happens is that section 146 is used to decide whether the provisions of the provincial Act will prevail or whether the conflicting provisions of the national Act will prevail. The provisions of the Act that do not prevail will remain in limbo. If the conflicting provisions of the Act that prevails are scrapped, the provisions of the conflicting Act will be ‘resurrected’, so to speak, and will again become operational.

For example, if both the national Parliament and the Western Cape Provincial Parliament pass legislation dealing with the regulation of the use of blue-light brigades by politicians, both will have the legislative power to pass such legislation as Schedule 4 states that road traffic regulation is a concurrent competence. If there is a direct clash between the provisions

of the Western Cape law and the provisions of the national law, say the national law allows all politicians to use blue-light convoys while the Western Cape law prohibits this, then a court may have to decide whether the national legislation prevails in terms of section 146 of the Constitution. If the court finds that section 146 is indeed applicable and that the provisions of the national law would prevail, the prohibition contained in the provincial law would become inoperable until such time as the national law is amended or scrapped. If the court finds that section 146 is not applicable, then the prohibition contained in the provincial law against the use of blue-light convoys by politicians will prevail, but only in the Western Cape.

#### 8.2.4.2 Conflicts related to exclusive provincial competences in Schedule 5

Section 44(2) of the Constitution states that even though provincial legislatures have the exclusive powers to pass legislation on one of the functional areas listed in Schedule 5 of the Constitution, the national Parliament may nevertheless intervene in areas listed in Schedule 5, but only when it is necessary:

- • to maintain national security
- • to maintain economic unity
- • to maintain essential national standards
- • to establish minimum standards required for the rendering of services
- • to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole.

If Parliament does intervene and validly passes legislation on one of the functional areas listed in Schedule 5, a conflict may arise between national legislation and provincial legislation with respect to the matters listed in Schedule 5. A conflict between national legislation and provincial legislation with respect to these matters must be resolved in terms of section 147(2) of the Constitution. This section provides that national legislation referred to in section 44(2) of the Constitution prevails over provincial legislation that falls with the functional areas listed in Schedule 5.

### 8.3 The division of legislative and executive power between the national and provincial and local spheres of government

#### 8.3.1 Introduction

As we have already seen, an important aspect of the Constitution is that it distributes legislative and executive authority between the national, provincial and local spheres of government. In the first part of this chapter, we discussed the division of legislative and executive authority between the national sphere of government, on the one hand, and the provincial spheres of government, on the other. In this part of the chapter, we discuss the division of legislative and executive authority between the national and provincial spheres of government, on the one hand, and the local sphere of government, on the other. Before doing so, however, it will be helpful to discuss briefly the objectives and structure of local government.

#### 8.3.2 The objectives of local government

The objectives of local government are set out in section 152(1) of the Constitution. This section provides that the objectives of local government are:

- • to provide democratic and accountable local government for local communities
- • to ensure the provision of services to communities in a sustainable manner
- • to promote social and economic development
- • to promote a safe and healthy environment
- • to encourage the involvement of communities and community organisations in the matters of local government.

In addition, section 153 of the Constitution also provides that a municipality must:

- • structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community
- • structure and manage its administration and budgeting and planning processes to promote the social and economic development of the community
- • participate in national and provincial development programmes.

Despite the fact that these sections impose a wide range of obligations on local government, the Constitutional Court held in *Joseph and Others v City of Johannesburg and Others* that one of the most important objectives of local government is to meet the basic needs of all of the inhabitants of South Africa.[149](#)

To achieve this objective, the Constitutional Court held further that sections 152 and 153 of the Constitution, read together with the Local Government: Municipal Systems Act,[150](#) impose an obligation on every municipality to provide basic municipal services to their inhabitants, such as water and electricity, irrespective of whether or not they entered in a contract for the supply of these services with the municipality.[151](#)

#### PAUSE FOR REFLECTION

Municipalities derive their power from the Constitution

The constitutional status of local government today is radically different from what it was prior to the transition to democracy in 1994. Prior to 1994, municipalities were at the bottom of a hierarchy of law-making powers. This is because they derived their existence and their powers from provincial ordinances which, in turn, derived their existence and powers from Acts of Parliament. An important consequence of this fact is that municipalities were not recognised or protected by the pre-1994 Constitution. Instead, they were classified as mere administrative agencies exercising delegated or subordinate powers. The institution of elected local government could, therefore, have been terminated at any time and its functions entrusted to administrators appointed by the central or provincial governments.

Today, however, as the Constitutional Court pointed out in *City of Cape Town and Other v Robertson and Other*,[152](#) the Constitution has moved away from this hierarchical division of governmental power. It has ushered in a new vision of government in which the sphere of local government is interdependent, ‘inviolable and possesses the constitutional latitude within which to define and express its unique character’ subject to constraints permissible under our Constitution.[153](#)



This means, the Constitutional Court pointed out further, that:

[a] municipality under the Constitution is not a mere creature of statute otherwise moribund save if imbued with power by provincial or national legislation. A municipality enjoys 'original' and constitutionally entrenched powers, functions, rights and duties that may be qualified or constrained by law and only to the extent the Constitution permits. Now the conduct of a municipality is not always invalid only for the reason that no legislation authorises it. Its power may derive from the Constitution or from legislation of a competent authority or from its own laws.[154](#)

### 8.3.3 The structure of local government

Section 155 of the Constitution distinguishes between three different categories of municipalities, namely category A municipalities, category B municipalities and category C municipalities:

- A category A municipality has exclusive municipal executive and legislative authority in its area and is referred to as a metropolitan municipality in section 1 of the Local Government: Municipal Structures Act.[155](#)
- A category B municipality shares its municipal executive and legislative authority in its area with a category C municipality and is referred to as a local municipality in section 1 of the Municipal Structures Act.
- A category C municipality has municipal executive and legislative authority in an area which includes more than one municipality and is referred to as a district municipality in section 1 of the Municipal Structures Act.

Apart from distinguishing between category A (metropolitan), category B (local) and category C (district) municipalities, section 155 of the Constitution also provides that national legislation must establish the criteria for determining when an area should have a single category A municipality or when it should have municipalities of both category B and category C. The national legislation referred to in this section is the Municipal Structures Act. Section 2 of this Act provides that metropolitan municipalities must be established in metropolitan areas, and section 3 provides that local and district municipalities must be established in all other areas.

A metropolitan area is defined in section 1 of the Municipal Structures Act as any area which reasonably can be regarded as a conurbation featuring areas of high population density, intense movement of people, goods and services, extensive development, multiple business districts and a number of industrial areas. In addition, the social and economic linkages between the constituent units should be strong.[156](#) The power to determine whether an area satisfies criteria and should therefore be classified as a metropolitan area with a metropolitan municipality is vested in an independent body known as the Municipal Demarcation Board. The Municipal Demarcation Board is responsible for determining and re-determining the boundaries of municipalities. Its powers and functions as well as the procedure it must follow when it exercises its powers and carries out its functions are set out in the Local Government: Municipal Demarcation Act.[157](#)

#### PAUSE FOR REFLECTION

Why an independent authority must carry out the task of determining municipal boundaries

Section 155(3)(b) of the Constitution declares that national legislation must establish criteria and procedures for the determination of municipal boundaries by an independent authority. The independent authority referred to in this section is the Municipal Demarcation Board. The Constitutional Court highlighted the reasons why an independent authority must carry out the task of determining municipal boundaries in its judgment in *Matatiele Municipality and Others v President of the Republic of South Africa and Others*.<sup>158</sup>

In 2005, Parliament passed the Constitution Twelfth Amendment Act and the Cross-Boundary Municipalities Laws Repeal and Related Matters Act.<sup>159</sup> In terms of these laws, the boundary between KwaZulu-Natal and the Eastern Cape was altered so that the area in which the Matatiele Municipality was located was transferred from KwaZulu-Natal to the Eastern Cape and new municipal boundaries were created.

The applicants then applied for an order declaring the Constitution Twelfth Amendment Act to be unconstitutional and invalid on the grounds that it violated section 155(3)(b) of the Constitution. They argued that the new boundaries of the Matatiele Municipality had been determined by Parliament and not by an independent authority, namely the Municipal Demarcation Board.

The Constitutional Court rejected this argument and refused to grant the order. In arriving at this decision, however, it set out some of the reasons why section 155(3)(b) of the Constitution provides that the Municipal Demarcation Board must be an independent body. In this respect, the Constitutional Court pointed out that the ‘purpose of section 155(3)(b) is to guard against political interference in the process of creating new municipalities’,<sup>160</sup> This is because, the Constitutional Court pointed out further, if municipalities were established along political lines or if there was political interference in the establishment of new municipalities, our system of multiparty democratic government would be undermined.<sup>161</sup> A deliberate decision, the Constitutional Court went on to conclude, was therefore made to confer the power to establish municipal areas on an independent authority.<sup>162</sup>

The different types of municipalities that may be established within each category of municipality are also set out in the Municipal Structures Act. The Act begins in this respect by distinguishing between three ‘executive systems’ of municipal government and two ‘participatory systems’.<sup>163</sup> The three executive systems are the collective executive system, the mayoral executive system and the plenary executive system:

- A collective executive system is one in which the executive authority of the municipality is exercised by an executive committee. In this system, the leadership of the municipality is therefore collectively vested in the executive committee.
- A mayoral executive system is one in which the executive authority of the municipality is exercised by an executive mayor assisted by a mayoral committee. In this system, the leadership of the municipality is vested in an executive mayor.
- A plenary executive committee is one in which executive authority is exercised by the municipal council itself. In this system, the leadership of the municipality is vested in the municipal council.

The two participatory systems are the subcouncil participatory system and the ward participatory system:

- • A subcouncil participatory system is one which allows for delegated powers to be exercised by subcouncils established for parts of the municipality.
- • A ward participatory system is one which allows for matters of local concern to wards to be dealt with by committees established for wards.

After distinguishing between these different systems of municipal government, the Municipal Structures Act goes on to provide that:

- • a metropolitan council must have either a collective or mayoral executive system and may combine its executive system with a subcouncil participatory system or a ward participatory system or both [164](#)
- • a local council may have a collective, mayoral or plenary executive system and may combine its executive system with a ward participatory system but not with a subcouncil participatory system [165](#)
- • a district council may have a collective, mayoral or plenary executive system but may not combine its executive system with a subcouncil or ward participatory system. [166](#)

The articulation of the type of municipality is important to determine three issues:

- • first, the institutional relationship between the municipality's executive and legislative functions
- • second, whether a metropolitan or local municipality is permitted to establish ward committees
- • third, whether a metropolitan municipality is permitted to establish subcouncils that exercise delegated powers for parts of the municipality.

Finally, it is important to note that section 155 of the Constitution also provides that national legislation must make provision for an appropriate division of powers and functions between local and district municipalities. A division of powers and functions between a local and a district municipality, however, does not have to be symmetrical, but must constantly ensure that the need to provide municipal services in an equitable and sustainable manner is being upheld. [167](#) The national legislation referred to in this section is the Municipal Structures Act.

#### 8.3.4 Municipal powers

As we have already seen, municipalities are no longer simply creatures of statute. Instead, they derive at least some of their executive and legislative powers directly from the Constitution itself. [168](#) The executive and legislative powers of a municipality are set out in section 156 of the Constitution. This section provides that a municipality has executive authority in respect of and has the right to administer:

- • the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5 [169](#)
- • any other matter assigned to it by national or provincial legislation. [170](#)

In addition, section 156 of the Constitution also provides that a municipality may make and administer by-laws for the effective administration of the matters which it has the right to administer. [171](#) A careful examination of this section shows that it distinguishes between two types of powers:

- those powers that are derived directly from the Constitution and that may be referred to as original powers
- those powers that are assigned to municipalities in terms of national or provincial legislation and that may be referred to as assigned powers.

Apart from those powers that are derived directly from the Constitution or that are assigned to it in terms of national or provincial legislation, section 156(5) of the Constitution also provides that a municipality has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions.[172](#)

#### 8.3.4.1 Original municipal powers

Section 156(1)(a) of the Constitution provides that a municipality has executive and legislative authority in respect of the local government matters listed in Part B of Schedule 4 and in Part B of Schedule 5. In addition, section 156(5) of the Constitution also provides that a municipality has the right to exercise any power concerning a matter reasonably necessary for or incidental to the effective performance of its Schedule 4 Part B and Schedule 5 Part B functions. Given that these powers can only be altered or withdrawn if the Constitution itself is amended, they form the most significant source of municipal powers and are a fundamental feature of local government's institutional integrity.[173](#)

#### PAUSE FOR REFLECTION

Using the bottom-up method to determine the scope and ambit of the matters set out in Schedule 4 and Schedule 5

In both the Liquor Bill case and in *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others*,[174](#) the Constitutional Court held that the scope and ambit of the matters set out in Schedule 4 and Schedule 5 of the Constitution must be interpreted in light of the model of government adopted by the Constitution and the manner in which the Constitution allocates power to the different spheres of government.

Besides these principles, the Constitutional Court also held in *Gauteng Development Tribunal* that where two or more matters appear to overlap with each other, they should be interpreted in a bottom-up manner.[175](#) A bottom-up method of interpretation is one in which the more specific matter is defined first and all residual areas are left for the much broader matter.[176](#)

In the *Gauteng Development Tribunal* case, for example, one of the key questions the Constitutional Court had to answer was whether the power to approve applications for the rezoning of land and the establishment of townships fell into the broad matter of urban and rural development, which is listed in Schedule 4A, or into the specific matter of municipal planning, which is listed in Schedule 4B. In accordance with the bottom-up method of interpretation, the Constitutional Court began its analysis, not with an examination of the scope and ambit of the broad matter of urban and rural development, but rather with an examination of the scope and ambit of the specific matter of municipal planning.

In so far as the scope and ambit of municipal planning was concerned, the Constitutional Court began by noting that although the term is not defined in the Constitution, it has a particular and well known meaning, which includes the zoning of land and the establishment of townships.[177](#) In addition, the Constitutional Court noted further, there is nothing in the

Constitution which indicates that the term ‘municipal planning’ should be given a meaning which is different from its common meaning.<sup>178</sup> The power to approve applications for the rezoning of land and the establishment of townships did, therefore, fall into the area of municipal planning listed in Schedule 4B.<sup>179</sup>

After coming to this conclusion, the Constitutional Court turned to consider whether the same powers also fell into the broad matter of urban and rural development. The Court held that they did not. In arriving at this conclusion, the Constitutional Court began by noting that the term ‘urban and rural development’ could not be interpreted in a way that included the power to approve applications for the rezoning of land and the establishment of townships. This is because, the Constitutional Court noted further, such an interpretation would infringe the principles of co-operative government which provide that each sphere of government must respect the functions of the other spheres and must not assume any functions or powers not conferred on them by the Constitution or encroach on the functional integrity of the other spheres.<sup>180</sup> An important consequence of this approach, the Court went on to note, was that the term ‘urban and rural development’ should be interpreted narrowly so that each sphere of government could exercise its powers without interference by another sphere of government.<sup>181</sup>

Having found that the term ‘urban and rural development’ was not broad enough to include the powers that form a part of municipal planning, the Constitutional Court then concluded that it was not necessary to go any further and define exactly what the scope of the functional area of urban and rural development was.<sup>182</sup>

The Constitution confers the authority on municipalities to pass laws in respect of the matters listed in Part B of Schedule 4 and Part B of Schedule 5. However, it is important to note that the authority to pass laws on the matters listed in Schedule 4B and Schedule 5B has also been conferred on the national <sup>183</sup> and provincial governments.<sup>184</sup> The authority conferred on the national and provincial governments to pass laws on the matters listed in Schedule 4B, however, is limited by section 155(6)(a) and 155(7) of the Constitution.<sup>185</sup> The authority conferred on the provincial governments to pass laws on the matters listed in Schedule 5B is limited by section 155(6)(a) and 155(7) of the Constitution.<sup>186</sup>

Section 155(6)(a) of the Constitution provides in this respect that ‘[e]ach provincial government ... by legislative and other measures, must provide for the monitoring and support of local government in the province’. Section 155(7) of the Constitution provides that:

[t]he national government, subject to section 44, and the provincial governments have the legislative and executive authority to see to the effective performance by municipalities of their functions in respect of matters listed in Schedule 4 and 5, by regulating the exercise by municipalities of their executive authority referred to in section 156(1).

In the Gauteng Development Tribunal case, the Constitutional Court held that an important consequence of section 155(7) of the Constitution is that neither the national nor the provincial spheres of government can, by legislation, give themselves the power to exercise executive municipal powers or the right to administer municipal affairs.<sup>187</sup> This is because, the Constitutional Court held further, the mandate of these two spheres is ordinarily limited to regulating the exercise of executive municipal powers and the administration of municipal affairs by municipalities.<sup>188</sup> In other words, while the national and provincial spheres of

government are entitled to pass laws regulating the local government matters set out in Schedule 4B and Schedule 5B, they are not entitled to pass laws giving themselves the power to administer or implement those laws. The municipalities themselves must exercise the power to administer or implement those laws.

#### 8.3.4.2 Assigned municipal powers

Sections 44(1)(a)(iii) and 104(1)(c) of the Constitution provide that both the national and provincial governments may increase the legislative powers of specific municipalities or municipalities in general by assigning any of their legislative powers to a specific municipality or to municipalities in general. Apart from sections 44(1)(a)(iii) and 104(1)(c), sections 99 and 126 of the Constitution provide that a national or provincial Minister may increase the executive powers of a specific municipality by assigning their executive powers to the municipal council of that municipality. The assignment must, however, be consistent with the Act in terms of which the relevant power is exercised or performed.<sup>189</sup> Finally, it is also important to note that section 156(4) of the Constitution provides that the national and provincial governments must assign the administration of a matter listed in Part A of Schedule 4 or Part A of Schedule 5 to a municipal council if certain conditions are met. These conditions are as follows:

- First, the matter necessarily relates to local government.
- Second, the matter would most effectively be administered locally.
- Third, the municipality has the capacity to administer the matter.
- Fourth, the municipal council agrees to the assignment.

A key difference between section 156(4) of the Constitution and sections 99 and 126 is that while section 156(4) is mandatory, sections 99 and 126 are discretionary. Section 156(4) thus reinforces the principle of subsidiarity, which requires that the exercise of public power takes place at a level as close as possible to the citizenry.

#### PAUSE FOR REFLECTION

#### The assignment of legislative and executive powers

It is not entirely clear how section 156(4) of the Constitution relates to the assignment of legislative powers in terms of sections 44(1)(a)(iii) and 104(1)(c) and the assignment of executive powers in terms of sections 99 and 126. On the one hand, it may be argued that section 156(4) of the Constitution is an additional basis for the assignment of both legislative and executive powers to a municipality. This is because it refers to the national and provincial ‘governments’ and not simply the national and provincial legislatures. On the other hand, it may be argued that section 156(4) of the Constitution simply sets out the circumstances under which the assignment of executive powers in terms of sections 99 and 126 becomes compulsory. This is because it refers to the assignment of the ‘administration’ of the matters listed in Schedules 4A and 5A in terms of an ‘agreement’ to a ‘specific municipality’.

Steytler and De Visser argue that the terms ‘administration’, ‘agreement’ and ‘specific municipality’ in section 156(4) of the Constitution all point towards assignments that have their basis in sections 99 and 126 of the Constitution. This means, they argue further, that section 156(4) is not an additional basis for assignment, but rather a principle that sets out the

circumstances under which an assignment of executive powers in terms of section 99 or 126 becomes compulsory.[190](#)

An assigning agent may set the parameters for the exercise of the assigned authority in the legislative act of assignment. The assignment is intended to be a complete transfer of the function and it entails the final decision-making power in individual matters. Accordingly, the assignment must conform to the requirements of section 151(4) of the Constitution. The assignment of powers and functions to municipalities by legislation or by an executive act or by agreement is regulated by the Local Government: Municipal Systems Act.

#### 8.3.4.3 Incidental municipal powers

Section 156(5) of the Constitution provides that a municipality has the right to exercise any power concerning a matter that is reasonably necessary for or incidental to the effective performance of its functions. This power is sometimes referred to as the incidental power. The incidental power refers to those powers that strictly speaking fall outside the matters over which a municipality has legislative and executive authority, but are so closely connected to the effective performance of its functions that they are considered to be a part of the matters over which a municipality has authority. While they are not intended to create new functional areas of legislative and executive authority, the incidental powers do broaden a municipality's existing functional areas of legislative and executive authority.

#### PAUSE FOR REFLECTION

Determining the subject matter of a law

The matters over which a municipality has legislative and executive authority may be divided into three categories:

- first, those set out in Schedules 4B and 5B of the Constitution
- second, those that have been assigned to a municipality by the national or provincial government
- third, those that are reasonably necessary for or incidental to the effective performance of its functions.

As the judgment in *Le Sueur and Another v Ethekewini Municipality and Others*[191](#) illustrates, a municipality may base its power to pass legislation on a particular subject matter on any one or all three of these categories. The facts of this case were as follows. In 2010, the eThekweni Municipal Council adopted a resolution amending its town planning scheme to introduce the Durban Open Space System (D-MOSS). This system is aimed at protecting areas that have a high biodiversity value in Durban by creating a system of open spaces that will link them together. To achieve this goal, the system provides that land which falls within a D-MOSS area may not be developed without first obtaining an environmental authorisation. Even then, it may only be developed subject to strict controls aimed at protecting the ecological goods and services the land provides.

After the Municipal Council had adopted this resolution, the applicant, who owned land located in the eThekweni Municipality, applied for an order declaring the resolution to be unconstitutional and invalid. He based his application, among others, on the grounds that the subject matter of the resolution was the environment, that this matter is listed in Schedule 4A

as a functional area of national and provincial legislative competence and, consequently, that the resolution fell outside the legislative authority of the Municipal Council.

The High Court rejected this argument. In arriving at this decision, the Court noted that the functional area of municipal planning which is set out in Schedule 4B must be interpreted in the light of section 24 of the Constitution.<sup>192</sup> This section provides that '[e]veryone has a right to an environment that is not harmful to their health or well-being'. In addition, section 152(1)(d) of the Constitution provides that one of the objectives of local government is to 'promote a safe and healthy environment'. These sections clearly indicate that the functional area of municipal planning includes responsibility over environmental affairs.<sup>193</sup>

The Court noted further that it is clear that legislative and executive authority over environmental matters as a part of municipal planning has been assigned to municipalities by national and provincial legislation.<sup>194</sup> Section 23(1)(c) of the Municipal Systems Act, which deals with integrated development planning at a municipal level, for example, recognises that there is an obligation on municipalities together with other organs of state to contribute to the progressive realisation of the fundamental rights contained in section 24 of the Constitution.<sup>195</sup>

Apart from the grounds set out above, the Court also appears to have accepted that the environment may be classified as a matter that is reasonably necessary for or incidental to the effective performance of a municipality's municipal planning function. This is because municipalities have traditionally been involved in regulating environmental matters at the local level and it is inconceivable that the drafters of the Constitution intended to exclude municipalities from legislating in this area.<sup>196</sup>

While the decision appears to be correct, it highlights the fact that it may not always be easy to determine whether the subject matter of a law falls into one of the functional areas set out in Schedules 4B and 5B, or into the incidental powers set out in section 156(5) of the Constitution.

### 8.3.5 Conflicting national, provincial and municipal laws

Given that Parliament, the provincial legislatures and the municipal councils all have the power to pass laws in respect of the matters listed in Schedules 4B and 5B, it is inevitable that these laws will on occasion conflict with one another. Conflicts between national and provincial laws and municipal laws are resolved in terms of section 156(3) of the Constitution. This section provides simply that, subject to section 151(4), a by-law that conflicts with national or provincial legislation is invalid. An important consequence of this provision is that a municipality must exercise its legislative and executive authority within the parameters set by national or provincial legislation. In the absence of any national or provincial law regulating a local government matter, however, a municipality is free to determine the content of its legislative and executive decisions.

#### PAUSE FOR REFLECTION

National and/or provincial legislation does not always prevail over municipal law

There is a common misconception that national and/or provincial legislation always prevails over municipal law. An example illustrating that this is not the case is section 29(1) of the



National Building Regulations and Building Standards Act<sup>197</sup> which provides that ‘the provisions of any law applicable to any local authority are hereby repealed in so far as they confer a power to make building regulations or by-laws regarding any matter provided for in this Act’. However, the Constitution grants original legislative and executive authority to local government over building regulations in Schedule 4B. Local government power therefore prevails in this situation.

### 8.3.6 Supervision of local government

Although the Constitution confers legislative and executive powers on local government, it also recognises that local government is the weakest of the three spheres of government and often lacks the capacity to exercise these powers.

The Constitution, therefore, also provides that the manner in which local government exercises its legislative and executive powers must be supervised by the national and provincial spheres of governments. These supervisory powers may be divided into four different categories:

- the power to monitor local government
- the power to support local government
- the power to regulate local government
- the power to intervene in local government.<sup>198</sup>

The power to monitor local government is set out in section 155(6) of the Constitution. This section provides that each provincial government must, by legislative or other measures, provide for the monitoring and support of local government in the province. Provincial governments must also promote the development of local government capacity to enable municipalities to perform their functions and to manage their own affairs. In the First Certification judgment, the Constitutional Court held that this power grants the provincial governments the authority to ‘observe’ or ‘keep under review’ the manner in which a municipality manages its affairs. It does not, however, confer on provincial government the authority to control the affairs of a municipality. It is accordingly the least intrusive of all the supervisory powers.<sup>199</sup>

The power to support local government is set out in section 154(1) of the Constitution. This section provides that the national and provincial governments, by legislative and other measures, must support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions.<sup>200</sup> In the First Certification judgment, the Constitutional Court held that this power grants both the national and provincial governments the authority to strengthen a municipality’s ability to manage its affairs. It may also be used by national and provincial governments to prevent a decline or degeneration in a municipality’s existing structures, powers and functions.<sup>201</sup> It is, therefore, more intrusive than the power to monitor local government, but not as intrusive as the power to regulate or intervene.<sup>202</sup>

The power to regulate local government is set out in section 155(7) of the Constitution. This section provides that both the national and provincial governments have the legislative and executive authority to see to the effective performance by municipalities of their functions in respect of the matters listed in Schedules 4 and 5 by regulating the exercise by municipalities of their executive authority. In the First Certification judgment, the Constitutional Court held

that this power grants the national and provincial governments the authority to ‘control’ the manner in which a municipality manages its affairs.<sup>203</sup> It does not, however, confer on the national and provincial governments the authority to exercise municipal powers or perform municipal functions.<sup>204</sup> It simply authorises the national and provincial governments to establish a framework within which a municipality must perform.<sup>205</sup> It is a ‘hands-off’ and not a ‘hands-on’ power.

Section 139(1) of the Constitution provides that when a municipality cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, the relevant provincial executive may intervene by taking any appropriate steps to ensure the fulfilment of that obligation. The appropriate steps which the provincial executive may take include measures such as issuing a directive, assuming responsibility and dissolving a municipal council.<sup>206</sup> The power to intervene in terms of section 139(1) of the Constitution is commonly referred to as a regular intervention. Apart from regular interventions, section 139 of the Constitution also provides for budgetary interventions and financial crises interventions.

Section 139(4) of the Constitution governs budgetary interventions. This section provides that if a municipality cannot or does not fulfil an obligation in terms of the Constitution or legislation to approve a budget or any revenue-raising measures necessary to give effect to the budget, the national or relevant provincial executive must intervene by taking any appropriate steps to ensure that the budget or those revenue-raising measures are approved. The appropriate steps which the national or provincial executive may take include measures such as the mandatory dissolution of the municipal council and the adoption of a temporary budget or revenue-raising measures.<sup>207</sup>

Section 139(5) of the Constitution governs financial crises interventions. This section provides that if a municipality, as a result of a crisis in its financial affairs, is in serious or persistent material breach of its obligations to provide basic services or to meet its financial commitments, or admits that it is unable to meet its obligations or financial commitments, the national or relevant provincial executive must impose a financial recovery plan, dissolve the municipal council, or assume responsibility for the implementation of a recovery plan.

In the First Certification judgment, the Constitutional Court explained that the power to intervene gives the provincial government the authority to intrude on the functional terrain of local government.<sup>208</sup> In other words, it does confer on provincial government the authority to exercise municipal powers and perform municipal functions. It is a ‘hands-on’ power. It is, accordingly, the most intrusive power.<sup>209</sup> Given its intrusive nature, the circumstances under which a provincial government can exercise this power are not only restricted, but are also subject to various procedural requirements.

## 8.4 Financial affairs

### 8.4.1 Introduction

Apart from dividing legislative and executive power between the national, provincial and local spheres of government, the Constitution also divides fiscal powers – the power to collect and spend public funds – between the three spheres of government. Chapter 13 of the Constitution sets out the constitutional provisions regulating fiscal powers. Chapter 13 is sometimes referred to as the financial constitution. Apart from regulating the power to collect

and spend public funds, Chapter 13 of the Constitution also establishes two important regulatory bodies, namely the central bank and the Fiscal and Financial Commission (FFC).

### CRITICAL THINKING

The power of the purse

Murray and Simeon argue that:

[I]n multilevel systems of government, fiscal federalism, or the division of revenues and expenditures among central and provincial governments, may say as much, if not more, about how power and influence are distributed than the constitutional text. Constitutional competencies are meaningless without an accompanying fiscal competence (not to mention other dimensions of competence such as administrative capacity). Financial sticks and carrots in a centralized financial system give the centre power to influence provincial actions and priorities well beyond the formal allocation of authority.[210](#)

After reading Chapter 13 of the Constitution and after assessing the financial powers of each sphere of government, it is easier to determine which sphere of government has been provided with more decisive powers. From such a study, it becomes apparent that the provincial sphere of government is less powerful than the other spheres.

#### 8.4.2 The division of fiscal powers

The division of fiscal powers between different spheres of government gives rise to a number of difficult questions. Among these are the following:

- First, whether the power to raise revenue should be distributed between the different spheres of government or centralised in the national sphere. In a competitive or divided system of federalism, for example in Canada, the power to impose taxes is usually distributed between the different spheres of government. In a co-operative or integrated system of federalism, such as South Africa, the power to impose taxes is usually centralised in the national sphere of government.[211](#)
- Second, if the power to impose taxes is centralised in the national sphere of government, the next question that arises is how the revenue that has been raised by the national sphere of government should be distributed, not only between the different spheres of government, but also within each sphere. Insofar as this question is concerned, there are a number of different approaches that may be adopted. The transfer of funds could, for example, take the form of conditional grants, on the one hand, or unconditional grants, on the other.[212](#)
- Finally, there is also the question of how the decision to divide national revenue between the different spheres of government and within each sphere of government should be made and by whom. Should it be made by the national sphere of government alone or should the other spheres have a say? What about third parties? Should they be given a role to play? [213](#)

#### 8.4.3 The collection of revenue

As Kriel and Monadjem point out, the power to collect revenue is vested primarily in the national sphere of government.[214](#) This is because Chapter 13 of the Constitution restricts the

power of the provincial and local spheres of government to impose taxes. In so far as the provincial sphere of government is concerned, section 228(1) of the Constitution provides that a provincial legislature may impose:

- taxes, levies and duties other than income tax, value-added tax, general sales tax, rates on property or customs duties
- flat-rate surcharges on any tax, levy or duty, other than corporate income tax, value-added tax, rates on property or customs duty.

An important consequence of these provisions is that the main sources of revenue such as income tax, value-added tax, general sales tax, and rates and customs duties have been expressly removed from the jurisdiction of the provinces.

#### PAUSE FOR REFLECTION

The reason for the decision to restrict the power of the provincial legislatures to impose taxes

Although the power to impose taxes promotes the principles of accountability and transparency in government, the drafters of the Constitution decided to restrict the power of the provincial legislatures to impose taxes. This is partly because the drafters of the Constitution believed that the economic disparities that already exist between the provinces would have been exacerbated if significant taxing powers were given in the provinces.

Apart from the provisions set out above, section 228(2) of the Constitution also provides that a provincial legislature's power to impose taxes, levies, duties and surcharges may not be exercised in a way that materially and unreasonably prejudices national economic policies, economic activities across provincial boundaries, or the mobility of goods, services, capital or labour. In addition, a provincial legislature's power to impose taxes must be regulated by an Act of Parliament which may be passed only after any recommendations made by the FFC have been considered.<sup>215</sup> The Act of Parliament referred to in this section is the Provincial Tax Regulation Process Act.<sup>216</sup>

The Provincial Tax Regulation Process Act restricts a provincial legislature's power to introduce a new provincial tax. This is because it essentially provides that if a province wishes to introduce a new provincial tax, it must first submit a proposal to the Minister of Finance who, after consulting the Budget Council, must introduce a Bill into the NA to regulate the new provincial tax. Given the restrictions imposed by this Act, it is not surprising that no new provincial taxes have ever been introduced.

In so far as municipalities are concerned, section 229(1) of the Constitution provides that a municipality may impose:

- rates on property and surcharges on fees for services provided by or on behalf of the municipality
- if authorised by national legislation, other taxes, levies and duties appropriate to local government or to the category of local government into which the municipality falls.

Like the provincial legislatures, however, municipalities may not impose income tax, value-added tax, general sales tax or customs duty. Apart from the provisions set out above,

section 229(2) of the Constitution also provides that a municipality's power to impose rates on property, surcharges on fees or other taxes, levies or duties may not be exercised in a way that materially and unreasonably prejudices national economic policies, economic activities across provincial boundaries, or the mobility of goods, services, capital or labour.

In addition, a municipality's power to impose rates on property, surcharges on fees or other taxes, levies or duties may be regulated by national legislation which may be passed only after organised local government and the FFC have been consulted and any recommendations made by the FFC have been considered.<sup>217</sup> The national legislation referred to in this section is the Local Government: Municipal Property Rates Act <sup>218</sup> and the Municipal Fiscal Powers and Functions Act.<sup>219</sup> The Municipal Property Rates Act regulates the municipalities' power to levy property rates and the Municipal Fiscal Powers and Functions Act regulates their power to levy surcharges on fees.

### PAUSE FOR REFLECTION

Determining when property is state property

Section 3(3)(a) of the Rating of State Property Act <sup>220</sup> (Rating Act) provides that a municipality may not impose rates on state property that is held by the state in trust for the inhabitants of an area that falls into the jurisdiction of a municipality. In *Ingonyama Trust v eThekweni Municipality*,<sup>221</sup> the Supreme Court of Appeal (SCA) had to decide whether land owned by the Ingonyama Trust fell into section 3 of the Rating Act and was therefore exempt from paying property rates to the eThekweni Municipality. The Ingonyama Trust was established in terms of the KwaZulu Ingonyama Trust Act.<sup>222</sup> It owns all the land that was previously owned by the government of KwaZulu and is administered by a board made up of the Ingonyama and eight other members appointed by the Minister of Land Affairs.

The key issue that the SCA had to decide was whether the land owned by the Ingonyama Trust could be classified as state property. The Court held that it could and, consequently, that the Trust was exempt from paying rates in terms of section 3 of the Rating Act.<sup>223</sup>

In arriving at this decision, the SCA noted that the land owned by the Ingonyama Trust could be defined as state property because the Trust itself could be said to be a part of the state.<sup>224</sup> The SCA gave the following reasons why the Trust could be said to be a part of the state:

- First, eight of the nine trustees were appointed by the Minister of Land Affairs who also had the power to make regulations governing the affairs of the Trust.<sup>225</sup>
- Second, the cost of administering the Trust had to be paid by the Department of Land Affairs.<sup>226</sup>
- Third, the financial statements of the Trust had to be audited by the Auditor-General.
- Fourth, an annual report on the activities of the Trust had to be submitted to the Minister of Land Affairs by the accounting authority of the Trust.<sup>227</sup>
- Last, the land owned by the Trust was defined as state land by Parliament in a number of other statutes, for example the National Veld and Forest Fire Act,<sup>228</sup> the National Forests Act<sup>229</sup> and the South African Schools Act.<sup>230</sup>

#### 8.4.4 The distribution of revenue

Although the Constitution restricts the power of the provincial and local spheres of government to impose taxes and thus to raise revenue, it compensates them for this loss by granting them a right to an equitable share of revenue collected nationally. Section 214(1) of the Constitution provides in this respect that an Act of Parliament must provide for:

- • the equitable division of revenue raised nationally between the national, provincial and local spheres of government
- • the determination of each province's equitable share of the provincial share of that revenue
- • any other allocations to provinces, local government or municipalities from the national government's share of that revenue, and any conditions on which those allocations may be made.

The Act referred to in section 214(1) of the Constitution is the annual Division of Revenue Act (DORA). Section 214(2) of the Constitution provides that the DORA may be passed only after the provincial governments, organised local government and the FFC have been consulted and any recommendations made by the FFC have been considered. In addition, section 214(2) of the Constitution also provides that the DORA is required to take into account:

1. (a) the national interest;
2. (b) any provision that must be made in respect of the national debt and other national obligations;
3. (c) the needs and interests of the national government, determined by objective criteria;
4. (d) the need to ensure that the provinces and municipalities are able to provide basic services and perform the functions allocated to them;
5. (e) the fiscal capacity and efficiency of the provinces and the municipalities;
6. (f) developmental and other needs of provinces, local government and municipalities;
7. (g) economic disparities within and among the provinces;
8. (h) obligations of the provinces in terms of national and provincial legislation;
9. (i) the desirability of stable and predictable allocations of revenue shares; and
10. (j) the need for flexibility in responding to emergencies or other temporary needs, and other factors based on similar objective criteria.

While regard must be had for the need of the provinces to be able to provide basic services and carry out their developmental objectives, the criteria set out in section 214(2) place a heavy emphasis on the importance of national objectives and priorities. The listing appears to suggest that the other criteria will be evaluated through the prism of national objectives. The process preceding the adoption of the DORA is set out in the Intergovernmental Fiscal Relations Act.[231](#)

At least 10 months before the start of each financial year, the FFC must submit recommendations for an equitable division of revenue raised nationally between the three spheres of government as well as each province's share of the provincial share of national revenue to the Minister of Finance, Parliament and the provincial legislatures.[232](#) After receiving the FFC's recommendations, the Minister of Finance must consult with the FFC itself, the provinces, either in the Budget Council or in some other way, and organised local government, either in the Budget Forum or in some other way.[233](#) The Budget Council and the Budget Forum are statutory bodies established by the Intergovernmental Fiscal Relations

Act to facilitate intergovernmental consultation with respect to fiscal matters.<sup>234</sup> Once these consultations have taken place, the Minister of Finance must introduce the annual Division of Revenue Bill in the NA at the same time that the annual budget is introduced. The equitable share allocated to each sphere of government as well as each province's share of the provincial share of national revenue must be set out in this Bill.<sup>235</sup>

The DORA begins by dividing the revenue raised nationally between the three spheres of government. It then goes on to divide the provincial share of revenue raised nationally between the provinces and finally it divides the municipal share of revenue raised nationally between the municipalities. The amounts allocated to each province and each municipality are based on different formulae. These formulae are made up of a number of different components.<sup>236</sup>

Finally, it is important to note that although the equitable share of national revenue is supposed to be an unconditional grant, there are some restraints on the manner in which the provinces may spend this money. Section 227 of the Constitution, for example, states that 'each province is entitled to an equitable share ... to enable it to provide basic services and perform the functions allocated to it'. Provinces, therefore, must use the equitable share to provide basic services and perform the functions allocated to them.

#### 8.4.5 The budgetary process

Section 215(1) of the Constitution provides that the national, provincial and municipal budgetary processes must promote transparency, accountability and the effective financial management of the economy, debt and the public sector. In addition, section 215(2) of the Constitution provides that national legislation must prescribe the form of national, provincial and municipal budgets; when national and provincial budgets must be tabled; and that budgets in each sphere of government must show the sources of revenue and the way in which proposed expenditure will comply with national legislation. Budgets in each sphere of government must also contain:

- estimates of revenue and expenditure, differentiating between capital and current expenditure
- proposals for financing any anticipated deficit for the period to which they apply
- an indication of the intentions regarding borrowing and other forms of public liability that will increase public debt during the ensuing year.<sup>237</sup>

As the Constitutional Court pointed out in the Premier: Limpopo Province case,<sup>238</sup> the Public Finance Management Act (PFMA) <sup>239</sup> deals with public finance. To help achieve the objects of section 215 of the Constitution, section 27(1) of the PFMA provides that the Minister of Finance must table the annual budget for the financial year before the start of that financial year. In addition, the MEC for Finance in each province must table an annual provincial budget within two weeks of the Minister's budget speech unless an extension has been granted by the Minister of Finance.<sup>240</sup> Section 27(3) provides that, among other factors, the annual budget must contain:

- estimates of all revenue expected to be raised during the financial year
- estimates for the current expenditure for that financial year
- estimates of interest and debt servicing charges
- any repayments on loans

- • estimates of capital expenditure for that financial year and projected financial implications of that expenditure for future financial years
- • estimates of all direct charges against the relevant revenue fund and standing appropriations for that financial year
- • proposals for financing any anticipated deficit in that financial year.

Apart from helping to achieve the objects of section 215 of the Constitution, the PFMA is also aimed at fulfilling the obligations imposed on Parliament by section 216 of the Constitution. Section 216 provides that national legislation must establish a national treasury and prescribes measures to ensure both transparency and expenditure control in each sphere of government by introducing generally recognised accounting practices, uniform expenditure classifications and uniform treasury norms and standards.

Although section 216 of the Constitution imposes an obligation on Parliament to establish a national treasury and not provincial treasuries, the PFMA makes provision not only for a national treasury, but also for a provincial treasury in each province. The Minister of Finance heads the National Treasury which comprises those departments that are responsible for financial and fiscal matters.<sup>241</sup> The main functions of the National Treasury are to:

- • promote the national government's fiscal policy framework
- • co-ordinate macroeconomic policies
- • co-ordinate intergovernmental financial and fiscal relations
- • manage the budget preparation process
- • exercise control over the implementation of the annual budget
- • facilitate the implementation of the annual DORA
- • monitor the implementation of the provincial budget
- • promote and enforce transparency and effective management in respect of revenue, expenditure, assets and liabilities of departments, public entities and constitutional institutions.<sup>242</sup>

In terms of section 11 of the PFMA, the National Treasury is also in charge of the National Revenue Fund. The National Revenue Fund is established in terms of section 213 of the Constitution. This section provides that all money received by the national government, except money excluded by an Act of Parliament, must be paid into the fund. In addition, it also provides that money may be withdrawn from the National Revenue Fund only in terms of an appropriation by an Act of Parliament or a direct charge against the National Revenue Fund when it is provided for in the Constitution or an Act of Parliament. A province's equitable share of national revenue is a direct charge against the National Revenue Fund.

The provincial treasury for each province is headed by the MEC for Finance in the province and the provincial department responsible for financial matters in each province.<sup>243</sup> The main functions of each provincial treasury are to:

- • prepare a provincial budget
- • exercise control over the implementation of the provincial budget
- • promote the transparent and effective management in respect of revenue, expenditure, assets and liabilities of the provincial departments and provincial public entities
- • ensure that its fiscal policies do not materially and unreasonably prejudice national economic policies.<sup>244</sup>



In terms of section 21 of the PFMA, each provincial treasury is in charge of the Provincial Revenue Fund for its province. Provincial Revenue Funds are established in terms of section 226 of the Constitution. This section provides that all money received by a provincial government, except money excluded by an Act of Parliament, must be paid into the Provincial Revenue Fund. In addition, it also provides that money may be withdrawn from a Provincial Revenue Fund only in terms of an appropriation by a provincial Act or a direct charge against the Provincial Revenue Fund when it is provided for in the Constitution or a provincial Act. Revenue allocated to local government in terms of section 214 of the Constitution is a direct charge against a Provincial Revenue Fund.

#### 8.4.6 The central bank

Section 223 of the Constitution provides that the Reserve Bank is the central bank of the Republic and that it must be regulated in terms of an Act of Parliament. The Act referred to in this section is the South African Reserve Bank Act.<sup>245</sup> In terms of section 224(2) of the Constitution, the 'primary objective of the South African Reserve Bank is to protect the value of the currency in the interest of balanced and sustainable economic growth'. In addition, section 224(2) also provides that the bank is obliged to function independently and without fear, favour or prejudice, but must consult regularly with the Minister of Finance. The Reserve Bank plays a key role in the management of the money and banking system. The Reserve Bank describes this role as follows:

- The formulation and implementation of monetary policy: Monetary policy refers to the measures taken to influence the quantity of money and the rate of interest in the country. This assists in ensuring stability of prices and seeks to promote employment and economic growth. The Reserve Bank sets the interest rates at which other banks can borrow money and this ultimately determines the interest that consumers pay in respect of their debts such as mortgage bonds.
- The provision of liquidity to banks: When banks face a liquidity problem as a result of a temporary shortage of cash, the Reserve Bank provides liquidity to these banks on a conditional and temporary basis. The main purpose of this assistance is to prevent banks going into bankruptcy and people losing their savings and deposits that they invested in the banks.
- Bank notes and coins: The Reserve Bank has the exclusive authority to issue and destroy bank notes and coins in the country.
- Banker of other banks: The Reserve Bank is the custodian of the cash reserves that banks are legally required to hold.<sup>246</sup>

The Reserve Bank thus plays a vital role in the formulation and implementation of economic policies. Its decisions have a direct impact on the lives of people. Importantly, the policy decisions of the Reserve Bank and the government in power may not always coincide and it is for this reason that the independence of the Bank is entrenched. The Reserve Bank is meant to act in the best interests of the economy of the country and to be shielded from having to act in accordance with the popular will.

#### 8.4.7 Procurement

##### 8.4.7.1 Introduction

Section 217 of the Constitution makes it imperative for an organ of state in the national, provincial or local sphere to contract for goods and services in a manner that is fair, equitable, transparent, competitive and cost-effective. However, organs of state are not prevented from implementing a procurement policy providing for categories of preferences in the allocation of contracts and the protection or advancement of persons or categories of persons previously disadvantaged by unfair discrimination.<sup>247</sup> The section goes on to require national legislation to be enacted to prescribe a framework to implement the policy of preference to previously disadvantaged persons. The Preferential Procurement Policy Framework Act (PPPFA) <sup>248</sup> is the empowering legislation that seeks to achieve this objective.

In *Millennium Waste Management (Pty) Ltd. v Chairperson of the Tender Board: Limpopo Province and Others*,<sup>249</sup> the SCA required tenders to be evaluated in a manner that advances the five constitutional values identified in section 217 of the Constitution. In this case, the appellant had submitted its tender which met all the specifications of the advertisement. However, the appellant had inadvertently omitted to sign the declaration of interest, but had inserted the name of the relevant person and had filled in the relevant information. A tender committee on behalf of the Limpopo Department of Health and Social Development disqualified the applicant and finally awarded the tender to a consortium called TTP. A particularly concerning aspect was that TTP's bid for the removal, treatment and disposal of hospital waste was R3 600 000 per month which was significantly more than appellant's tender which would have cost the Department R400 000 per month.

The Tender Board argued that the signing of the declaration of interest was peremptory and as the appellant had not signed it, the Tender Board was obliged to disqualify the appellant.

The SCA held that the decision to award the tender was administrative action and had to comply with the provisions of the Promotion of Administrative Justice Act (PAJA),<sup>250</sup> with section 217 of the Constitution and with the PPPFA.<sup>251</sup> Interpreting the regulations in terms of which the Tender Board was acting, the SCA held that the Tender Board had the power to condone non-compliance with procedural defects in the application.<sup>252</sup> However, the SCA went on to hold that 'our law permits condonation of non-compliance with peremptory requirements in cases where condonation is not incompatible with public interest and if such condonation is granted by the body in whose benefit the provision was enacted'.<sup>253</sup> The SCA stated further that the condonation of the failure to sign would have been in the public interest as it would have facilitated competitiveness.<sup>254</sup> A condonation in this instance would have served the broader constitutional values of fairness, competitiveness and cost-effectiveness.<sup>255</sup>

Importantly, the SCA held that whether the appellant's tender constituted an acceptable tender in terms of the PPPFA must be construed in the context of a system that is fair, equitable, transparent, competitive and cost-effective.<sup>256</sup> In other words, the constitutional values must be the prism through which the enabling legislation must be interpreted. The SCA held the term 'tender' must be given a relatively narrow meaning and cannot mean that the tender must comply with conditions which are immaterial, unreasonable or unconstitutional.<sup>257</sup> The SCA concluded that by insisting on disqualifying the appellant for an innocent omission, the Tender Board had acted unreasonably.<sup>258</sup> The SCA set aside the decision of the Tender Board and ordered the Tender Board to reconsider and adjudicate on the bids submitted by the appellant and TTP afresh. The Court thus assessed the entire tender process against the five values identified in the Constitution and not just the final evaluation process of the shortlisted candidates.

## PAUSE FOR REFLECTION

When is condonation permissible?

Assume that the price differential was not as stark and assume that tenderer B had submitted their tender a day after the date stipulated in the advertisement. Tenderer B tendered to remove hospital waste for R400 000 per month and the successful tenderer (Tenderer A) quoted R1 million per month. In all other respects, the tenders are similar. Does the Millennium Waste Management case allow a tender board to entertain the late submission of the tender by tenderer B? Alternatively, could such an option not be used to overlook all sorts of non-compliance and in the final analysis be contrary to the values in the Constitution?

In *Minister of Social Development and Others v Phoenix Cash & Carry Pmb CC*,<sup>259</sup> the SCA once again reiterated that the five principles of fairness, equitable treatment, transparency, competitiveness and cost-effectiveness must inform all aspects of the tender process. In a frank judgment, the SCA directly questioned the legitimacy of the process that led to the appellants being denied the tender and in a damning indictment indicated that from its experience drawn from matters before the Court, the values of section 217 are more honoured in the breach than in the observance.<sup>260</sup>

The facts of this case were as follows. Bids were invited to supply food hampers to indigent families in KwaZulu-Natal and in the Eastern Cape. The price of the bid submitted by Phoenix was approximately 40% less than that submitted by the successful tenderer. In response to a request for reasons, the department indicated that it had evaluated the bids and that Phoenix was unsuccessful. Subsequently, the department attempted to supplement their reasons by stating that Phoenix had not complied with certain prerequisites.

The SCA found that the department in excluding the bid by Phoenix had elevated form above substance.<sup>261</sup> Had it properly appraised the documents submitted, it would have concluded that the material issues dealing with financial viability had been dealt with even though no audited statements were submitted.<sup>262</sup> Accordingly, the SCA held that the process was fundamentally flawed and set aside the decision. In an effort to prevent such a fundamentally flawed process from being repeated, the Court laid down the following principles:

- It is against the principle of fairness for the tender process to be evaluated on the basis of uncertain criteria which could have the effect of meritorious applicants being excluded.
- A process that emphasises form over substance could have the effect of facilitating corrupt practices by providing an excuse not to consider meritorious tenders and by excluding them on technicalities. This is often inimical to fairness, competitiveness and cost-effectiveness.
- The tender board can prescribe formalities, provided the requirements are made clear and the consequences of non-compliance spelt out.<sup>263</sup>

The SCA cautioned against unreasonably elevating matters of subsidiary importance to a level of primary importance and then deeming non-compliance to be fatal to the bid.<sup>264</sup>

Section 217 of the Constitution must be read with section 5 of the PAJA which requires a functionary to provide adequate reasons for administrative decisions which materially and adversely affect rights if requested. Once reasons are provided, the decision can be appraised

against the constitutional criteria in section 217. In the Phoenix Cash & Carry case, the reasons supplied were woefully inadequate and the supplementary reasons confirmed that, at best, an unreasonable and irrational decision had been made. The tenor of the judgment appears to suggest that the irrationality bordered on improper conduct.

What is apparent from these decisions is that while price may not be the decisive factor, massive disparities in pricing will weigh with the court when determining whether a public body has discharged its ultimate mandate of acting in the public good. It would be advisable therefore that if the successful tenderer's contract price is much more expensive than the unsuccessful tenderer, that the reasons provided deal with the disparity in price and justify the decision to award the tender despite the price differential.

## PAUSE FOR REFLECTION

### Dealing with disparities in price

When a tender is awarded to a body that did not submit the lowest tender, the state is paying more for a service or product. Assume that Cleaners Incorporated, a group of female cleaners who have been cleaning the officers of the KZN Provincial Administration for the last five years, form a consortium and bid for a new provincial government cleaning contract against their previous employers, Sparkling Clean CC. Most members of Cleaners Incorporated are African female and many of them are sole breadwinners. Their bid is R10 000 more a month to clean the buildings than the corresponding offer by Sparkling Clean, which is a national company. Should the government procurement policy be used to bridge the economic disparity in our society or should government attempt to obtain the maximum value for its rands given the demands on a limited budget?

#### 8.4.7.2 The Preferential Procurement Policy Framework Act 5 of 2000

While section 217(1) of the Constitution imposes an obligation to act in terms of a system that accords with the five principles, section 217(2) permits public bodies to implement a preferential procurement policy. The PPPFA requires organs of state to determine a preferential procurement policy and to implement it.[265](#)

The process envisaged by the PPPFA is that:

- persons are invited to tender in respect of a formal tender proposal
- all applications are assessed in terms of evaluation criteria specifically identified in the tender proposal
- the various bids are ranked in terms of each evaluation criteria.[266](#)

Section 2 of the PPPFA draws a distinction between contracts above the prescribed amount [267](#) and contracts below the prescribed amount. In respect of contracts above the prescribed amount, a maximum of 10 points may be allocated for the specific goals identified in the PPPFA while in respect of contracts below the prescribed amount a maximum of 20 points may be allocated for the specific goals. The specific goals relate to contracting with people who were historically disadvantaged by unfair discrimination on the basis of race, gender, sex or disability or for the purposes of implementing the Reconstruction and Development Programme. Thus, a maximum of 10 points or 20 points, depending on the contract price, may be assigned to historically disadvantaged individuals. In terms of the regulations,[268](#) a

maximum of 90 or 80 points must be assigned for price. The points allocated must be out of 100 and the person scoring the highest points must be allocated the tender. Thus, the PPPFA and the regulations adopt a fairly rigid system to ensure that price is allocated the overwhelming segment of the points, but that equity issues are not ignored.

## SUMMARY

The Constitution does not only divide power vertically, but also horizontally between the national, provincial and local spheres of government. This horizontal division of power establishes a quasi-federal system of government. Power is divided largely according to an integrated model of federalism in which the subject matters in respect of which policies and laws may be made are not strictly divided between the different levels or spheres of government but are shared between them. To ensure that this system works optimally, the Constitution also establishes the principle of co-operative government, requiring the various spheres of government to work together regardless of the political party in power nationally, provincially or at local government level. The National Council of Provinces (NCOP), the second House of the national legislature, plays an important role in co-ordinating the legislative activities of the three spheres of government.

The structures of government for the nine provinces largely mirror that of the national sphere. A Premier elected by the provincial legislature heads the provincial executive and can also be removed by the provincial legislature. A province has executive authority in terms of those functional areas listed in Schedules 4 (concurrent powers shared with the national executive) and 5 (exclusive powers) of the Constitution. Provincial legislatures operate largely in the same manner and according to the same principles as the national legislature. However, provincial legislatures only have one House and not two although their interests are represented in the NCOP at national level. When both the national legislature and the provincial legislature pass legislation on one of the areas listed in Schedule 4, the provincial legislation shall prevail except if one of the criteria set out in section 146 of the Constitution is present in which case the national legislation shall prevail. It will only be permissible in exceptional circumstances for the national legislature to pass legislation relating to one of the areas exclusively reserved for provinces in Schedule 5 if this is authorised by section 44(2) of the Constitution. When determining whether the subject matter of a Bill falls within Schedule 4 or Schedule 5, we must apply the pith and substance test. This test must be distinguished from the substantial measure test used to decide how to tag a national Bill to decide on the procedure to be used to pass it.

In the constitutional dispensation, local government fulfils an important role. Municipalities thus enjoy original and constitutionally entrenched powers, functions, rights and duties that may be qualified or constrained by law and only to the extent to which these are set out in section 152(1) of the Constitution. Section 155 of the Constitution distinguishes between three different categories of municipalities, namely:

- category A municipalities with exclusive municipal executive and legislative authority in their area and which are referred to as metropolitan municipalities
- category B municipalities which share their municipal executive and legislative authority in their area with a category C municipality and which are referred to as local municipalities

- category C municipalities with municipal executive and legislative authority in an area which includes more than one municipality and which are referred to as district municipalities.

The Constitution determines that a municipality has executive authority in respect of and has the right to administer the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5 and any other matter assigned to it by national or provincial legislation. In addition, municipalities may make and administer by-laws for the effective administration of the matters which they have the right to administer. Conflicts between national and provincial laws and municipal laws are resolved in terms of section 156(3) of the Constitution. This section provides simply that, subject to section 151(4), a by-law that conflicts with national or provincial legislation is invalid. An important consequence of this provision is that a municipality must exercise its legislative and executive authority within the parameters set by national or provincial legislation. In the absence of any national or provincial law regulating a local government matter, however, a municipality is free to determine the content of its legislative and executive decisions.

The financial arrangements in the Constitution tilt power decisively in favour of the national sphere of government as the power to collect revenue is vested primarily in the national sphere of government. This is because Chapter 13 of the Constitution restricts the power of the provincial and local spheres of government to impose taxes. Although the Constitution restricts the power of the provincial and local spheres of government to impose taxes and thus to raise revenue, it compensates them for this loss by granting them a right to an equitable share of revenue collected nationally. Section 215(1) of the Constitution provides that the national, provincial and municipal budgetary processes must promote transparency, accountability and the effective financial management of the economy, debt and the public sector. Section 217 of the Constitution also makes it imperative for an organ of state in the national, provincial or local sphere to contract for goods and services in a manner that is fair, equitable, transparent, competitive and cost-effective.

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1Huglin, TO and Fenna, A (2006) Comparative Federalism: A Systematic Inquiry 61.

2Huglin and Fenna (2006) 61.

3Prior to 1994, South Africa had a unitary system of government. While provincial and local spheres of government existed, they were subservient to and subject to the control of a strong central government where all meaningful decisions were made. The constitutional system prior to 1994 was thus a unified one with little divergence in laws between the various provinces.

4The National States Citizenship Act 26 of 1970 provided that every black person would become a citizen of the tribal entity to which he or she had a tribal or cultural affiliation and would simultaneously cease to be a citizen of South Africa. The fact that they did not live in that entity nor desired the new citizenship was irrelevant. The apartheid government described this as a process of internal decolonisation. In reality, it was nothing other than denationalisation. The homelands were impoverished parcels of land cobbled together to

create 'independent states'. They were totally dependent on the South African state for their financial survival and were provided with monthly grants. Towards the end of the 1980s, most of the independent homelands had collapsed into military dictatorships and were dysfunctional. The apartheid grand design had unravelled even before formal negotiations began. See also ch 1.

5Haysom, N 'Federal features of the final Constitution' in Andrews, P and Ellmann, S (eds) (2001) *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law* 504.

6See Woolman, S and Swanepoel, J 'Constitutional history' in Woolman, S and Bishop, M (eds) (2013) *Constitutional Law of South Africa* 2nd ed rev service 5 2.37. For a more detailed discussion of the approach adopted by the different political parties during the process of negotiations, see Spitz, R and Chaskalson, M (2000) *The Politics of Transition: A Hidden History of South Africa's Negotiated Settlement* 122.

7African National Congress 53rd National Conference Resolutions 4. Legislature and Governance 4.2.1 28 available at <http://www.anc.org.za/docs/res/2013/resolutions53r.pdf>.

8Principle XVI of Schedule 4 of the interim Constitution.

9Principle XVIII.

10Principle XIX.

11Principle XXI.

12Principle XXII.

13Principle XXIII.

14Principle XXIV.

15Principle XXVI.

16(CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996) para 472.

17First Certification paras 480–1.

18(CCT37/96) [1996] ZACC 24; 1997 (1) BCLR 1; 1997 (2) SA 97 (4 December 1996) paras 109–10.

19It has been argued that the description of the various facets as spheres as opposed to levels was meant to convey the notion of parity of esteem and responsibility between the different spheres. See Woolman, S and Roux, T 'Co-operative government and intergovernmental relations' in Woolman and Bishop (2013) 14.1ff.

20Freedman, DW 'Constitutional law: Structures of government' in Joubert, WA (ed) (2012) *Law of South Africa* 2nd ed Vol 5 Part 4 para 57.

[21](#)Freedman (2012) para 57.

[22](#)Freedman (2012) para 57.

[23](#)Freedman (2012) para 57.

[24](#)Act 84 of 1996.

[25](#)S 100 of the Constitution. See *Centre for Child Law and Others v Minister of Basic Education and Others* (1749/2012) [2012] ZAECGHC 60; [2012] 4 All SA 35 (ECG); 2013 (3) SA 183 (ECG) (3 July 2012).

[26](#)S 40(1).

[27](#)S 40(2).

[28](#)S 41(1)(e) of the Constitution.

[29](#)S 41(1)(f) of the Constitution.

[30](#)S 41(1)(g) of the Constitution.

[31](#)S 41(1)(h) of the Constitution.

[32](#)S 41(3).

[33](#)(CCT 49/00) [2001] ZACC 23; 2001 (3) SA 925 (CC); 2001 (9) BCLR 883 (CC) (7 June 2001).

[34](#)Langeberg paras 27–9.

[35](#)Langeberg para 31.

[36](#)(CCT7/02) [2002] ZACC 11; 2002 (11) BCLR 1220; 2003 (1) SA 678 (CC) (12 June 2002) para 18.

[37](#)First Certification para 291.

[38](#)Uthukela para 14.

[39](#)Uthukela para 13.

[40](#)Act 13 of 2005.

[41](#)S 2 of the IGRFA.

[42](#)S 4 of the IGRFA.

[43](#)S 4(a)–(d) of the IGRFA.



[44S](#) 6 of the IGRFA.

[45S](#) 9 of the IGRFA.

[46S](#) 18 of the IGRFA.

[47S](#) 24 of the IGRFA.

[48](#)See Steytler, N ‘Co-operative and coercive models of intergovernmental relations: A South African case study’ in Courchene, TJ and Allen, JR (eds) (2011) *The Federal Idea: Essays in Honour of Ronald L. Watts* 413–28.

[49S](#) 35.

[50S](#) 35(3) of the IGRFA.

[51S](#) 39(1)(b) of the IGRFA.

[52S](#) 1 of the IGRFA.

[53S](#) 40 of the IGRFA.

[54S](#) 41 of the IGRFA.

[55S](#) 42 of the IGRFA.

[56S](#) 42(3) of the IGRFA.

[57S](#) 43 of the IGRFA.

[58S](#) 125(2)(c) of the Constitution.

[59S](#) 103(1) of the Constitution.

[60Ss](#) 104–124.

[61Ss](#) 125–141.

[62S](#) 142 of the Constitution.

[63](#)Constitution of the Western Cape of 1998.

[64](#)See *Certification of the Kwazulu-Natal Constitution* (CCT15/96) [1996] ZACC 17; 1996 (11) BCLR 1419; 1996 (4) SA 1098 (6 September 1996).

[65](#)*Certification of the Kwazulu-Natal Constitution* para 8. See also *Certification of the Constitution of the Western Cape, 1997* (CCT6/97) [1997] ZACC 8; 1997 (12) BCLR 1653; 1998 (1) SA 655 (2 September 1997) para 8.

[66S](#) 104(1)(b)(i) of the Constitution.

[67S](#) 104(1)(b)(ii) of the Constitution.

[68S](#) 104(1)(b)(iii) of the Constitution.

[69S](#) 104(1)(b)(iv) of the Constitution.

[70S](#) 104(1)(c) of the Constitution.

[71S](#) 104(2) of the Constitution.

[72S](#) 104(4).

[73S](#) 105(2) of the Constitution. The legislation referred to in s 105(2) is the Electoral Act 73 of 1998. The formula for determining the number of members of each provincial legislature is set out in Schedule 3 of the Electoral Act.

[74S](#) 13 of the Constitution of the Western Cape determines the size to be 42.

[75S](#) 106 of the Constitution.

[76S](#) 109 of the Constitution.

[77S](#) 113 of the Constitution.

[78S](#) 125(2) of the Constitution.

[79S](#) 125(3) of the Constitution.

[80S](#) 125(3) of the Constitution.

[81S](#) 125(4) of the Constitution.

[82S](#) 126 of the Constitution.

[83S](#) 128 of the Constitution.

[84](#)(CCT 94/10) [2011] ZACC 25; 2011 (11) BCLR 1181 (CC); 2011 (6) SA 396 (CC) (11 August 2011).

[85S](#) 121 of the Constitution enables the Premier of a province to refer a Bill back to the provincial legislature if he or she has misgivings about the constitutionality of the Bill. The section goes on to provide that if the reservations are not adequately addressed by the provincial legislature, the Premier may refer the Bill to the Constitutional Court for a decision.

[86](#)Act 10 of 2009. S 104(1)(b)(iii) of the Constitution provides that each provincial legislature has the power ‘to pass legislation for its province with regard to any matter outside (the functional areas listed in Schedules 4 and 5), and that is expressly assigned to the province by national legislation’.

[87](#)S 104(1)(b)(iv) of the Constitution provides that each provincial legislature has the power ‘to pass legislation for its province with regard to any matter for which a provision of the Constitution envisages the enactment of provincial legislation’.

[88](#)Premier: Limpopo Province para 24.

[89](#)Premier: Limpopo Province para 24.

[90](#)Premier: Limpopo Province para 21.

[91](#)Premier: Limpopo Province para 23.

[92](#)Premier: Limpopo Province paras 34–9.

[93](#)Premier: Limpopo Province para 36.

[94](#)Premier: Limpopo Province para 37.

[95](#)Premier: Limpopo Province para 38.

[96](#)Premier: Limpopo Province para 39.

[97](#)Premier: Limpopo Province para 40.

[98](#)Premier: Limpopo Province para 41.

[99](#)Premier: Limpopo Province para 41.

[100](#)Premier: Limpopo Province para 53.

[101](#)Premier: Limpopo Province para 60.

[102](#)Premier: Limpopo Province para 85.

[103](#)Premier: Limpopo Province para 85.

[104](#)Premier: Limpopo Province para 85.

[105](#)Premier: Limpopo Province para 92.

[106](#)For a critical discussion of this judgment, see Steytler, N and Williams, RF (2012) Squeezing out provinces’ legislative competence in Premier: Limpopo Province v Speaker: Limpopo Provincial Legislative and Others I and II South African Law Journal 129(4):621–37.

[107](#)S 146(5) of the Constitution.

[108](#)(CCT12/99) [1999] ZACC 15; 2000 (1) SA 732; 2000 (1) BCLR 1 (11 November 1999).

[109](#)Liquor Bill para 55.

[110](#)Liquor Bill para 39.

[111](#)Liquor Bill para 39.

[112](#)Liquor Bill para 46.

[113](#)Liquor Bill para 47.

[114](#)Liquor Bill para 50.

[115](#)Liquor Bill para 51.

[116](#)Liquor Bill para 61.

[117](#)Liquor Bill para 73.

[118](#)Liquor Bill para 75.

[119](#)Liquor Bill para 76.

[120](#)Liquor Bill para 86.

[121](#)Liquor Bill paras 59–60.

[122](#)Liquor Bill para 76.

[123](#)(CCT12/09) [2009] ZACC 31; 2010 (2) BCLR 99 (CC) (14 October 2009).

[124](#)Act 6 of 2007.

[125](#)Abahlali para 20.

[126](#)Abahlali para 21.

[127](#)Abahlali para 26.

[128](#)Abahlali para 29.

[129](#)Abahlali para 30.

[130](#)Abahlali para 37.

[131](#)Abahlali para 40.

[132](#)Act 19 of 1998.

[133](#)Abahlali para 92.

[134](#)See In re: KwaZulu-Natal Amakhosi and Iziphakanyiswa Amendment Bill of 1995, In re: Payment of Salaries. Allowances and Other privileges to the Ingonyama Bill of 1995

(CCT1/96, CCT6/96) [1996] ZACC 15; 1996 (7) BCLR 903; 1996 (4) SA 653 (5 July 1996). See also Bronstein, V 'Conflicts' in Woolman and Bishop (2013) 16.4.

[135](#)(CCT27/95) [1995] ZACC 8; 1995 (10) BCLR 1289; 1995 (4) SA 877 (22 September 1995).

[136](#)Klaaren, J 'Federalism' in Chaskalson, M et al (eds) (1999) Constitutional Law of South Africa 1st ed 5–12.

[137](#)S 146(1) of the Constitution.

[138](#)S 149 of the Constitution.

[139](#)S 146(2)(a) of the Constitution.

[140](#)S 146(2)(b) of the Constitution.

[141](#)S 146 (2)(c) of the Constitution.

[142](#)(CCT 67/03) [2004] ZACC 6; 2005 (2) SA 476 (CC); 2004 (12) BCLR 1243 (CC) (6 September 2004).

[143](#)Act 59 of 1992.

[144](#)This was the predecessor of s 146 of the final Constitution.

[145](#)Mashavha para 57.

[146](#)Bronstein (2013) 16.19.

[147](#)Mashavha para 51.

[148](#)Mashavha para 57.

[149](#)(CCT 43/09) [2009] ZACC 30; 2010 (3) BCLR 212 (CC); 2010 (4) SA 55 (CC) (9 October 2009) para 34.

[150](#)Act 32 of 2000.

[151](#)Joseph para 39.

[152](#)(CCT 19/04) [2004] ZACC 21; 2005 (2) SA 323 (CC) (29 November 2004). See also Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others (CCT7/98) [1998] ZACC 17; 1999 (1) SA 374; 1998 (12) BCLR 1458 (14 October 1998) para 38 and CDA Boerdery (Edms) Bpk en Andere v Nelson Mandela Metropolitan Municipality (526/05) [2007] ZASCA 1; [2007] SCA 1 (RSA) (6 February 2007) para 33.

[153](#)City of Cape Town para 60.

[154](#)City of Cape Town para 60.

[155](#)Act 117 of 1998.

[156](#)Steytler, N and De Visser, J ‘Local government’ in Woolman and Bishop (2013) 22.20.

[157](#)Act 27 of 1998.

[158](#)(1) (CCT73/05) [2006] ZACC 2; 2006 (5) BCLR 622 (CC); 2006 (5) SA 47 (CC) (27 February 2006).

[159](#)Act 23 of 2005.

[160](#)Matatiele Municipality para 41.

[161](#)Matatiele Municipality para 41.

[162](#)Matatiele Municipality para 41.

[163](#)S 7 of the Municipal Structures Act.

[164](#)S 8 of the Municipal Structures Act.

[165](#)S 9 of the Municipal Structures Act.

[166](#)S 10 of the Municipal Structures Act.

[167](#)S 155(4) of the Constitution.

[168](#)City of Cape Town para 55.

[169](#)S 156(1)(a) of the Constitution.

[170](#)S 156(1)(b) of the Constitution.

[171](#)S 156(2).

[172](#)A municipality also has those powers that have been granted to it by its own by-laws.

[173](#)See Steytler and De Visser (2013) 22.47.

[174](#)(CCT89/09) [2010] ZACC 11; 2010 (6) SA 182 (CC); 2010 (9) BCLR 859 (CC) (18 June 2010). See also *Maccsand (Pty) Ltd v City of Cape Town and Others* (CCT103/11) (CC) [2012] ZACC 7; 2012 (4) SA 181 (CC); 2012 (7) BCLR 690 (CC) (12 April 2012).

[175](#)See also Steytler and De Visser (2013) 22.21–22.22.

[176](#)Steytler and De Visser (2013) 22.21–22.22.

[177](#)Gauteng Development Tribunal para 57.

[178](#)Gauteng Development Tribunal para 57.

[179](#)Gauteng Development Tribunal para 57.

[180](#)Gauteng Development Tribunal para 58.

[181](#)Gauteng Development Tribunal para 63.

[182](#)Gauteng Development Tribunal para 63.

[183](#)S 44(1) of the Constitution.

[184](#)S 104(1) of the Constitution.

[185](#)Schedule 4 of the Constitution.

[186](#)Schedule 5 of the Constitution.

[187](#)Gauteng Development Tribunal para 43.

[188](#)Gauteng Development Tribunal para 59.

[189](#)This mode of assignment only takes effect upon a proclamation by the President or the Premier.

[190](#)See Steytler and De Visser (2013) 22.61.

[191](#)(9714/11) [2013] ZAKZPHC 6 (30 January 2013).

[192](#)Le Sueur para 19.

[193](#)Le Sueur para 19.

[194](#)Le Sueur para 22.

[195](#)Le Sueur para 25.

[196](#)Le Sueur para 39.

[197](#)Act 103 of 1977.

[198](#)Freedman (2012) para 231–5.

[199](#)First Certification para 372.

[200](#)S 155(6) of the Constitution also provides that each provincial government must, by legislative or other measures, provide for the monitoring and support of local government in the province and promote the development of local government capacity to enable municipalities to perform their functions and to manage their own affairs.

[201](#)First Certification para 371.

[202](#)First Certification para 371.

[203](#)First Certification para 372.

[204](#)First Certification para 373.

[205](#)First Certification para 375.

[206](#)See *Mnquma Local Municipality and Another v Premier of the Eastern Cape and Others* (231/2009) [2009] ZAECBHC 14 (5 August 2009).

[207](#)See *Premier of the Western Cape and Others v Overberg District Municipality and Others* (801/201) [2011] ZASCA 23; 2011 (4) SA 441 (SCA); [2011] 3 All SA 385 (SCA) (18 March 2011).

[208](#)First Certification para 376.

[209](#)First Certification para 370.

[210](#)Murray, C and Simeon, R (2000) South Africa's financial Constitution: Towards better delivery? SA Public Law 15(2):477–504 at 477.

[211](#)Murray and Simeon (2000) 479.

[212](#)Murray and Simeon (2000) 479. A conditional grant is one in which the money that has been transferred must be used for a specific purpose and not for any other purpose. An unconditional grant is one in which the money can be used by the recipient for any purpose.

[213](#)Murray and Simeon (2000) 480.

[214](#)Kriel, R and Monadjem, M 'Public finance' in Woolman and Bishop (2013) 27.8.

[215](#)S 228(2) of the Constitution.

[216](#)Act 53 of 2001.

[217](#)S 229(2) of the Constitution.

[218](#)Act 6 of 2004.

[219](#)Act 12 of 2007.

[220](#)Act 79 of 1984.

[221](#)(149/2011) [2012] ZASCA 104; 2013 (1) SA 564 (SCA) (1 June 2012).

[222](#)Act 3 of 1994.



[223](#)Ingonyama Trust para 11.

[224](#)Ingonyama Trust para 11.

[225](#)Ingonyama Trust para 8.

[226](#)Ingonyama Trust para 8.

[227](#)Ingonyama Trust para 8.

[228](#)Act 101 of 1998.

[229](#)Act 84 of 1998.

[230](#)Ingonyama Trust para 10; Act 84 of 1996.

[231](#)Act 97 of 1997.

[232](#)S 9(1) of the Intergovernmental Fiscal Relations Act.

[233](#)S 10(3) of the Intergovernmental Fiscal Relations Act.

[234](#)Ss 2 and 5 of the Intergovernmental Fiscal Relations Act. The Budget Council consists of the Minister of Finance and the MEC for Finance in each province, while the Budget Forum consists of the Minister of Finance, the MEC for Finance in each province, five representatives from the national body representing organised local government and one representative from each of the provincial bodies representing organised local government.

[235](#)S 10(1) of the Intergovernmental Fiscal Relations Act.

[236](#)The provincial government equitable formula consists of six components: an education component, a health component, a basic share component, an institutional component, a poverty component and an economic output component. The local government equitable formula consists of five components: a basic services component, an institutional support component, a development component, a revenue-raising capacity correction and a correction and stabilisation factor (see the Explanatory Memorandum to the Division of Revenue Bill 2013).

[237](#)S 215(3) of the Constitution.

[238](#)Premier: Limpopo Province para 26.

[239](#)Act 1 of 1999.

[240](#)S 27(2) of the PFMA.

[241](#)S 5 of the PFMA.

[242](#)S 6 of the PFMA.

[243](#)S 17 of the PFMA.

[244](#)S 18 of the PFMA.

[245](#)Act 90 of 1989.

[246](#)The Role and Functions of the South African Reserve Bank available at <http://www.resbank.co.za/AboutUs/Functions/Pages/default.aspx>.

[247](#)S 217(2) of the Constitution.

[248](#)Act 5 of 2000.

[249](#)(31/2007) [2007] ZASCA 165; [2007] SCA 165 (RSA); [2008] 2 All SA 145; 2008 (2) SA 481; 2008 (5) BCLR 508; 2008 (2) SA 481 (SCA) (29 November 2007).

[250](#)Act 3 of 2000.

[251](#)Millennium Waste Management para 21.

[252](#)Millennium Waste Management para 16.

[253](#)Millennium Waste Management para 17.

[254](#)Millennium Waste Management para 17.

[255](#)Millennium Waste Management para 17.

[256](#)Millennium Waste Management para 18.

[257](#)Millennium Waste Management para 19.

[258](#)Millennium Waste Management para 21.

[259](#)(189/06, 244/06) [2007] ZASCA 26; [2007] SCA 26 (RSA); [2007] 3 All SA 115 (SCA) (27 March 2007).

[260](#)Phoenix Cash & Carry para 1.

[261](#)Phoenix Cash & Carry para 2.

[262](#)Phoenix Cash & Carry para 17.

[263](#)Phoenix Cash & Carry para 2.

[264](#)Phoenix Cash & Carry para 2.

[265](#)S 2 of the PPPFA.

[266](#) See the discussion by Penfold, G and Reyburn, P 'Public procurement' in Woolman and Bishop (2013) 25.16.

[267](#) The prescribed amount at the time of writing is R1 000 000.

[268](#) GN R502, GG 34350, 8 June 2011.

## PART TWO

### The Bill of Rights and the enforcement of the Constitution

[CHAPTER 9](#) Introduction to and application of the Bill of Rights

[CHAPTER 10](#) The limitation of rights

[CHAPTER 11](#) Constitutional remedies

[CHAPTER 12](#) Equality, human dignity and privacy rights

[CHAPTER 13](#) Diversity rights

[CHAPTER 14](#) Political and process rights

[CHAPTER 15](#) Administrative justice, access to information, access to courts and labour rights

[CHAPTER 16](#) Socio-economic rights