Chapter 1: Sources of Law

Where 2 find legal rules, principles and values that govern a particular branch of law

| 1. Constitution | • Broad framework for the governance of a country – A Body of rules (written & unwritten) that governs State Authority between citizens & the state - Horizontal relationship
| | • Written documents with constitutional rules
| | • Rules binding the distribution & exercise & limits of State Authority
| | **Section 2 of the Constitution**: The CC is the supreme law of the Republic; law/conduct inconsistent is invalid, +obligations imposed by it must be fulfilled.

| 2. Legislation | • Most NB - Authoritative and Binding
| | • Du Plessis’ & Garber = CC can’t be repealed/amended must be capable of growth & development over a period to meet changes in tech, social, political + economic
| | • NB National Laws - SA Citizenship Act, Electoral Act, LG Municipal Structures Act

| 3. Case Law (Stare decisis) | • NB practical application of CC principles, rules, values + how it helps develops law

| 4. International Law | |

| 5. Common Law | • 96 CC – Common Law ceased to be NB
| | • English Law NB in developing SA CC = Westminster System
| | • 93 & 96 Constitution broke away from Westminster System
| | **Section 39 Interpretation of the Bill of Rights**
| | (2) When interpreting any legislation, and developing common law/customary law, every court, tribunal or forum to promote the spirit, purport + objects of Bill of Rights

| 6. Other Sources | • These are persuasive in nature – can refer to them but don’t have to follow them
| | • Academic Writing
| | • Policy Documents
| | • Reports of State Institutions
| | • Foreign Law


**Parliamentary Sovereignty**: - Parliament supreme - any law – couldn’t be challenged
- White privilege, Blacks excluded - Denied freedom, quality and human dignity
- Apartheid used forced = anarchy in townships, threatened "white" areas - South Africa becomes isolated.
- FW de Klerk unbanned "liberation movements" released Nelson Mandela 2 February 1990
- Political negotiations eventually produced the 1993 Constitution.

**Interim Constitution** Interim Constitution adopted the election of a CA, who will adopt a final CC
Bridge btwn deeply divided society of conflict, injustice to = opportunities for all irrespective of colour, race, class,

**96 Constitutions**
Parliamentary sovereignty replaced by constitutional supremacy
Adopted by CA (National Assembly and Senate) + 2/3 majority b4 new text came into operation, CC had to certify that it complied with Constitutional Principles in Schedule 4 of the interim Constitution.

**The constitutional principles**
- "solemn pact" to stick to principles when the final Constitution was drawn up
8 May 96 submitted to CC for certification - text not compliant with the CC Principles - CA amended text, CC certified the amendment as compliant with the Constitutional Principles = New Constitution came into operation on 4 February 1997

**CC is not an Act of Parliament – made up by Constitutional Assembly (CA), a body separate from Parliament.**
Chapter 3: Concepts of Constitutional Law

<table>
<thead>
<tr>
<th>Section Number &amp; Title</th>
<th>Content</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Republic of South Africa</td>
<td>Republic of SA is one, sovereign, democratic state founded on the following values: (a) Human dignity, equality and human rights (b) Non-racialism and non-sexism. (c) Supremacy of the Constitution and the rule of law. (d) National common voters roll, regular elections + multi-party system of democratic gov.</td>
</tr>
<tr>
<td>2. Supremacy of CC</td>
<td>CC supreme law any; law or conduct inconsistent is invalid, + obligations imposed to be fulfilled</td>
</tr>
<tr>
<td>7. Rights</td>
<td>(1) Bill of Rights =cornerstone of democracy in SA - values of human dignity, equality &amp; freedom. (2) The state must respect, protect, promote and fulfil these rights. (3) Bill of Rights is subject to the limitations contained in section 36, or elsewhere in the Bill.</td>
</tr>
<tr>
<td>8. Application</td>
<td>8(1) Bill of Rights applies to all law binds legislature, executive, judiciary and all organs of state.</td>
</tr>
<tr>
<td>74. Bills amending the Constitution</td>
<td>(1) Section 1 + sub-section may be amended by a Bill passed by (a) NA, with a vote of at least 75 percent of its members; and (b) NCOP, with a vote of at least six provinces. (2) Chapter 2 may be amended by a Bill passed by (a) NA, vote of at least two thirds of its members; and (b) NCOP, vote of at least six provinces. (3) Any other provision of the Constitution may be amended by a Bill passed by: (a) NA, vote of at least two-thirds of its members; and (b) NCOPs, vote of at least six provinces, if amendment (i) matter that affects the Council; (ii) alters provincial boundaries, powers, functions or institutions; or (iii) amends a provision that deals specifically with a provincial matter. (4) bill amending the CC can’t have provisions other than CC amendments + matters (5) 30 days b4 bill amending the CC is introduced, person introducing bill must: (a) publish in GG (b) submit to the Chairperson of the NCOP for tabling in the Council. (7) Bill amending the CC can be put to the vote in the NA in 30 days of: (a) if Assembly is sitting when the bill is introduced; or (b) if Assembly is in recess when the bill is introduced. (8) bill referred to in (3)(b), specific province/s, NCOP can’t pass until approved by legislature/s (9) A bill amending the Constitution that has been passed by the National Assembly and, where applicable, by the National Council of Provinces, must be referred to the President for assent.</td>
</tr>
<tr>
<td>172. Powers of courts in constitutional matters</td>
<td>172 (1) (a) When 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.</td>
</tr>
</tbody>
</table>

Constitutional law Definition:
- binding rules relating to the distribution and exercise of State authority (power & limitations)
- Rules of CC law define the relationship between organs of State and individuals and organs of state inter se

Organ of State Definition: Section 239 – functional or institution that exercises a public power/function.
Constitutional Law is part of - relationship of Organs of State

Public Law:
- exercising of State Authority in relationships of inequality
- State, State and Individuals, under State Authority
- E.g. Accuses stands trail for criminal offence

Private Law:
- Relationship between people on equal footing - No State Authority
- E.g. Marriage, can be unequal with parent and child as parent has authority, but there is not State Authority
- State involved in private law relationships – ER and EE via labour laws and Landlord and Tenant
- State in private law is unequal – Bill of Rights are for Private persons

Administrative Law:
- Body of legal rules, governing the admin + powers, functions of admin authorities like government departments.
- Part of public law - regulates public interest either btwn authorities or btwn admin authorities& private individuals
- Focus on why State is governed

Types of Constitutions:
1. **Flexible and Inflexible** - Deals with the Status of the Constitutions and how easy it is to amend it
   - Flexible – same status as other laws, no special procedure to amend
   - Inflexible – Superior status to other laws, special procedure to amend (2/3 majority vote of NA)
   - Amended too easily the majority will try abolish some of these protections
   - ‘61 = flexible / ‘83 = less flexible / ‘96 = inflexible
   - E.g. Germany, Namibia & USA are all inflexible

2. **Supreme Constitution and not supreme Constitution Supreme:**
   - Above any other laws, any law inconsistent is invalid
   - Usually inflexible
   - Courts have testing power – CC to test the validity of any law that is inconsistent to the Constitution
   - USA, Canda, Germany and SA

   **Not Supreme:**
   - Not above any other laws, any laws that are inconsistent can be passed
   - Usually flexible – called brut law = Parliament is supreme, Constitution is not supreme
   - Legislature can pass any law even if unreasonable/discriminatory as long as it complies to the procedures for passing laws
   - Britain and 83 SA Con

3. **Written and unwritten**
   - Britain unwritten but has Statutory Constitutional Sources
   - Written Laws normally have other Constitutional enactments to supplement it
   - Sources of CC law – Constitution, Legislation, Case Law, International Law, Common Law & other

4. **Indigenous (Autochthonous) or borrowed (Allochthonous)** = Van de Vyver: 3 types of Constitutions
   1. **Reactive Constitution** – a result of a specific problem in the past, try to solve = INDIGENOUS LAW = Germany & SA
   2. **Constitution intended to maintain continuity of norms in society** – INDIGENOUS LAW = Netherland
   3. **Superimposed Constitutions** – unrelated to history of country – ZIM- imposed by the British
      - Autochthonous – SA CC (home grown)
      - Allochthonous – ZIM (forced)
State & Government:

State (SA)
- Specific, geographically defined territory
- a community of people who live in territory
- Organised system of government
- legal order that a community is subjected to
- Certain measure, - separate political identity or sovereign political status
- State is the permanent legal entity consisting of a territory, community, legal order, organised government and a measure of political identity

Government of a state: (ANC)
- Government is the temporary bearer of state authority – represent the state at a particular time.
- Gov - executive function, having a bearing on the formation and implementation of policy.
- Baxter, government is “the tangible machinery of the State”

Sovereignty:
- Sec 1 CC - Republic of South Africa is a sovereign state.
- used in international law - states which are autonomous and independent, the state is not subject to the authority of any other state, sole right to own & control its own territory E.g. SA not 2 used airspace of another country without consent
- Britain parliament is still sovereign or supreme power +83 Constitution = Parliament was sovereign - highest legislative authority was vested in Parliament where parliament could enact any legislation, no matter how unreasonable or unjust, as long as the procedures were adhered courts had not power to question that legislation
- Parliament not sovereign any more cause the Constitution is now the supreme law
- Parliament exercise legislative authority subject to the Constitution

Summary:
- inflexible is usually a supreme constitution/flexible constitution is usually not supreme
- flexibility/inflexibility relates to the ease or difficulty of amending a constitution
- supremacy/non-supremacy is the status of a constitution verses other laws of a particular state
- supreme higher status than other laws / not supreme ranks equal with other laws
- Can have a flexible, supreme constitution/ inflexible constitution which is not supreme
- inflexibility of 96 CC - procedure for the adoption of Bills (Acts) amending the Constitution
- Supremacy of 96 Constitution - judicial review and CC to test Acts that could conflict the Constitution.
Chapter 4: Concepts of Constitutional Law Continued

93 Constitution – Sovereign and Democratic state
Sec 1 of 96 Constitution – SA is democratic state founded on the supremacy of the Constitution & Rule of Law.

1. Democracy:
   - Core Value of new CC - form of government in a country- either democratic or Dictatorship
   - Electoral system promotes democracy by facilitating the voting
   - Democracy – Greek work meaning the people strength.
   - Gov by people - right to govern is not vested in 1 person but in all people = free political discussion, toleration of differences and right of all people to partake in political decision making

Examples:
Preamble: Society based on democratic values | Foundations for democratic & open society | Build a united & democratic South Africa

1: SA is a democratic State

36: Limitation on rights: Reasonable, justifiable in open & democratic society based on H dignity, equality & freedom

39(1): promote values that underlie an open & democratic society based on H dignity, equality & freedom

NB!!! Types of Democracy:

<table>
<thead>
<tr>
<th>Direct Democracy</th>
<th>Representative democracy</th>
</tr>
</thead>
<tbody>
<tr>
<td>• All political decisions made by the people themselves</td>
<td>• People chose representatives to express their will</td>
</tr>
<tr>
<td>• Works in small political community</td>
<td>• All people over 18 years can have a say</td>
</tr>
<tr>
<td>• People get together to discuss and decide on matters</td>
<td>• Process of elections @regular intervals and frequently.</td>
</tr>
<tr>
<td></td>
<td>• Meant to ensure interest are protected by elected</td>
</tr>
<tr>
<td></td>
<td>representation</td>
</tr>
<tr>
<td></td>
<td>• Based on consent of the people who elected them</td>
</tr>
<tr>
<td></td>
<td>• Parliamentary terms: - constitutional system for electing</td>
</tr>
<tr>
<td></td>
<td>members of the legislative body</td>
</tr>
</tbody>
</table>

Disadvantages of modern representative Democracies | Advantages of modern representative Democracies

| • Weakened by the power of certain groups | • Good way to keep government accountable                     |
| • Political parties depend on b us to finance election campaign | • Don’t do good job, won’t be re-elected                     |
| • Trade Unions powerful and can paralysis the economy | • Guarantee – Freedom of association, press and separation of power |
| • Don’t always listen to the less powerful groups like the elderly and unemployed | • Appease business and labour                               |

NB for democratic government:
• Free & regular elections
• Multiparty system
• All people can vote if over 18
• Protection of minorities
• Ensure accountability of government to the electorate

Dictatorship or Despotic Regime:
• Governed by a dictator who runs country as he/she see fits, makes all laws
• People have no say or political decisions.

2. Constitutionalism:
• Government in accordance with the Constitutions – government gets powers from and is bound to the Constitution – Limited to the Constitution
• Protection of fundamental rights, independent judiciary and separation of powers
• Associated with the supreme constitution and legislature
Constitutional Democracy:
- 93 Constitution – fully represented democracy
- 96 Constitution- guarantees all SA over 18 can vote in democratic elections and allows for direct elections of representatives at the national, provincial and local spheres of government.
- Constitutional Democracy – representative are not fee to make whatever laws the want but bound by the rules and values in the Constitution – anything inconsistent is invalid.

NB !! Constitution way to curb powers of government:
- Bill of rights +subject to judicial control
- Democratic election of representative to Parliament
- Collective and individual responsibilities of Cabinet to parliament
- Separation of powers between legislature, executive and judiciary +Independent judiciary
- Independent institutions – Public Prosecutor, H.Rights Commission, Commission of gender equality
- Civil control of the military.

3. Rule of Law:
- Constitutionalism is a state where the law reigns supreme - State is bound by the law
- Anglo American and Rechtsstaat Principle
- Rule of law developed in England – Dicey based on:
  - Random power - no 1 is above the law and no 1 is punishable unless in normal manner in normal court
  - Equality before the law – ever 1 is subject to the law
  - Judge made Constitution - general principles of British Constitutional Law are as a result of judicial decision confirming the common law
- SA – common law didn’t give individuals the protection when the fundamental right were as liberty

4. Rechtsstaat Concepts
- German – meaning government by law and not force
- Formal – compliance with formal criteria – due process, separation of powers and legal certainty
- Material – stat is bound to a higher legal value in the Constitution
- 93 & 96 are both formal and material

NB!! Parliamentary & Presidential Systems of Government

<table>
<thead>
<tr>
<th>Presidential System</th>
<th>Parliamentary System</th>
</tr>
</thead>
<tbody>
<tr>
<td>Head of Government and Head of State same person (SA +USA)</td>
<td>Head of Gov +Head of State are diff people (parliamentary sovereignty –Westminster system)</td>
</tr>
<tr>
<td>Head of Gov &amp; Cabinet are not members of Legislature</td>
<td>Head of Gov &amp; Cabinet are a member of Legislature</td>
</tr>
<tr>
<td>Head of Government is elected by the people (USA 2 elections 1 for pres and 1 par, in SA only have 1)</td>
<td>Head of Gov is the leader of the party who had the majority vote.</td>
</tr>
</tbody>
</table>

SA – Presidential = President is the head of state and government
Parliamentary = President elected by Parliament and not by votes directly
Parliamentary = Cabinet are members of Parliament
### The Legislature

| 43 Legislative authority of the Republic | Republic, the legislative Authority:  
(a) national sphere of government vested in Parliament, sec 44;  
(b) provincial sphere of government vested in provincial legislatures, sec 104;  
(c) Local sphere of government vested in the Municipal Councils, sec 156. |

| 44(1) National legislative authority | The national legislative authority as vested in Parliament:  
(a) confers on the NA the power:-  
(i) to amend the Constitution;  
(ii) pass legislation any matter, including matter in functional area listed in Schedule 4, excluding, subsection (2),a matter in a functional area listed in Schedule 5; and  
(iii) assign any legislative powers, except power to amend the CC, to any legislative body in another sphere of government;  
(b) confers on the NCOP the power:  
(i) to participate in amending the Constitution ito sec 74;  
(ii) to pass, ito sec 76, legislation regardinh any matter in a functional area in Schedule 4 + any other matter needed by the CC to be passed in accordance with section 76; and  
(iii) to consider, ito section 75, any other legislation passed by the NA. |

| 44(4) | Parliament bound by CC, act in accordance with, and within the limits of, the CC. |

| 54 Rights of certain members of Cabinet in National Assembly | The President and any member of the Cabinet or any Deputy Minister who is not a member of the NA may, subject to the rules and orders of the Assembly, attend and speak in the Assembly, but may not vote. |

| 55(1) Powers of National Assembly | In exercising its legislative power, the National Assembly may:  
(a) consider, pass, amend or reject any legislation before the Assembly;  
(b) initiate or prepare legislation, except money Bills. |

### Executive Authority

| 85 Executive authority of the Republic | (1) The executive authority of the Republic is vested in the President.  
(2) President exercises the executive authority, with members of the Cabinet:-  
(a) implementing national legislation unless CC/ Act of Parliament says otherwise;  
(b) developing and implementing national policy;  
(c) co-ordinating the functions of state departments and administrations;  
(d) preparing and initiating legislation; and  
(e) performing any other executive function provided for in CC or in national legislation. |

### The Judiciary

| 165 Judicial Authority | (1) judicial authority of the Republic is vested in the courts.  
(2) courts are independent, subject to CC - apply impartially, without fear, favour or prejudice.  
(3) No person/organ of state may interfere with the functioning of the courts.  
(4) Organ of State, to assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.  
(5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies. |
STATE AUTHORITY

<table>
<thead>
<tr>
<th>Branches - Cooperative Government</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>LEGISLATIVE AUTHORITY</strong></td>
</tr>
<tr>
<td>(Parliament/Congress)</td>
</tr>
<tr>
<td>The power to create, amend</td>
</tr>
<tr>
<td>enforce legal rules</td>
</tr>
<tr>
<td><strong>EXECUTIVE AUTHORITY</strong></td>
</tr>
<tr>
<td>(President &amp; Cabinet) (85)</td>
</tr>
<tr>
<td>The power to execute and</td>
</tr>
<tr>
<td>and repeal legal rules</td>
</tr>
<tr>
<td><strong>JUDICIAL AUTHORITY</strong></td>
</tr>
<tr>
<td>Courts (165)</td>
</tr>
<tr>
<td>The power to interpret legal</td>
</tr>
<tr>
<td>rules and to apply rules</td>
</tr>
<tr>
<td>2 concrete situation</td>
</tr>
</tbody>
</table>

| National Sphere (43)            |
| PARLIAMENT (44)                 |
| National Assembly (NA) +        |
| National Council of Provinces   |
| (NCOP)                          |
| **National Sphere**             |
| PRESIDENT (elected by NA) +     |
| CABINET (President, Deputy-     |
| President & Ministers)(91)      |
| **All spheres**                 |
| COURTS                          |

| Provincial Sphere (43)          |
| PROVINCIAL LEGISLATURE (104)    |
| **Provincial Sphere**           |
| PREMIER (elected by provincial  |
| Legislature) + EXECUTIVE        |
| COUNCIL (Premier & MECs)        |

| Local Sphere (43)               |
| MUNICIPAL COUNCILS (156)        |
| **Local Sphere**                |
| MUNICIPALITIES                  |
| Sec 43 of the Constitution      |
| Sec 85 & 125 of the Constitution|
| Sec 165 of the Constitution     |

Separation of Powers:
- Division of State authority into legislative, executive and judicial functions divided into branches
- **Branches:** Legislative, Executive and Judicial (Separation of Powers)
- **Spheres:** Local, National and Provincial (Co-operation Governance)

Montesquieu – father of the doctrine of separation of powers (trias politica). Reason for division is that there is no political freedom where one or the same person or body of persons makes the laws, implements then and acts as arbiter when they contravened.

**Doctrine of Separation of powers:** also called either Trias Politica or Principle of law follows from the Rule of Law.
- State authority must be divided into legislative, Executive and Judicial to decrease the power in the hands of 1 organ of state – protects citizens from abuse of state power. The power is divided into legislative, Executive and judicial authorises all exercised by different government bodies.

NB!!!!! Separation of Powers and Checks and Balances:

**Carpenter:** Doctrine of Separation of powers can mean the following:
1. **Formal division** of statue authority among the legislative, executive and judiciary
2. **Separation of personnel** – ensure that 1 person cant at same time perform in more than 1 branch of gov
3. **Separation of function** – 1 branch of gov can’t usurp the functions & powers of another
4. **Checks and Balances** – in each branch to achieved equilibrium in all three components of government authority

**Checks & Balances:**
- Ensure each branch is subject to influence and control of others
- Legislative vests in parliament, president can veto legislation
- Veto – political power that has power to prevent the authorisation of a decision or action
- 1st certification – didn’t comply with the CC Provisions VI – requiring a separation of powers with the appropriate checks, balances to ensure accountability, responsiveness and openness.
Entrenchment of the Doctrine in the South African Constitution:
Definition: New Constitution has formal requirements that must be met for any government action to be valid. Constitution is supreme, + Bill of Rights with values that the SA political community has committed to - values to guide the legislature, executive and judiciary in applying the provisions of the Constitution.

- 96 - `rule of law' & 93 - `constitutional state''
- **Rule of Law** – broader than Dicey's restrictive understanding as a system of gov in which the law reigns supreme
- CC is supreme + Bill of Rights = judges to regard constitutional values
- CC aims to establish a CC state - Doctrine of separation of powers entrenched CC
- CC will not tolerate unconstitutional taking over of the functions of 1 branch of government by another(De la gens)
- Overlap of legislative & exec authority in CC – NB 4 check +balance = accountability of executive authority to voters
- CC - checks and balance = most NB is the power of judicial review.
- **Judicial Review** - checks legislative and executive
- Judiciary acts as a watchdog over the legislature + executive – ensures gov actions are compliant with the procedural and substantive requirements of the Constitution.

Judicial Review and Democracy:
1 Representative democracy and the separation of powers (read)

- Representative democracy = citizens elect the reps of their choice to express their will with concent
- Elections held at regular intervals, and reasonably frequently -ensure that the interests of society are protected
- Checks & guarantees like the separation of powers, freedom of the press, information & association prevent any 1 group from becoming too strong, and promote a democratic debate and competition.

2 Constitutional democracies and the separation of powers
Constitutional democracy - people’s representatives in Parliament, provincial legislatures & in municipal councils not free to make whatever laws they wish, but have to observe the norms, values in the Constitution.
Laws inconsistent with Constitution will be declared invalid.

3 Is judicial review undemocratic?
- Undemocratic that the judiciary (not an elected body) has the power to declare legislation enacted by Parliament (an elected body) invalid
- American ``counter-majoritarian problem'' = judicial review in conflict with wishes of the legislative majority
- Constitutionalism and democracy may complement each other
- Supreme Constitution is not necessarily incompatible with democracy

Points defending judicial review against the charge that it is undemocratic: (only in 10 % of exams)
- SA Constitution = CA with 2/3 majority member of CA = negotiations and democratic deliberation is why CC has precedence over ordinary legislation.
- Democracy presupposes a vigorous political debate so citizens feel free to state their views and challenge widely accepted beliefs. Judicial Review protects people's political rights, or freedom of expression, judges ensure a free and uninhibited public debate.
- Judges may inquire into the constitutionality of legislation, but can’t substitute their own views for those of the legislature. If judge decides its unconstitutional its not a new law this discretion to amend a law belongs to the legislature but must be constitutional!
Chapter 6: Cooperative Government (Chapter 3 CC – Sec 40 & 41) (overlap btwn national & provincial)

State Authority is distributed in two ways:
1. Among branches of Legislature, Executive and Judiciary = separation of powers
2. Among spheres of National, Provincial and Local = cooperative governance

| 40 Government of the Republic | (1) In the Republic, government is constituted as national, provincial and local spheres are distinctive, interdependent and interrelated.
|                           | (2) Spheres observe & adhere to the principles in this Chapter to conduct their activities within the parameters that the Chapter provides. |
| 41(1) Principles of cooperative government and intergovernmental relations | (a) preserve the peace, the national unity and the indivisibility of the Republic;
|                           | (b) secure the wellbeing of the people of the Republic;
|                           | (c) provide effective, transparent accountable, coherent gov for Republic as a whole;
|                           | (d) be loyal to the Constitution, the Republic and its people;
|                           | (e) respect the constitutional status, institutions, powers + functions of government in the other spheres;
|                           | (f) not assume any power/ function not conferred to the by the CC
|                           | (g) exercise powers + functions in way that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and
|                           | (h) cooperate with one another in mutual trust and good faith by
|                           | (i) fostering friendly relations assisting and supporting one another
|                           | (ii) informing and consult one another on matters of common interest;
|                           | (iii) coordinating their actions and legislation with one another; and
|                           | (iv) avoiding legal proceedings against one another. |
| 41(2) | An Act of Parliament must
|       | (a) establish+ provide for structures & institutions to promote + facilitate intergovernmental relations; and
|       | (b) provide for appropriate mechanisms and procedures to facilitate the settlement of intergovernmental disputes. |
| 41(3) | An organ of state involved in intergovernmental dispute make every reasonable effort to settle the dispute by procedures for that purpose + exhaust all other remedies before a court resolves the dispute. |
| 41(4) | If a court is not satisfied with subsection (3) refer a dispute back |

6.1 Definition of Cooperative Government
- **espouse** to promote or encourage meaning of mixture: to blend or integrate or fuse
- **synthesis** - Combination
- **Cooperative government** is a form of government that supports political flexibility, negotiation, compromise with less reliance on rigid distribution of powers between the 3 spheres of government by combining and coordinating the functions the 3 spheres of government by working together for the common good of the nation as a whole.
### 6.2 Forms of Government

<table>
<thead>
<tr>
<th>Forms of Government</th>
<th>Difference between is the degree of interaction &amp; division of power between national, provincial &amp; local spheres of government</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Unitary Form – 83 SA</strong></td>
<td><strong>Federal Form</strong></td>
</tr>
</tbody>
</table>

- **King**: unitary state is supreme, ultimate and unified centre of authority.
- All government bodies are subject to authority exercised by national government.
- Power is concentrated in national sphere of government.
- Greater emphasis is placed on the centralisation of state activities than the decentralisation of state activities. Where decentralisation does occur, the provinces or regions concerned enjoy only a limited degree of autonomy.
- The provinces are subordinate to the national sphere of government.
- No real distribution of state authority takes place in this form of government.
- Repressive in nature.
- Is rarely conducive to good governance
- Necessary to delegate power to be efficient = decentralization of State powers

**International context** - single legal entity that has a defined measure of independence (autonomy).

**Domestic context** – 2 legal orders - a national government and a provincial government ruling over the same territory.

- State power (legislative & executive) sources of income are divided between the two spheres of government.
- The regions/provinces are given wider powers.
- NB issues like defence, taxation and custom excise are regulated by the national sphere of government.
- Disputes between the spheres of government are usually resolved by an arbiter.
- USA disputes are settled by the Supreme Court and in Germany by the CC.

**Devolution** / decentralization - is a process
Where a national sphere of government surrenders substantial legislative and executive powers to the provinces without giving up its control of the unitary state and making it into a federal system of government.

**Carpenter** says it a top down model

**Examples**: France, Zimbabwe and Namibia.

SA - Apartheid

#### Advantages

**Motala & Ramaphosa advantages:**
- Central planning power
- Suited to a society faced with major dislocation, famine and economic crises.
- Aimed at greater homogeneity
- Less costly - no duplication of government at different levels.
- Administratively and economically efficient.

**South Africa before 1993**
- Parliament was sovereign
- Centralised legal & political government
- Three-tier system:
  1. Central government at the top (strongest)
  2. Provincial tier in the middle
  3. Local, tier (weakest)

**Federal System of Government had 2 types: NB!!!**

The classical (divided) model of federalism

The non classical (integrated) model of federalism
6.3 The Model of Government Adopted Under the 1996 Constitution:

- **Simeon**: SA has opted for a Federal system – closer to German model (integrated from)
- **Carpenter**: This non-classical form – has features consistent with “subsidiary” (“bottom-up” approach rather than “top-down”). – Decisions are taken by those who have most detailed knowledge of local circumstances & greatest interest in making things happen at local level.
- **SA Const**: places emphasis on need for cooperation & co-ordination among national, provincial & local gov.
- **There is therefore a hybrid institution in operation:**
  - One based on the devolution of state power and one based on the principles of subsidiary

<table>
<thead>
<tr>
<th><strong>a. National government as opposed to central government:</strong></th>
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<tr>
<td>• Chapter 3 of Constitution called entitled “Cooperative Government”</td>
</tr>
<tr>
<td>• Sec 40 – “government is constituted as national, provincial &amp; local spheres of gov which are distinctive, interdependent &amp; interrelated.”</td>
</tr>
<tr>
<td>• “National” rather than “central” intent to move away hierarchical model under old dispensation &amp; acknowledgement for need of a cooperative / intergovernmental model.</td>
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<tr>
<th><strong>b. Sphere instead of level:</strong></th>
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<tbody>
<tr>
<td>• Spheres of government may not exercise power beyond that which is conferred upon then by the constitution – 3 spheres of government must assist and support each other.</td>
</tr>
<tr>
<td>• Level of government – used to depict hierarchical relationship in which tiers of government are ordered.</td>
</tr>
<tr>
<td>• Sphere - an attempt to move away from traditional hierarchical structure of government – towards a form of government where national, provincial &amp; local spheres operate more/less equal partners in government.</td>
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<tr>
<th><strong>c. Relationship between national &amp; provincial spheres:</strong></th>
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<tbody>
<tr>
<td>• National &amp; provincial spheres share legislative power &amp; exclusive provincial legislative competence (capability).</td>
</tr>
<tr>
<td>• Functional areas are allocated to provincial &amp; local spheres: a process of decentralisation has taken place: consistent with principle.</td>
</tr>
<tr>
<td>• Cooperation is inevitable as constitution provides for concurrent legislative powers which can = legislative conflict. <em>Premier of the Province of the Western Cape v President of the Republic of South Africa 1999.</em> Cooperation is of particular importance in the field of current law making &amp; implementation of laws. It is desirable, wherever possible, to avoid conflicting legislative provisions, to determine the administrations which will implement laws that are made therefore in the budgets of the different governments</td>
</tr>
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<table>
<thead>
<tr>
<th><strong>The classical (divided) model of federalism</strong></th>
<th><strong>The non classical (integrated) model of federalism</strong></th>
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</thead>
<tbody>
<tr>
<td><strong>Simeon</strong> distinguishes between two models of federalism: a divided model and an integrated one</td>
<td>designed to integrate &amp; coordinate national &amp; provincial politics at all levels</td>
</tr>
<tr>
<td>• Canada &amp; USA</td>
<td><strong>Germany features:</strong></td>
</tr>
<tr>
<td>• Canadian national &amp; provincial levels interact through bargaining, looks like the relation among independent countries</td>
<td>• national government enjoys exclusive power</td>
</tr>
<tr>
<td></td>
<td>• Some areas national government /provinces have concurrent powers or shared responsibility.</td>
</tr>
<tr>
<td></td>
<td>• Revenues and powers of taxation are shared between the national and the provincial governments</td>
</tr>
<tr>
<td></td>
<td>• A whole number of intergovernmental institutions are charged with cooperation between the various levels of government</td>
</tr>
<tr>
<td></td>
<td>• Parliament made up of provincial ministers</td>
</tr>
<tr>
<td></td>
<td>• These institutions are more structured than in Canada,</td>
</tr>
<tr>
<td></td>
<td>• German second chamber of Parliament, the Bundesrat, is made up of directly appointed ministers of the provincial governments, who are subject to recall</td>
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<td></td>
<td>• SA Similar</td>
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</table>

Federal System of Government had 2 types:

<table>
<thead>
<tr>
<th>Classical (divided) model of federalism</th>
<th>Non classical (integrated) model of federalism</th>
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<tbody>
<tr>
<td>Canada &amp; USA</td>
<td>German features:</td>
</tr>
<tr>
<td>Canadian national &amp; provincial levels</td>
<td>• national government enjoys exclusive power</td>
</tr>
<tr>
<td>powers &amp; responsibilities of the national / provincial levels of government are clearly divided</td>
<td>• Some areas national government /provinces have concurrent powers or shared responsibility.</td>
</tr>
<tr>
<td>Canadian Constitution sets out areas that the national government / provinces are responsible</td>
<td>• Revenues and powers of taxation are shared between the national and the provincial governments</td>
</tr>
<tr>
<td>Few shared responsibilities</td>
<td>• A whole number of intergovernmental institutions are charged with cooperation between the various levels of government</td>
</tr>
<tr>
<td>Provinces have independent powers of taxation</td>
<td>• Parliament made up of provincial ministers</td>
</tr>
<tr>
<td>Mechanisms have no formal status &amp; enjoy no express constitutional recognition</td>
<td>• These institutions are more structured than in Canada,</td>
</tr>
<tr>
<td>Provincial interests are not directly represented within the national government</td>
<td>• German second chamber of Parliament, the Bundesrat, is made up of directly appointed ministers of the provincial governments, who are subject to recall</td>
</tr>
<tr>
<td></td>
<td>• SA Similar</td>
</tr>
</tbody>
</table>
d. Other indicators – SA’s state authority is more a non-classical model then to the classical model.

- Provinces – limited powers to raise revenues BUT are entitled to a “equitable share” of revenues collected by National Government.
- Sec 41(2) – Act of Parliament to “establish / provide for structures & institutions to promote & facilitate intergovernmental relations”
- Sec 41(3) – “an organ of state involved in an intergovernmental dispute must make every reasonable effort to resolve the dispute by means of mechanisms & procedures provided for that purpose, & must exhaust all other remedies before it approaches a court to resolve the dispute”

Provincial interests are represented in Parliament in the NCOP = “ensure that provincial interests are taken into account in the national sphere of gov”

South African model of federalism is closely related to the German model of integrated federalism, however it is considerably more centralised than the German one.

6.4 Cooperative government in the 1996 Constitution

- Sec 40 SA has 3 spheres of government – national, provincial, local - distinctive, interrelated and interdependent

Distinctive nature of government

Division of power achieved if following guidelines are adhered to:

- Sphere to respect the constitutional status, institutions, powers & functions of gov in other spheres (S41(1)(e)).
- Spheres exercise powers given to them by the Constitution (S 41(1)(f))
- 1 sphere of government respects the institutional integrity and functions of the other spheres of government.

Parliament is the national law-making body, other spheres can’t interfere if falls in exclusive powers of Parliament unless Parliament has delegated that power.

Interdependent & Interrelated

- 3 spheres of government are independent with their own powers & functions
- Spheres to consult, coordinate + conduct affairs with mutual support, especially on matters of common interest
- Sec 41 is a framework setting out certain guidelines of conduct of different government spheres when dealing with each other.

6.5 Provincial Autonomy & Cooperative Gov

Why an integrated federalism model is best for SA NB!!!!

- 9 provinces have never been independent states. (1st created by the 93 Const.) Most provinces lack a separate political identity & administrative capacity to perform their functions.
- Identity and institutional capacity of provinces can be developed only within a framework of intergovernmental cooperation S125 (3) enjoins the national government to assist the provinces (by legislative and other means) to develop the administrative capacity for the effective exercise of their powers.
- Local governments in past, were broken & racially fragmented. S154 (1) enjoins the national government and provincial governments to support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions.

NB - The decision in Premier of the Province of the Western Cape vs President of the RSA 1999 (4) BCLR 382 (CC)

Despite warning in Sec 41 – organs of state should avoid legal proceedings against each other & exhaust all other remedies before approaching a court, especially the CC whom has exclusive jurisdiction to decide over disputes between organs of state in the national/provincial spheres.

Institutions established before the Constitution in operation continued to exist:

- The Intergovernmental Forum (IGF), provincial premiers & national ministers discuss policy at the provincial level.
- MINMECS were established to facilitate harmonisation, consultation & joint action in a number of functional areas.
Parliament adopted legislation to promote cooperation between the national, provincial and local spheres in specific areas, such as environmental protection and fiscal, budgetary and financial matters. The Intergovernmental Fiscal Relations Act is a good example of legislation designed to promote cooperation between the different spheres of government.

6.7 Diagrammatic Summary Of SA’s Position - integrated model of federalism. This is how state power is distributed.

State authority is then divided between the legislative and the executive branches of government within each sphere. Judicial authority is the third branch of government, but it applies to all three spheres of government.
This is the first branch of government or organ of state. *(Branch of government is same as organ of state)*

42 Composition of Parliament

| 1 | Parliament consists of-  
|   | (a) NA (people)  
|   | (b) NCOP (Provinces)  
| 2 | NA + NCOP participate in the legislative process as set out in the Constitution.  
| 3 | NA represents the people + ensure gov by the people by choosing the President, providing a national forum 4 public issues passing  
| 4 | NCOP represents the provinces ensuring provincial interests are taken into account at national sphere of government.  
| 5 | President may summon Parliament to conduct special business.  
| 6 | seat of Parliament – C.T, but an Act of Parliament enacted in accordance with section 76 (1) and (5) may determine that the seat of Parliament is elsewhere. |

43 Legislative authority of the Republic

| 1 | The legislative authority-  
|   | (a) national sphere of government is vested in Parliament, section 44;  
|   | (b) provincial sphere of government is vested in provincial legislatures, section 104;  
|   | (c) local sphere of government is vested in the Municipal Councils, section 156. |

44 National legislative authority

| 1 | The national legislative authority as vested in Parliament-  
|   | (a) confers on the National Assembly the power-  
|   | (i) to amend the Constitution;  
|   | (ii) to pass legislation with regard including a matter in a functional area in Schedule 4, excluding a matter in Schedule 5; and  
|   | (iii) to assign legislative powers, but not power to amend the CC  
|   | (b) confers on the NCOP the power-  
|   | (i) to participate in amending the CC into section 74;  
|   | (ii) to pass, to sec 76, legislation regarding a matter in functional area in Schedule 4 + any other matter required by the CC to be passed into sec 76  
|   | (iii) to consider, into sec 75, any other legislation passed by the NA.  
|   | When exercising its legislative authority; Parliament is bound by the CC |

55 Powers of National Assembly

| 1 | In exercising its legislative power, the National Assembly may-  
|   | (a) consider, pass, amend or reject any legislation before the Assembly;  
|   | (b) initiate or prepare legislation, except money Bills  
| 2 | The NA must provide for mechanisms-  
|   | (a) ensure executive organs in national sphere of gov are accountable  
|   | (b) to maintain oversight of-  
|   | (i) to exercise national executive authority (ii) any organ of state |

58 Privilege

| 1 | Cabinet members, Deputy Ministers and members of the National Assembly-  
|   | (a) have freedom of speech in the Assembly and in its committees, subject to its rules and orders; and  
|   | (b) are not liable to civil or criminal proceedings, arrest, imprisonment or damages  
|   | (i) anything that they have said in, produced before or submitted to the Assembly or any of its committees; or  
|   | (ii) anything revealed as a result of anything that they have said in, produced before or submitted to the Assembly or any of its committees. |

Study the following sections which highlight the following issues in relation to the national legislative authority:

- the **body** that is vested with national legislative authority
- the **powers and functions** of the national legislative authority
- the **power** of the national legislative authority to **regulate and control** its own internal proceedings
- the **privileges** enjoyed by the members of the national legislative authority
7.1 Definition of Legislative Authority: power to enact, amend and repeal rules of law = the power to make laws that are binding on the people within a state and on the organs of the state.

7.2 Parliament as the Seat of National Legislative Authority in SA:
- Legislative authority in the national sphere of government is vested in Parliament (S43(a)).
- SA Parliament – bicameral legislature – consists of 2 houses which function separately:
  - National Assembly
  - National Council of Provinces
- Why two-chambered Parliament? Section 42(1)
  - Better representation in mixed societies
  - Alleviating Parliament’s workload
  - Encourages thorough consideration of matters before Parliament
  - Two houses act as a check on each other.

7.3 The Functions of Parliament: NNB
- 55 – powers & functions of the NA.
- 42(3) NCOP

**Representation of the electorate:**
- Representative government based on the concept that voters will choose individual to act for them for a fixed period
  - NA will represent people in decision making process in national sphere.
  - NA will represent and promote interests of the people.
  - NA serves as communication between national government and electorate so there is full discussion of all matters.

**The election of the President:**
- Section 86.

**The functions of the National Assembly: (5)**

**Public consideration of issues:**
- Section 59(1) & 72(1) states NA & NCOP must facilitate public involvement in legislative & other processes.
- Parliament provides a forum in which bills, policy and performance are debated on.
- The media and public may not be excluded from a sitting of a committee unless reasonably justified.

**Passing legislation:**
- Parliaments most NB function is to approve, amend, and repeal legislation submitted to it by the executive committees or individuals.

**Scrutinizing & overseeing executive action: s 55(2)**
- NA exercises control over;
  - state spending,
  - state administration
- Analyses government policy through debate.

**Section 42(4) sets out the following functions of the NCOP:**
- Representation of the provinces in the national sphere of government.
- Participation in the national legislative process.
- Public consideration of issues affecting the provinces.
7.4 Elections

7.4.1 The right to vote
Principle in representative democracies = decide who should govern + represent them
The right to vote is not absolute: qualifications: min. age, certain circumstances.
- Sec 19(3) (a) – guarantees every right of every adult citizen to “vote in elections for any legislative party”
- Sec 19(3) – Was subject to much Const litigation in run to 1999 elections.

7.4.2 Electoral systems
Right to vote for the representative of its choice which sets out the procedures for the election of political representatives = i.e. the way votes are translated into seats in the legislature..

August vs Electoral Commission:
- Court to consider the constitutionality of actions of the Electoral Commission which denied prisoners the right to vote.
- Court found it unconstitutional that it denied prisoners the right to vote.
- CC held: - The right to vote by its very nature imposes positive obligations upon legislature & the executive.
- Electoral Commission Act – imposes obligation on Commission to ensure eligible voters are registered.
- By omitting these steps – Commission failed at obligation which would disfranchise all prisoners.
- CC ordered Elect Comm to make plan ensure people in prison could register.

a. What are electoral systems:
- the franchise
- the method of voting
- the frequency of elections
- the manner in which the number of votes are converted into the number of representatives in the legislature
- the qualification of candidates
- the determination and declaration of the results of an election

b. Forms of electoral systems - 2 ways in which political parties can participate in elections:-
- Territorial / regional representation - English
- Proportional Representation - SA

1. Territorial/regional representation
- Character of Westminster electoral system - Featured promptly before adoption of 1996 Const.
- In this system where there are single-member constituencies, the winner of an election is the person who is \"first past the post\" the system incorrectly reflects the strength of the political parties, by eliminating weaker ones
- The demarcation of the constituencies will effect this imbalance.
- A government may have majority in Parliament and not in terms of votes cast among the people.

Functions
- Nat. Territory – divided into number of geographical units = “constituency”
- Voters residing in constituency – elects single member to represent them in Parliament
- Single constituency could have more than one candidate – but voters only to pick one
- Candidate who won more vote than any other is elected. (\"first-past-the-post\")

<table>
<thead>
<tr>
<th>Advantages</th>
<th>Disadvantages</th>
</tr>
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<tbody>
<tr>
<td>Simple.</td>
<td>Incorrectly reflects the relative strength of the parties.</td>
</tr>
<tr>
<td>Conducive to a strong and stable government.</td>
<td>Tends to favour stronger parties</td>
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<tr>
<td>Close bond btwn rep and voter.</td>
<td>The artificial delineation of constituencies can give rise to an imbalance between constituencies.</td>
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<td></td>
<td>Lead to alleged gerrymandering (the drawing of constituency lines in a manner which dilutes support for certain political parties, cultural or racial groups)</td>
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2. Proportional Representation

- All parties obtain a representation in Parliament that directly reflects the votes cast.
- Most inclusive system of representation, because both majority parties and minority parties are given the right to represent their constituencies in the legislative authority.

<table>
<thead>
<tr>
<th>Advantages</th>
<th>Disadvantages</th>
</tr>
</thead>
<tbody>
<tr>
<td>• It provides a fair reflection of voter opinion.</td>
<td>• May lead to a weak unstable government. (More than 50% of the seats in Parliament). Only where there is no majority party.</td>
</tr>
<tr>
<td>• Eliminates delimitation of electoral districts.</td>
<td>• Impersonal, no contact between voter and representative. (Vote for a party not an individual).</td>
</tr>
<tr>
<td>• All votes carry same weight.</td>
<td>• It is often complicated and difficult to understand.</td>
</tr>
<tr>
<td>• It accommodates a wider representation of parties than territorial/regional representation</td>
<td>• It often fails to produce a clear and workable majority.</td>
</tr>
<tr>
<td>• Minorities can form coalitions against a majority party, preventing dominance by a major party</td>
<td>• By-election doesn't operate as indicators of political trends.</td>
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Diff types of Proportional systems:-
1. Saint-Lague System
2. D’Hondt System
3. Single-transferable-vote
4. List system

Interim CC provided for use of List system = 1 choice is offered: to vote for the political party of his/her choice.

96 CC proportional representation – both majority & minority parties are given right to represent region in legislative authority.

7.5 Membership and Term of Office

Theories of representation

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<tr>
<th>Free-mandate theory – SA (NB)</th>
<th>Imperative-mandate theory</th>
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<tbody>
<tr>
<td>• A Member of Parliament not bound by the mandate given by the electorate but must act in accordance with her conscious and in the interests of the country.</td>
<td>• The representative is bound by the mandate given to her by her principal (the electorate).</td>
</tr>
<tr>
<td>• If conflict between allegiance to her party &amp; her duty to country - no longer wishes to remain a member of the political party: the member must act in accordance with the dictates of her conscious, she does not a legal duty to resign.</td>
<td>• If conflict between allegiance to her party &amp; her duty to country must vacate her seat in Parliament.</td>
</tr>
<tr>
<td>• If conflict between allegiance to her party &amp; her duty to country - can maintain her seat in Parliament.</td>
<td>• Cannot then remain in Parliament / join another party without resigning her seat in Parliament.</td>
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</table>

Does SA follow a free / imperative mandate?
Imperative-mandate applied during 93 CC & during transitional period under 96 CC.
Interim Const’s endorsement of imperative mandate =criticism. = Placed political parties in watertight position
Schedule 6A of 96 CC – Provided imperative model could be abolished by Act of Parliament within reasonable time period

In June 2002 Parliament passed 4 separate Acts:

2 which regulated the position of members in Parliament and the provincial legislatures =

• Constitution of the Republic of South Africa Act 21 of 2002
• Loss and Retention of Membership of National and Provincial Legislatures Act
2 which regulated the position of municipal councils =
- Constitution of the Republic of South Africa Amendment Act 18 of 2002
- Local Government Municipal Structures Amendment Act

United Democratic Movement v The President of the Republic of South Africa:
- Applicants contested validity of 4 acts of Parliament
- CC found that the legislation which applied to members of Parliament and the provincial legislatures was invalid because it had not been passed within a reasonable period of time (5 yrs)
- Immediately after this judgment, 2 constitutional amendments were effected to regulate the issue of floor-crossing (joining another political party) in Parliament and the Provincial legislatures:
  - Constitution of the Republic of South Africa Amendment Act 2 of 2003

7.6 Functioning of Parliament
- Quorums (prescribed min no. of members necessary to Parliament to be competent to perform its functions).
- Sittings and recess periods – sec 51
- Presiding officers. – sec 64
- decision-making procedures and majorities (ss 53(1)(c), 65)
- participation by members of the national executive (ss 54, 66) and local-government representatives (s 67)
- powers of the National Assembly (s 55) and NCOP (s 68)
- evidence or information (ss 56, 69)
- privileges and immunities (ss 57±58, 70±71)
- public access and involvement (ss 59, 72)

Privileges (internal procedures)
Parliamentary privileges = powers + privileges enjoyed by members of Parliament that enable them to perform their functions without interference.
  e.g. The freedom of members to say anything in Parliament without having to fear liability in a court.

NB !!! Privileges under the 96 Constitution: (Regulated by the Privileges of Parliament Act)
- NA to determine & control its own internal procedures and policies
- NA members guaranteed freedom of speech
- Parliament & its committees can summon person’s t give evidence & submit documents.
- Parliament entitled to its own disciplinary measures for contempt of Parliament and other infringements of the Act. (Disorderliness, failure to comply with an order/decision/submit documents, perjury etc).
- Not allowed to vote on any matter in which they have financial interest.

NB !!! Is the exercise of parliamentary privileges subject to judicial review = YES
Answered in the affirmative by Cape HC in De Lille v Speaker of the National Assembly 1998.
- De lille (PAC) suspended for 15 days from NA for making allegations certain ANC official had been spies for the apartheid regime.
- Argued she had not had a fair hearing and her Constitutional rights were infringed. NA counsel argued it was exercising its Parliamentary privilege to control its own affairs. The court held the exercise of Parliamentary privileges is subject to the Constitution. (No longer claim Parliamentary sovereignty). Section 57 constitutional powers of Parliament: The suspension is not consistent with the requirements for representative democracy. The punishment would penalise the electorate who voted for that party. Parliamentary privilege is inconsistent with constitutional provisions; it is subject to judicial review. If action male fide or in defiance of the constitutional rights of a member, the court will intervene.
- The court found that the suspension was an infringement of De Lille’s constitutional right to freedom of speech, right to just administrative action and access to court. The decision was upheld by the SCA.
- Section 1: Parliament can no longer claim supremacy and is subject to the Constitution.
7.7 Committees:
• CC recognises the role of committees in the functioning of Parliament.

Rules of Parliament provide for various types of committees =
1. Both Houses of Parliament have their own committees, there are also joint committees consisting of members of both the NA and NCOP.
2. A distinction is also made between standing committees and ad hoc committees:
   a. Standing committee = exists for the duration of Parliament
   b. Ad hoc committee = appointed to execute particular functions

Role and importance of parliamentary committees:
1. Portfolio committees in the NA = one for every government department (i.e. one for health, one for safety and one for security). Each committee consists of about seventeen MPs (members of Parliament).
   • Consider bills falling within their respective portfolios, and monitor the activities of their government departments.
   • They may investigate and make recommendations relating to the legislative programme, budget, functioning, staff and policies of a government department or organ of state falling within their portfolio.
2. Select committees in the NCOP = fulfil a role similar to that of the portfolio committees in the NA.
3. The Committee on Public Accounts in the NA =
   • Consider the financial statements and audit reports of all executive organs of state, and may report on any of those statements or reports to the NA.
   • It may initiate an investigation into alleged irregularities.
   • It plays an important role in the prevention of corruption and financial mismanagement.
4. The mediation committee = a joint committee which must be appointed to resolve disagreements (about Bills) between the NA & NCOP.

Members of committees are drawn from different political parties. The Rules of the NA provide that political parties are entitled to be represented in committees in substantially the same proportion as they are represented in Parliament. For the sake of greater openness and public involvement in parliamentary proceedings = committees meet in public.

Prerogatives: common law discretionary powers that the monarch exercised by virtue of status as supreme head of government.
Parliamentary privileges apply to the legislative authority and all members of Parliament.
### Study Unit 8: Legislative Authority: National Sphere

#### 73(1) All bills
- (1) Parliament consists of -
  - (a) NA; and
  - (b) NCOP.
- (2) NA + NCOP participate in the legislative process as set out in the Constitution.
- (3) NA elected to represent the people + ensure government by the people by choosing the President, by providing a national forum for public consideration of issues, by passing legislation and by scrutinizing and overseeing executive action.
- (4) NCOP represents the provinces to ensure that provincial interests are taken into account at national sphere of government.
- (5) President may summon Parliament to conduct special business.
- (6) Parliament is CT, but an Act of Parliament enacted into sec 76 (1)+ (5) may determine that the seat of Parliament is elsewhere. Any bill may be introduced in the National Assembly.

#### 74(1) Bills amending the Constitution
Bills amending the Constitution sec 1 may be amended by a bill passed by
- (a) NA, with a supporting vote of at least 75 percent of its members; and
- (b) NCOP, with a supporting vote of at least six provinces.

#### 74(2)
Chapter 2 may be amended by a bill passed by
- (a) NA, with a supporting vote of at least two thirds of its members; and
- (b) NCOP, with a supporting vote of at least six provinces.

#### 74(3)
Any other provision of the Constitution may be amended by a bill passed by
- (a) NA, with a supporting vote of at least two thirds of its members; and
- (b) NCOP, with a supporting vote of at least 6 provinces, if the amendment
  - (i) relates to a matter that affects the Council;
  - (ii) alters provincial boundaries, powers, functions or institutions;
  - (iii) Amends a provision that deals specifically with a provincial matter.

#### 75(1) Ordinary bills not affecting the provinces
NA passes a bill other than a bill to which the procedure set out in section 74 and 76 applies, the bill must be referred to the NCOP and dealt with in accordance with the following procedure:
- (a) The Council must
  - (i) pass the bill;
  - (ii) pass the bill subject to amendments proposed by it; or
  - (iii) reject the bill.
- (b) Council passes the bill without proposing amendments, bill submitted to President assent.
- (c) Council rejects the bill, or Assembly refuses to pass an amended bill, referred to Mediation Committee, which must agree on
  - (i) the bill as passed by the Assembly;
  - (ii) the amended bill as passed by the Council; or
  - (iii) another version of the bill.
- (d) Mediation Committee can't agree in 30 days, bill lapses unless Assembly again passes the bill, but with a supporting vote of at least two thirds of its members.

#### 76(1) Ordinary bills affecting the provinces
NA passes a bill referred to in subsection (3), (4) or (5), bill referred to the NCOP and dealt with in accordance with the following procedure:
- (a) The Council must
  - (i) pass the bill;
  - (ii) pass an amended bill; or
  - (iii) reject the bill.
- (b) Council passes the bill without amendment, bill to be submitted to President for assent.
- (c) Council passes an amended bill, bill referred to Assembly, if passed - President for assent.
- (d) Council rejects the bill, or Assembly refuses to pass an amended bill, referred to Mediation Committee, which must agree on
  - (i) the bill as passed by the Assembly;
  - (ii) the amended bill as passed by the Council; or
  - (iii) another version of the bill.
- (e) Mediation Committee can’t agree in 30 days, bill lapses unless Assembly again passes the bill, but with a supporting vote of at least two thirds of its members.
79(1) Assent to bills
President either assent to + sign a bill passed in terms of this Chapter or, if has reservations on
the constitutionality of the bill, refer it back to the National Assembly for reconsideration

8.2 Legislative Capacity of Parliament

8.2.1 General
- State power = 3 spheres of government = national, provincial and local sphere of government
- Separation of powers doctrine - another way state power is distributed = legislature, executive and judiciary

8.2.2 Exclusive competence of Parliament
CC gives Parliament 3 types of law-making power: (can’t be delegated)
1. Parliament has exclusive powers to amend and repeal its own laws.
2. Parliament has exclusive powers to make laws on areas expressly given into the provisions in the CC
3. Parliament has legislative capacity to make laws relating to areas not itemised in CC or listed in schedule 4 & 5
Parliament makes laws in its exclusive legislative to follow section 75 of the Constitution.

8.2.3 Concurrent legislative competence of Parliament
Parliament + provincial legislatures share the power to make laws for matters that are listed in Schedule 4
Conflict between national law and provincial law, then national law prevails over provincial law.

8.2.4 National legislative power to intervene
Provincial legislative has competence to make any laws listed in schedule 5 BUT Parliament can intervene on:
(a) to maintain national security;
(b) to maintain economic unity;
(c) to maintain essential national standards;
(d) to establish minimum standards required for the rendering of services; or
(e) to prevent unreasonable action which is prejudicial to the interests of another province or to the country as a whole.

8.3 The National Legislative Process NNB

8.3.1 Definition
Parliament:
- To follow sec 75 if wants to make laws in its areas of exclusive competence; and
- To follow sec 76 if wants to make laws in its areas where it shares legislative competence with provincial legislatures

8.3.2 Beginning of legislation
Stage 1:
- draft legislation is formulated + finalised to intro to Parliament
- drafted by the executive authority – responsible for execution + repeal legal rules - better equipped to determine need for new, adapted, laws to regulate a particular sphere of interest
- bill is a detailed proposal by a competent institution for the enactment of a law, bills are so final that context are accept as “final”
- Bill most NB stage in the legislative process.
Stage 2:
- introduction of bills in Parliament - place a bill on the order paper of Parliament
- Sec 73 - bill to be introduced in the NA by Cabinet member/Deputy Minister/member of NA
- Bill passed by the NA must be referred to the NCOP
Stage 3:
- consideration of bills by Parliament – put to vote
- Bills are debated by NA + NCOP to determine its background, purpose +principles
- Bill considered - put to the vote by majority of the members
- Bill amending the Constitution requires a greater majority (s 74).
- Bill passed by the NA to be referred to the NCOP
- Bill passed by the NCOP to be referred to the NA
Bill adopted – goes to President for assent (s 79)
Bill assented & signed by President = Act of Parliament
Act of Parliament only in effect once published in GG or on a date later determined ito of the Act

8.4 Bills Amending the Constitution (NB)

- Bills are introduced with the intention of amending provisions of the Constitution
- SA Constitution is an inflexible Constitution - needs special procedures + majorities before amended.
- Purpose of special procedure + majorities to make sure CC isn’t amended without thought about issues involved

Requirements for constitutional amendments - 74.

74 Bills amending the Constitution
(1) Section 1 and this subsection may be amended by a Bill passed by-
   (a) NA, with a supporting vote of at least 75 per cent of its members; and
   (b) NCOP, with a supporting vote of at least six provinces.

Because the values & principle need to be protected, otherwise it would be too easy to undermine section 1

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

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

(4) A Bill amending the Constitution only constitutional amendments + matters of amendments.

(5) 30 days before a Bill amending the CC, the person or committee intending to introduce the Bill must-
   (a) publish GG particulars proposed amendment for public comment;
   (b) submit, ito rules and orders of the Assembly, those particulars to the provincial legislatures for their views;
   (c) submit, ito rules and orders of the NCOP, those particulars to the Council for a public debate, if the proposed
       amendment is not an amendment that is required to be passed by the Council.

(6) Bill amending the CC introduced, the person/ committee introducing the Bill must submit any written comments
   received from the public and the provincial legislatures-
   (a) to the Speaker for tabling in the NA; and
   (b) mendments referred to in subsection (1), (2) or (3) (b), to the Chairperson of the NCOP for tabling in the Council.

(7) A Bill amending the Constitution may not be put to the vote in the NA within 30 days of-
   (a) its introduction, if the Assembly is sitting when the Bill is introduced; or
   (b) its tabling in the Assembly, if the Assembly is in recess when the Bill is introduced.

(8) If a Bill referred to in subsection (3) (b), concerns only a specific province/s, the NCOP may not pass the Bill or the
    relevant part unless it has been approved by the legislature/s of the province/s concerned.

(9) A Bill amending the Constitution that has been passed by the NA and, where applicable, by the NCOP, must be
    referred to the President for assent.
8.5 Ordinary Bills Affecting the Provinces

- Section 75 – Ordinary Bills not affecting provinces
- Section 76 – Ordinary Bills affecting the provinces

75 – Ordinary Bills not affecting provinces

75 Ordinary Bills not affecting provinces

(1) NA passes a Bill, bill must be referred to the NCOP:

(a) The Council must-
   (i) pass the Bill;
   (ii) pass the Bill subject to amendments proposed by it; or
   (iii) reject the Bill.

(b) Council passes the Bill - no amendments - President for assent.

(c) Council rejects the Bill - NA reconsider Bill; look at proposed amendments of Council, and may-
   (i) pass the Bill again, either with or without amendments; or
   (ii) decide not to proceed with the Bill.

(d) Bill passed by NA - submitted to the President for assent.

(2) When the NCOP votes on a question in terms of this section, section 65 does not apply; instead-

(a) each delegate in a provincial delegation has one vote;

(b) at least one third of the delegates must be present before a vote may be taken on the question; and

(c) the question is decided by a majority of the votes cast, but if there is an equal number of votes on each side of the question, the delegate presiding must cast a deciding vote.

76 – Ordinary Bills affecting the provinces

- Bills that don’t amend the Constitution
- 76(1) adoption of bills introduced + passed by NA and referred to NCOP
- 76(2) adoption of bills introduced + passes by NCOP and referred to NA
- Bill passed by NA + NCOP – bill becomes an Act and sent to President for assent

76 Ordinary Bills affecting provinces

(1) NA passes a Bill, referred to NCOP:

(a) The Council must-
   (i) pass the Bill;
   (ii) pass an amended Bill; or
   (iii) reject the Bill.

(b) NCOP passes the Bill - no amendment - President for assent.

(c) NCOP amends Bill - referred to NA, if passes - President for assent.

(d) NCOP rejects Bill or NA refuses to pass amended Bill, the Bill/amended Bill referred to Mediation Committee, which may agree on-
   (i) the Bill as passed by the Assembly;
   (ii) the amended Bill as passed by the Council; or
   (iii) another version of the Bill.

(e) Mediation Committee don’t agree in 30 days, Bill lapses unless the NA re passes Bill, with supporting vote of 2/3rds

(f) Mediation Committee agrees on the Bill as passed by NA, Bill referred to NCOP – if NCOP passes -submitted to President for assent.

(g) Mediation Committee agrees on the amended Bill of the NCOP, Bill referred to NA, if NA passed - submitted to the President for assent.

(h) Mediation Committee agrees on another version, Bill referred to NA + NCOP – passed by both –President for assent.

(i) Bill not passed by NCOP, Bill lapses unless the NA passes the Bill with 2/3rds of its members.

(j) Bill not passed by NA Bill lapses, but original bill passed by the NA can be passed by the NA but need 2/3rds vote.

(k) Bill passed by the Assembly must be submitted to the President for assent.
(2) NCOP passes a Bill referred to the NA and dealt with ito following procedure:

(a) The Assembly must-
   (i) pass the Bill;
   (ii) pass an amended Bill; or
   (iii) reject the Bill.
(b) Bill passed by the NA - submitted to President for assent.
(c) NA passes an amended Bill, - referred to the NCOP, if NCOP passes -submitted to President for assent.
(d) NA rejects the Bill, or NCOP refuses to pass an amended Bill referred to the Mediation Committee, which may agree on-(i) the Bill as passed by the Council;
   (ii) the amended Bill as passed by the Assembly; or
   (iii) another version of the Bill.
(e) If the Mediation Committee is unable to agree within 30 days of the Bill's referral to it, the Bill lapses.
(f) If the Mediation Committee-agrees on the Bill as passed by the Council, the Bill must be referred to the Assembly, and if the Assembly passes the Bill, the Bill must be submitted to the President for assent.
(g) If the Mediation Committee agrees on the amended Bill as passed by the Assembly, the Bill must be referred to the Council, and if it is passed by the Council, it must be submitted to the President for assent.
(h) If the Mediation Committee agrees on another version of the Bill, that version of the Bill must be referred to both the NCOP and NA, and if it is passed by the NCOP + NA, it must be submitted to the President for assent.
(i) If a Bill referred to the Assembly in terms of paragraph (f) or (h) is not passed by the Assembly, the Bill lapses.

76(3) Schedule 4 list of functional areas for both national (Parliament) & provincial legislatures have the power to make laws. A bill on a matter listed in Schedule 4 – one that affects the provinces - adopted ito section 76(1)-(2).

- In which House/s of Parliament may bills affecting the provinces be introduced? 73(1) and (3) makes it clear that a bill affecting the provinces may be introduced in either the NA or the NCOP and 73(2) and (4) tells us who may introduce it.
- What happens if a bill has been passed by both Houses? Referred to President to Assent
- What happens if a bill passed by one House is rejected by the other, or is passed with amendments? Matter referred to the Mediation Committee.
- How is the Mediation Committee composed? (a) 9 members of the NA elected by the Assembly ito procedures that is prescribed by the rules and orders of the Assembly and results in the representation of parties in substantially the same proportion that the parties are represented in the Assembly; and (b) 1 delegate from each provincial delegation in the NCOP, designated by the delegation.
- Can NA adopt the bill without further cooperation of the NCOP – Yes NA can pass the bill with two thirds majority the refer to President for assent.
- Can NCOP adopt the bill without the further cooperation of the NA? – NCOP doesn’t have power to override NA

**Note**
Schedule 4 – bill falls in this functional area to be adopted into section 76
Schedule 5 - functional areas which the provinces have exclusive legislative competence - Parliament can’t adopt legislation falling within any of these functional area, unless it is authorised to do so in terms of section 44(2). This would be the case if, for instance, the legislation is needed to protect national security or maintain economic unity.

**Differences between section 75 and 76:**
- 76 unlike 75, has a Mediation Committee for conflict between the two Houses
- If NCOP raises objections to a bill approved by Mediation Committee where the bill was introduced NA, the bill lapses unless the NA passes it again with a two-thirds majority"
- 76 gives more weight to the NCOP than section 75
- NCOP votes under 75, each delegate in a provincial delegation has one vote and question is decided by a majority of votes cast (s 75(2))
- Considers bill ito 76, each province has a single vote, and such a bill has to be adopted by at least five of the nine provinces in the NCOP (s 65(1)).
8.7 Assents by the President – Section 79
- 79(1) President refer a bill back NA for reconsideration if have reservations on constitutionality of the bill.
- President does not have power to refuse to sign a bill as in America but to refer to the CC.
- 79(2) Procedure for reconsideration of bill by NA and NCOP.
- 79(3) NCOP assist in reconsideration of bill that President has referred back to the NA if reservation on constitutionality that relates to procedures.
- 79(4) President to sign bill, or refer bill back to NA or to CC for a decision on its constitutionality.
- 79(5) If CC says bill is constitutional – president to assent and sign.

8.8 Limitations on Parliament's Legislative Authority
- Parliament’s power derived from and limited by the Constitution.
- Chaskalson & Klaaren identify limitations on Parliament:
  1. Fundamental-rights limitations
     Parliament may not limit the rights contained in the Bill of Rights except in accordance with s36.
  2. Federalism limitations (nb)
     - Parliament may not pass laws regarding Schedule 5 matters [unless s 44(2)].
     - Parliament may not pass laws in any area over which the Constitution allocates legislative authority to the provincial / local spheres.
     Executive Council v Western Cape v Minister for Provincial Affairs; Executive Council of KwaZulu-Natal v President of the RSA 1999: CC considered whether Parliament can make laws on a matter which the Constitution entrusts to provincial legislatures & municipalities.
     - CC rejected that Parliament can make all laws except for those in Schedule 5.
     - CC emphasized Parliament must exercise authority in terms of the Constitution.
  3. Separation-of-powers limitations
     - Parliament may not usurp the functions of the executive or judiciary / allow them to usurp its own powers.
     - Parliament may not do anything to compromise the independence of the courts or to restrict access to the courts.
  4. Delegation limitations:
     - Delegation of legislative authority to other bodies/functionaries. Parliaments leave it to provincial legislatures / members of the national executive to ‘fill the gaps’ by means of proclamations/regulations.
     - Question arose under the interim – whether there are limits to Parliament authority to delegate. CC: Affirmed this.

Delegation of legislative authority to the executive:
Proclamations and regulations
Executive Council of the Western Cape Legislature v President of the RSA 1995. Section 16A of the Local Government Transition Act (which conferred on the President the power to amend the Act). The President used his power and transferred certain powers from the provincial to the national government. The provincial government attacked the constitutionality.
Chaskalson: There is nothing that prevents Parliament from delegating subordinate legislation. However there is a difference between delegating legislation within the framework of the statute and assigning plenary legislative power to another body including (such as s 16A) the power to amend the assignment. SA courts have in the past given effect to Acts which vested power in the executive (to amend / repeal) the same in English and Commonwealth countries.
USA and Ireland hold legislative delegation may only be within prescribed limits. (May not be that executive effectively takes over the function of the legislature). 93 Constitution intentions to break away from Commonwealth and parliamentary supremacy. Parliament subject to CC and only have the powers expressly or by necessary implication conferred upon it by the Constitution. To delegate the power to amend and repeal Acts is inconsistent with the manner and form provisions of the Interim. In a later decision CC found that s 24 of the Municipal Structure Act was an impermissible delegation of Parliaments legislative authority.
Delegation of legislative authority to the provincial sphere:
- Section 44 (1)(a)(iii): Authorises NA to assign any of its powers (except the power to amend the Constitution) to any legislative body in another sphere.
- Chaskalson: The assignment takes place by Act of Parliament and may not take place by proclamation.

5. Procedural limitations:
Parliament must identify a bill as one:
- amending the Constitution;
- affecting the provinces;
- not affecting the provinces; and then follow the prescribed procedure.

6. Extra-parliamentary consultation:
- Constitution provides that certain categories of bills may not be passed unless certain bodies have been consulted/had the opportunity to make representations beforehand.
  154(2): persons must have an opportunity to make representations regarding draft legislation affecting local government.

8.7 Constitutional amendment
- section 74 special procedures and special majorities to amend the Constitution
- Amendment that contravenes the basic structure or spirit of the Constitution would be invalid even if the required procedure was followed.
Study Unit 9 - The Executive Authority: National Sphere

- 3 branches: the legislature, the judiciary and the executive
- doctrine of the separation of powers = prevent the abuse of power
- executive authority:
  - national sphere exercised by the President + members of the Cabinet (s 85)
  - provincial sphere exercised by the Premier of province + members of the executive council (s 125)
  - local sphere exercised by a municipal council (s 151(2))

A Note on Terminology
- Government, administration and public administration - sometimes referred to as the executive authority.
- Government - broad terms = legislative, executive & judicial authority, narrow terms = executive organs of state.
- Section 197(1) states: "Within public administration there is a public service for the Republic". It therefore seems as if public administration means both political functionaries (President, Cabinet Minister) and public officials.
- Public service = officials in public admin who implement gov policy. This does not include political functionaries.

BOLD – learn, NOT Bold - Read

83 The President

<table>
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<th>The President</th>
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<td>(a) is the head of state and head of national executive;</td>
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<tr>
<td>(b) uphold, defend + respect the Constitution as the supreme law;</td>
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<tr>
<td>(c) Promote unity of the nation.</td>
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84 Powers + functions of President

| (1) President powers entrusted by the Constitution and legislation for head of state + head of the national executive. |
| (2) The President is responsible for |
| (a) assenting to and signing bills; |
| (b) referring a bill back to the NA for reconsideration of the bill’s constitutionality; |
| (c) referring a bill to the Constitutional Court for a decision on the bill’s constitutionality; |
| (d) summoning the NA, NCOP /Parliament to an extraordinary sitting to conduct special bus; |
| (e) appointments that CC/ legislation requires the President to make, other than as head of the national executive; |
| (f) appointing commissions of inquiry; |
| (g) calling a national referendum in terms of an Act of Parliament; |
| (h) receiving and recognising foreign diplomatic and consular representatives; |
| (i) appointing ambassadors, diplomatic and consular representatives; |
| (j) pardoning or reprieve offenders and remitting any fines, penalties or forfeitures; |
| (k) conferring honours. |

85 Executive authority of the Republic (functions)

| (1) The executive authority of the Republic is vested in the President. |
| (2) The President exercises the executive authority with members of the Cabinet |
| (a) implementing national legislation unless CC or an Act of Parliament provides diff; |
| (b) developing and implementing national policy; |
| (c) co-ordinating the functions of state departments and administrations; |
| (d) preparing and initiating legislation; |
| (e) performing any other executive function provided for in the CC/national leg. |

86 Election of President

| (1) 1st sitting after election, NA elect person from among its members to be President. |
| (2) Chief Justice to preside over the election of the President. Part A of Schedule 3 |
| (3) Election of President at a time + date of Chief Justice, 30 days after vacancy occurs. |

88 Term of office of Prest

| Term of office begins on assuming office & ends upon a vacancy. Two terms 5 yrs each |

89 Removal of President

| (1) NA with resolution + 2/3 of members, can remove President from office only on |
| (a) a serious violation of the Constitution or the law; |
| (b) serious misconduct; or |
| (c) inability to perform the functions of office. |
| (2) removed from office of President can’t receive any benefits |
91 Cabinet

(1) Cabinet consists of the President, as head of Cabinet, a Deputy President and Ministers.
(2) President appoints D.President + Ministers, assigns powers, functions + can dismiss
(3) The President
   (a) must select the Deputy President from among the members of the NA;
   (b) may select any number of Ministers from among the members of the NA; and
   (c) may select no more than two Ministers from outside the Assembly.
(4) President to appoint a member of the Cabinet as leader of gov business in the NA.
(5) D.President to help President in the execution of the functions of government.

92 Accountability and responsibilities

(1) D.President + Ministers responsible for the powers +functions of the executive assigned to them by the President.
(2) Members of the Cabinet are accountable collectively +individually to Parliament for the exercise of their powers and the performance of their functions.
(3) Members of the Cabinet must
   (a) act in accordance with the Constitution; and
   (b) provide Parliament with full / regular reports on matters under their control.

102 Motions of no confidence

(1) NA, vote supported by a majority of its members, passes a motion of no confidence in the Cabinet excluding the President, the President must reconstitute the Cabinet.
(2) NA, by a vote supported by a majority of its members, passes a motion of no confidence in the President, President, other members of Cabinet + Deputy Ministers must resign.

9.1 Definition

What is executive authority? - Executive authority is the power to execute and enforce legal rules.

9.2 The Importance Of The National Executive

Rautenbach and Malherbe = 3 reasons why the national executive is important, and why public attention normally focuses more on the activities of the executive than on those of legislative and judicial bodies:
1. The highest executive offices are nearly always occupied by national political leaders.
2. In all states, extensive powers are assigned to executive bodies to create rules of law through subordinate legislation.
3. Executive organs of state plan, co-ordinate and manage state activities. NB role in "planning" policy + contents of rules of law which legislative bodies approve.
   - SA – NB – need to address social & economic imbalances created by apartheid.
   - Must devise policies & initiate legis to effect more equitable distrib of wealth & power.
   - To implement these policies & oversee transformation of public service.
   - Can only be done by a strong, effective exec authority
   - Need for strong exec – to be balanced against CC values of openness, accountability & rule of law
   - Exec derives his powers from Const but is also limited thereby
   - Const provides for mechanisms through which other institutions can exercise control over exec.

9.3 The President

9.3.1 The President as head of state and head of the national executive

- 85(1) = executive authority is vested in the President = President exercises the executive authority with other members of the Cabinet.
- 85(4) President has the powers entrusted by the Constitution and legislation – therefore - President has only those powers entrusted to him or her by law, and may not exercise powers that have been conferred on Cabinet Ministers or government officials.
- The exercise of executive authority is not the sole responsibility of the President: the members of the Cabinet are, individually and collectively, responsible for executive decisions (s 92(2)).
9.4 Election, Term of Office, And Removal

- 86 = election of the President by the NA from its members – (Part A of Schedule 3 = procedure to be followed);
- 87 = governs the assumption of office by the President;
- 88 = the term of office of the President – same as parliament – no longer than two terms -10 yrs
- NB - 89 = the removal of the President by the National Assembly on the grounds of the following:
  1. Impeachment – termination grounds:
     Serious violation of the CC, Inability to perform functions of office
     Resolution of NA with 2/3 majority
  2. Vote of no confidence – Parliament vote with a simple majority vote
- 90 = Acting president

9.5 Powers and Functions

84(1):

1. Powers entrusted by the Constitution
   - Sec 84(2)
   - Sec 85(2)
   - Dissolution of NA
   - Transfer of functions between Cabinet members
   - Appointment of judges
   - Powers relating to the defence force
   - Appointment of national commissioner of police
   - Powers relating to intelligence services

2. Powers entrusted by other legislation
   - Sec 1(a) Commissioner Act – empowers the president to declare the provisions of the Act applicable to a commission appointed by the President
   - Legislation powers of President must be consistent to the CC

3. Implied powers
   - powers necessary for the exercise of powers expressly conferred by the Constitution or legislation –NB to perform functions as head of state and head of National Executive

9.6 Prerogatives NB

Definition:
A Discretionary power exercised at will.

- Initially, prerogatives exercised personally, now only on advice of the Cabinet Ministers.
- In SA history of ‘royal prerogatives’ e.g. power to conclude treaties, declare war, make peace, honorary title, pardon offenders etc.
- 1983 Constitution: Expressly retained all prerogatives, but 1993 and 1996 Constitutions are silent. However, the powers conferred in s 84(2) originate from royal prerogatives. This raises 2 questions:

  a. If president retains any of the common-law prerogatives not contained in section 84(2) and if so, whether the exercise of these powers is subject to constitutional review
  b. if powers of the President in section 84(2) are subject to the Constitution, or whether these powers, like the prerogatives of old, are at the absolute discretion of the head of state

Does the President retain any common-law prerogatives? (If so are they subject to constitutional review).

- Rautenbach  President retains prerogatives to issue passports and perform acts of State.
- The SA Passports & Travel Documents Act: Prescribes State powers in respect of passports are vested in the Government. This is no longer a prerogative power – it is now a statutory power.
- Therefore the only prerogatives powers that have not been written into the Constitution are;
  - The acquisition of foreign territory.
  - The recognition of other states and governments.
This means that acts of state are the only prerogative powers which have not been written into the CC or legislation.

Are these powers subject to the Constitution and judicial review?
Case study: President of the Republic of South Africa v Hugo CC to consider the question whether the Presidents power to pardon / reprieve offenders is subject to constitutional review. - The power is recognised in both '93 & '96 Constitution. The CC held: The only prerogative powers still in force are those specifically expressed in the Constitution, and The exercise of these powers is subject to constitutional review.

9.7 How Must The President Exercise Powers and Functions?
9.7.1 Powers which the President exercises together with Cabinet
s 85(2) states that the President exercises executive authority ``together with'' the other members of the Cabinet.

When does the President Exercise executive authority?
It is clear from the Constitution that not all the President's powers involve the exercise of executive authority. President does not exercise these powers as head of the national executive. Apart from the fact that the Constitution does not expressly entrust these powers to the President as ``head of the national executive'', the CC has indicated that these powers derive from the old common-law prerogatives, and concern the exercise of the President's powers as head of state. The President therefore does not need to perform these functions together with the Cabinet.

9.7.2 Powers which the President exercises after consulting other functionaries
The President appoints:
- judges of the CC
- the Chief Justice and Deputy Chief Justice
- four members of the Judicial Service Commission

``After consulting'' = President must consult the relevant functionary but not bound by the recommendation. The President appoints after consultation.

9.7.3 Powers which the President exercises on the recommendation of
``after consultation with'' President is bound to act as advised, or according to the recommendations received.

9.7.4 Confirmation of executive decisions
A decision by the President must be in writing if it is taken in terms of legislation or has legal consequences. If the decision concerns a function assigned to a member of Cabinet, that member of Cabinet must countersign the decision.

9.7.5 The President must take personal responsibility for powers conferred upon him/her
Power must exercise that power personally, unless there has been a valid delegation of the power in question. CC considered applicability of this principle to Pres’s const powers in President of RSA vs SA Rugby Football Union. – Validity of appointment of inquiry into administration of rugby was in issue.

9.8 The President and the Courts
President of the RSA v South African Rugby Football Union, the CC asked if President can be ordered to give evidence in a civil matter in relation to the performance of his official duties. Yes if in interest of justice

9.9 The Cabinet(3)
Sec91 - composition of the Cabinet, and the appointment of Cabinet members other than the President.

Accountability
92(1) D. President & Ministers responsible for powers & functions of the executive assigned to them by the President. 92(2) members of the Cabinet are accountable, individually and collectively, to Parliament for the exercise of their powers and the performance of their functions. 92(2)

Collective accountability
Cabinet `act in union to the outside world and carry joint responsibility before Parliament for the way in which each member exercises and performs powers and functions". Ministers who disagree with a particular Cabinet decision must either support it in public or resign.
Individual accountability

Venter = conveys three duties on the minister concerned:

- **explain** to Parliament what happens in his or her
- **Acknowledge** that something has gone wrong in the department & see mistake is **rectified**.
- **resign** if the situation is sufficiently serious if:
  - minister is personally responsible for something that has gone wrong, or
  - minister is vicariously responsible for the actions of officials in his/her department, or
  - minister has been guilty of immoral personal behaviour

**Can a minister be forced to resign?**

Parliament no power to dismiss a minister BUT, can put moral and political pressure on a minister to resign.
President likely to dismiss a minister if minister is an embarrassment to the rest of the Cabinet.

**9.10 Control Over The Executive (4)**

**9.10.1 Parliamentary control**

The following types of parliamentary control over the executive are currently in place:

- **Individual and collective ministerial accountability**
- **Question** time in Parliament, members may put questions to ministers on any aspect their powers and functions.
- Short debates with ministers on particular aspects of their responsibilities.
- **Parliamentary committees** often investigate and report on the activities of the executive.
- **101(4) tabling in and approval** by Parliament of subordinate legislation - proclamations / regulations
- Parliament authorise **raising of taxes and the spending of public funds by the executive**.
- **89 removal** of the President from office by the NA.
- **102 adoption of motions of no confidence** in the President, Cabinet excluding the President

**Note:**
The President, is **not a member of Parliament** (see s 87: when elected, the President ceases to be a member of the NA).
The President, as head of the Cabinet (s 91(1)), is accountable to Parliament for the exercise of his powers (s 92).

**9.10.2 Judicial control**

Executive is bound by CC as the supreme law, and conduct which is inconsistent with the Constitution is invalid

**6 roles of the court to make sure the executive respect and observe the Constitution.**

1. The Bill of Rights - executive and state administration may limit rights in the Bill of Rights only into general application, to be reasonable, justifiable in an open and democratic society based on human dignity, equality and freedom (s 36).
   Bill of Rights tries to prevent the executive from abusing human rights during a state of emergency (s 37).
2. Apartheid years, power of courts to inquire on the validity of executive & administrative conduct was often very limited by ouster clause – don’t exist now cause. Sec 34 guarantees right to have any dispute resolved by the application of law decided in fair public hearing before a court or another independent and impartial tribunal or forum. Sec 34 & 33(1) ban these clauses. The courts can therefore inquire into the validity of any executive action.
3. The inclusion in the Bill of Rights of the right of access to information (s 32) and the right to just administrative action (s 33) is meant to ensure the accountability and openness of executive organs of State.
4. CC lays down certain procedural requirements for the validity of the President’s action. If President fails to consult another functionary when needed, or if an executive decision taken into legislation not in writing
5. Executive organs to respect the doctrine of separation of powers can’t usurp the functions of legislature or compromise the independence of the courts.
6. Executive organs in national sphere to respect the CC status, institutions, powers and functions of government in the provincial and local spheres.

**9.10.3 Control by other institutions**

CC empowers a number of other institutions to investigate, criticise and report on the activities of the executive.

- Public Protector + Auditor-General + Commissions of inquiry + Special Investigating Units + Media + General public

**NB: NOTE FOR EXAM** = Do not confuse prerogatives with parliamentary privileges.
**Study Unit 10: Judicial Authority**

### Separation of powers:
- trias politicas doctrine 1996 Constitutional dispensation;
- doctrine, the judiciary constitutes the third branch of government or organ of State;
- Legislature and the executive are the other two branches of government.

<table>
<thead>
<tr>
<th><strong>165 Judicial authority</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) The judicial authority of the Republic is vested in the courts.</td>
</tr>
<tr>
<td>(2) Courts are independent + subject to Constitution to apply impartially and without fear, favour or prejudice.</td>
</tr>
<tr>
<td>(3) No person or organ of state may interfere with the functioning of the courts.</td>
</tr>
<tr>
<td>(4) Organs of state to protect courts ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.</td>
</tr>
<tr>
<td>(5) Order/decision of court - binds all persons and organs of state</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>166 Judicial system</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>The courts are-</td>
</tr>
<tr>
<td>(a) the Constitutional Court;</td>
</tr>
<tr>
<td>(b) the Supreme Court of Appeal;</td>
</tr>
<tr>
<td>(c) the High Courts;</td>
</tr>
<tr>
<td>(d) the Magistrates’ Courts; and</td>
</tr>
<tr>
<td>(e) any other court – maintenance court, divorce court, labour court, tax court.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>167 CC</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) CC - Chief Justice of SA, Deputy Chief Justice and nine other judges.</td>
</tr>
<tr>
<td>(2) eight judges.</td>
</tr>
<tr>
<td>(3) The Constitutional Court-</td>
</tr>
<tr>
<td>(a) highest court in all constitutional matters;</td>
</tr>
<tr>
<td>(b) only constitutional matters, issues on constitutional matters;</td>
</tr>
<tr>
<td>(c) final say if matter is a constitutional matter</td>
</tr>
<tr>
<td>(4) Only the constitutional Court may-</td>
</tr>
<tr>
<td>(a) decide disputes between organs of state in the national/provincial sphere on constitutional status, powers or functions</td>
</tr>
<tr>
<td>(b) decide on the constitutionality of any parliamentary or provincial Bill</td>
</tr>
<tr>
<td>(c) decide applications envisaged in section 80 or 122;</td>
</tr>
<tr>
<td>(d) decide on the constitutionality of any amendment to the Constitution;</td>
</tr>
<tr>
<td>(e) decide if Parliament/President failed to fulfil obligation;</td>
</tr>
<tr>
<td>(f) certify a provincial constitution in terms of section 144.</td>
</tr>
<tr>
<td>(5) CC makes the final decision on Act of Parliament is constitutional/confirm invalidity made by SCA, HC</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>168 SCA</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) The SCA consists of a President, a Deputy President and the number of judge.</td>
</tr>
<tr>
<td>(2) Matters decided by the number of judges determined in terms of an Act of Parliament.</td>
</tr>
<tr>
<td>(3) The SCA may decide appeals in any matter.highest court of appeal except in CC, decide only-</td>
</tr>
<tr>
<td>(a) appeals;</td>
</tr>
<tr>
<td>(b) issues connected with appeals; and</td>
</tr>
<tr>
<td>(c) any other matter that may be referred to it in circumstances defined by an Act of Parliament.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>169 HC</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>A HC may decide-</td>
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<tr>
<td>(a) any constitutional matter except a matter that-</td>
</tr>
<tr>
<td>(i) only the CC may decide; or</td>
</tr>
<tr>
<td>(ii) if assigned by an Act of Parliament to another court</td>
</tr>
<tr>
<td>(b) any matter not assigned to another court by an Act of Parliament.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>170 MC + others</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>MC decide any matter determined by an Act of Parliament. Lower status than HC – can’t enquire into or rule on the constitutionality of any legislation or any conduct of the President.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>174 Appointment of judicial officers</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) Any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer. Any person to be appointed to the CC be a SA citizen.</td>
</tr>
<tr>
<td>(2) Judiciary – Racial and Gender - SA to considered when judicial officers are appointed.</td>
</tr>
<tr>
<td>(3) President - head of the national executive = consults with JSC + NA = appoints CJ, DCJ and JSC then appoint the President + Deputy President of SCA</td>
</tr>
<tr>
<td>(4) Other judges of CC appointed by President</td>
</tr>
</tbody>
</table>
Other judicial officers must be appointed in terms of an Act of Parliament – to ensure appointment, promotion, transfer or dismissal of, or disciplinary steps against, these judicial officers take place without favour or prejudice.

Before judicial officers begin to perform their functions, they must take an oath to Schedule 2, that they will uphold and protect the Constitution.

176 Terms of Office

(1) A CC judge holds office for a non-renewable 12 years, or until 70 years

177 (1) Removal

(1) A judge may be removed if
(a) JSC finds that the judge suffers from incapacity, grossly incompetent or guilty of gross misconduct;
(b) NA – removal by resolution + supporting vote of at least 2/3 members.

180 Other matters concerning the administration of justice

National legislation may provide for any matter concerning the administration of justice that is not dealt with in the Constitution, including
(a) training programmes for judicial officers;
(b) procedures for dealing with complaints about judicial officers;
(c) the participation of people other than judicial officers in court decisions.

10.2 Judicial Authority Definition

- JA vested in the courts = responsibility of interpreting, applying and enforcing legal rules
- Adjudication function - solves disputes between people, or between the state and people.

10.3 The Role of the Judiciary under the 1996 Constitution

- Constitutional role of the judiciary has changed fundamentally since 1994
- Judiciary NB role for maintaining and upholding the Constitution.

Functions:
- Constitutional supremacy replaced parliamentary sovereignty = judiciary has power to test that all laws passed by Parliament/Provincial legislatures are in line with the Constitution.
- Judiciary = "watchdog" over executive to ensure the executive adheres to the norms, values and principles set out in the Constitution.
- Judiciary acts as the guardian of the Constitution and the guardian of its ethos and values.

10.4 Structure of the Judicial System

Prior To 1993
- Appellate Division - Highest court of Appeal – provincial and local divisions of the SCA.
- SC of SA = Appellate Division which had provincial and local divisions of the various provinces.
- LC / MC = regional and district courts
- African Courts = Chiefs' and Headmans' Courts

After 1993 = Sec 166 Constitution – new hierarchy into 5 categories of courts = CC, SCA, HC, MG and others created by Act of Parliament

10.5 Jurisdiction of the Courts

Meaning
- Jurisdiction= authority and competence of a court to adjudicate on, determine, or dispose of, a dispute.
- Geographical area, cause of action and amount of claim
  - The Constitutional Court
  - The Supreme Court of Appeal
  - The High Courts
  - The Magistrates' Courts
  - SCA, HC or Court of a similar status to a High Court - make order on constitutionality of an Act of Parliament/Provincial Act or any conduct of the President
10.6 Appointment of Judges (174 NB)

- Need to transform the judiciary from white males to one that represents both race and gender.
- 1993 Constitution: Created Judicial Service Commission (JSC) [Members of the judiciary and legal profession & politicians]. Purpose: To restrict the executive and ensure judicial independence.

178 Judicial Service Commission = NB For exam *****

(1) There is a Judicial Service Commission consisting of-
   (a) Chief Justice - presides at meetings of the Commission;
   (b) President of the Supreme Court of Appeal;
   (c) Judge President designated by the Judges President;
   (d) Cabinet member responsible for the administration of justice
   (e) 2 practising advocates from advocates’ profession appointed by the President;
   (f) 2 practising attorneys from attorneys’ profession appointed by the President;
   (g) 1 teacher of law designated by teachers of law at South African universities;
   (h) 6 from NA, at least 3 must be members of opposition parties represented in the Assembly;
   (i) 4 permanent NCOP member with vote of at least six provinces;
   (j) 4 designated by President as head of the national executive, after consulting NA

- The Judicial Service Commission has the powers +functions assigned to it in the Constitution and national legislation.
- The Judicial Service Commission may determine its own procedure

174 Appointment of judicial officers

Section 174(1) and (2) sets out the considerations that must be taken into account when judicial appointments are being made. These include:
- that the candidate must be a South African citizen
- that the candidate must be a fit and proper person
- that the appointments must reflect the racial and gender composition of South Africa

174(3):
- The President appoints the Chief Justice and Dpty. Chief Justice of the CC after consultation with the JSC and parties leaders of the NA.
- President makes appointment in capacity as head of national executive. (Act together with Cabinet).
- President makes appointment after consultation with JSC. – Not bound but obliged to consult with in good faith.
- the Chief Justice and Deputy Chief Justice (s 174(3))
- the other nine judges of the Constitutional Court (s 174(4))
- four members of the CC must be persons who were judges at the time they were appointed to the Constitutional Court. 174(5)
- judges of the other courts, for example the SCA,HC, the Labour Appeals Court (s 174(6))
- other judicial officers, for example magistrates (s 174(7))

10.7 Judicial Independence

10.7.1 Meaning of judicial independence
- Trias politica Doctrine = firmly embedded in 1996 Const
- Consequences of doctrine = independence of judiciary goes in hand with the separation of powers
- Courts only subject to law – no person/institution interfere with functioning of the court – prevent abuse of power
- CC = General provision – guarantees principle judicial indep & non-interference by organs of state. (s 165)
- CC= Specific provisions on the appointment, salaries, removal & terms of judges
- Ruautenbach distinguishes between PERSONAL & FUNCTIONAL independence of courts

10.7.2 Functional independence (Primarily a consequence of the Separation of Powers Doctrine)
- Way courts operate within the framework of a constitutional state.
- Judicial power may not be usurped by the legislature, the executive / other institutions.
- Judicial officers exercise powers subject to Constitution and not public opinion or majority in Parliament.
- 1950's Parliament attempted to set up a HC of Parliament with powers to set aside the decisions of the courts.
• *Minister of the interior v Harris*: Argued that Parliament was usurping the powers of the courts - Cape Prov. Div. accepted this as did Appellate Div. who state the HC Parliament was not a court of law, merely Parliament in a different disguise.

**Section 165 of the Constitution ** **NB For EXAM **
- Judicial authority is vested in the courts,
- Recognizes the independence of the courts,
- No person/ organ of state may interfere with the functioning of the courts.
- Obliges organs of state to assist, protect, ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.
- Another factor contributing to functional independence is that judicial officers enjoy immunity against civil actions & contempt of court order.

10.7.3 Personal independence/institutional

Personal Independence of judges determined by:-
- **Manner in which they are appointed**
- **Terms of office**: If appointed for fixed, non-renewable period (12 yrs or 70 yrs old)
- **Their security of tenure** – hard to force judge to leave unless voluntary resigns
- **Their conditions of employment** – Politicians should not be in position to determine salaries of judicial officers in an arbitrary manner
- Const seeks to safeguard personal independent of judges in the following ways:-
  1. **JSC appointment** of judges – making it harder for the executive to appoint its own judges
  2. Sec 176 – judges of CC appointed for a non-renewable period of 12 years or retire at the age of 70. Other judges retire at 75 = **security of tenure**
  3. CC makes it hard for executives to dismiss judges into Sec 177 – President remove judge if incapacity, incompetent or gross misconduct and if NA has called for their removal by resolution adopted with support of at 2/3 majority of members.
  4. Sec 176(3) provides that salaries, allowances & other benefits of judicial officers may not be reduced

10.8 Controls over Judicial Bodies (limitations)NB!!!
- Judicial review is NB for checks on the power of the legislature and the executive.
- Controls of judiciary = Fear that control over judicial may put independence of courts at risk, but doesn’t mean judges can’t accountable
- Judges held accountable in the following ways:
  - **Judicial Control** –decisions can be taken on review/appeal
  - **Appointment** – JSC more transparent & instil greater accountability
  - **Removal from Office** – if incapacity, is grossly incompetent / guilty of gross misconduct (sec 177)
  - **Public debate & criticism** – Freedom of speech and press help create environment where judicial decisions subject to public debate & criticism. Helps judges realise their responsibility towards the public.
  - **Civil liability** – normally have immunity from civil action arising from their decisions, but if act *mala fide* will not escape civil liability.

<table>
<thead>
<tr>
<th>Judicial Officers</th>
<th>President (executive)</th>
<th>JSC</th>
<th>National Assembly</th>
<th>Chief Justice</th>
<th>Acts of Parliament</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chief Justice</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
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</tr>
<tr>
<td>Deputy Chief Justice</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>President of SCA</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Deputy President of SCA</td>
<td>X</td>
<td></td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Other 9 Judges of CC</td>
<td>X</td>
<td>Prepares a list</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Other Judges of the other Courts</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>X</td>
</tr>
</tbody>
</table>
SA gov is an example of integrated/cooperative model of federalism. Moving away from the unitary system.

1993/1996 Constitutions recognise degree of provincial autonomy.

Federal characteristics of the Constitution:
- Matters over which provinces have exclusive legislative authority.
- Functional areas over which Parliament & provincial legislatures have concurrent legislative authority.
- Procedures for conflict to be resolved.
- Exclusive authority to implement provincial legislation in that province.
- CC to hear dispute between national & provincial organs of states.
- Recognises authority for provinces to adopt their own constitutions.
- NCOP: Represents the provinces in the national sphere.

Limitations on the autonomy of provinces:
- National legislation will prevail where concurrent legislation and conflict arises.
- National legislation may intervene where province has exclusive authority
- Gov in National Sphere can intervene if province can fulfil ann executive duty
- Provincial has limited power of taxation: property / custom duties. s 228 (1).

"Exclusive" legislative authority: only the provinces have the power to make laws in relation to certain matters, and that the national legislature generally does not have any authority in relation to these matters. (Parliament + provincial legislatures have concurrent legislative authority (s 104(1)(b)(i) read with s 44(1) and Schedule 4).

"Concurrent" legislative authority means that both the national and provincial legislatures may make laws dealing with certain matters.
| **104 Legislative authority of provinces** | (1) Legislative authority of a province vested in provincial legislature, and confers on the provincial legislature the power:
(a) to pass a constitution for its province or to amend any constitution passed by it, in Sections 142 and 143;
(b) to pass legislation for its province with regard to:
(i) any matter within a functional area listed in Schedule 4;
(ii) any matter within a functional area listed in Schedule 5;
(iii) any matter outside functional areas, that’s expressly assigned to the province by national legislation;
(iv) any matter where the Constitution envisages the enactment of provincial legislation; and
(c) to assign any of its legislative powers to a Municipal Council in that province. |
| **Section 125 Executive authority of provinces** | (1) The executive authority of a province is vested in the Premier of that province.
(2) The Premier exercises executive authority + members of the Executive Council, by:
(a) implementing provincial legislation in the province;
(b) implementing all national legislation in functional area in Schedule 4 or 5, except where the Constitution or an Act of Parliament provides otherwise;
(c) administering provincial national legislation outside the functional area in Schedules 4 + 5, the admin which has been assigned to the provincial executive in terms of an Act of Parliament;
(d) developing and implementing provincial policy;
(e) coordinating the functions of the provincial administration and its departments;
(f) preparing and initiating provincial legislation; and
(g) performing any other function assigned to the province by national legislation. |
| **132 Executive Councils** | (1) ECOP = Premier head of Council, + no less than 5, no more than 10 members appointed by the Premier from the members of the provincial legislature.
(2) The Premier of a province appoints the members of the Executive Council, assigns their powers and functions, and may dismiss them. |
| **133 Accountability and responsibilities** | (1) Members of ECOP = responsible for functions of the executive assigned to them by the Premier.
(2) Members of the ECOP = accountable individually to the legislature for powers + functions.
(3) Members of the Executive Council of a province must:
(a) act in the CC and also if a provincial constitution has been passed for the province
(b) provide the legislature with full and regular reports concerning matters under their control. |
| **136 Conduct of members of Executive Councils** | (1) Members of the ECOP must act in accordance with a code of ethics prescribed by national legislation.
(2) Members of the Executive Council of a province may not:
(a) undertake any other paid work;
(b) act inconsistent/ expose to risk of a conflict between official responsibilities + private interests;
(c) use position/ information enrich themselves or improperly benefit any other person. |
| **141 Motions of no confidence** | (1) If a provincial legislature, by vote supported by majority of members, passes a motion of no confidence in the province’s Executive Council excluding Premier, Premier must reconstitute the Council.
(2) If a provincial legislature, by vote supported by a majority of its members, passes a motion of no confidence in the Premier, Premier + other members of the Executive Council must resign. |
| **146 Conflicts between national and provincial legislation** | (1) Conflict between national legislation & provincial legislation in a functional area in Schedule 4.
(2) National legislation that applies uniformly with regard to the country as a whole prevails over provincial legislation if any of the following conditions is met:
(a) National legislation deals with matter that cannot be effectively regulated by individual provincial legislation.
(b) National legislations deals with matter that requires uniformity across the nation by establishing;
(i) norms and standards;
(ii) frameworks or standards;
(iii) national policies.
(c) The national legislation is necessary for-
(i) the maintenance of national security;
(ii) the maintenance of economic unity;
(iii) the protection of the common market or the mobility of goods, services, capital and labour;
(iv) the promotion of economic activities across provincial boundaries; |
(v) the promotion of equal opportunity or equal access to government services; or
(vi) the protection of the environment.

(3) National legislation prevails over provincial legislation if the national legislation is aimed at preventing unreasonable action by a province that-
(a) is prejudicial to the economic, health / security interests of another province / the country.
(b) impedes the implementation of national economic policy.

(4) If dispute on if national legislation, dispute comes before a court for resolution, the court must have due regard to the approval or the rejection of the legislation by the NCOP.

(5) Provincial legislation prevails over national legislation if subsection (2) or (3) does not apply.

(6) Law made into Act of Parliament/Provincial Act prevail only if law has been approved by NCOP.

(7) NCOP no decision in 30 days of 1st sitting after a law was referred, law to be considered for all purposes to have been approved by the Council.

(8) NCOP doesn’t approve a law referred to in subsection (6), must in 30 days of decision, give reasons for not approving the law to the authority that referred the law to it.

### Other conflicts

(1) Conflict between national legislation + provision of a provincial constitution with regard to-
(a) matter concerning which this CC = national legislation prevails over the affected provision of the provincial constitution;
(b) national legislative = national legislation prevails over the provision of the provincial constitution; or
(c) Schedule 4 = section 146 applies as if the affected provision of the provincial constitution were provincial legislation referred to in that section.

(2) National legislation in section 44 (2) prevails over provincial legislation for matters in Schedule 5.

### National legislative authority

(1) National legislative authority as vested in Parliament-
(a) confers on the NA the power-
(i) to amend the Constitution;
(ii) to pass legislation into any matter, including matter in a functional area in Schedule 4, excluding, matters in a functional area listed in Schedule 5; and
(iii) to assign any of its legislative powers, except the power to amend the Constitution, to any legislative body in another sphere of government; and
(b) confers on the NCOP the power-
(i) to participate in amending the Constitution in accordance with section 74;
(ii) to pass, into sec 76, legislation regarding a matter in functional area listed in Schedule 4 or sec 76
(iii) to consider, to sec 75, any other legislation passed by the NA

(2) Parliament may intervene, by passing legislation in accordance with section 76 (1), with regard to a matter falling within a functional area listed in Schedule 5, when it is necessary-
(a) to maintain national security;
(b) to maintain economic unity;
(c) to maintain essential national standards;
(d) to establish minimum standards required for the rendering of services; or
(e) to prevent unreasonable action taken by a province that is prejudicial to another

(3) Legislation with regard to a matter that is reasonably necessary for, or incidental to, the effective exercise of a power concerning any matter listed in Schedule 4 is, for all purposes, legislation with regard to a matter listed in Schedule 4.

(4) When exercising its legislative authority; Parliament is bound only by the CC, and must act in accordance with, and within the limits of, the CC.

### Schedule 4

**FUNCTIONAL AREAS OF CONCURRENT NATIONAL AND PROVINCIAL LEGISLATIVE COMPETENCE**

**PART A**
- Administration of indigenous forests, Agriculture, Airports Animal control and diseases
- Casinos, racing, gambling and wagering, excluding lotteries and sports pools
- Consumer protection, Cultural matters
- Disaster management
- Education at all levels, excluding tertiary education, Environment
- Health services, Housing
- Indigenous law and customary law, Industrial promotion
- Language policy + official language - section 6 of the Constitution expressly confer upon the provincial
legislatures legislative competence
- Media services directly controlled or provided by the provincial government, subject to section 192
- Nature conservation, excluding national parks, national botanical gardens and marine resources
- Police, Pollution control, Population development, Property transfer fees
- Provincial public enterprises in respect of the functional areas in this Schedule and Schedule 5
- Public transport, Public works
- Regional planning and development, Road traffic regulation
- Soil conservation
- Tourism, Trade, Traditional leadership
- Urban and rural development
- Vehicle licensing
- Welfare services

PART B
The following local government matters to the extent set out in section 155 (6) (a) and (7):
- Air pollution
- Building regulations
- Child care facilities
- Electricity and gas reticulation
- Firefighting services
- Local tourism
- Municipal airports, Municipal planning, Municipal health services, Municipal public transport
- Municipal public
- Pontoons, ferries, jetties, piers and harbours, excluding reg on Int. & national shipping
- Stormwater management systems in built-up areas
- Trading regulations
- Water and sanitation services

<table>
<thead>
<tr>
<th>Schedule 5</th>
<th>FUNCTIONAL AREAS OF EXCLUSIVE PROVINCIAL LEGISLATIVE COMPETENCE</th>
</tr>
</thead>
<tbody>
<tr>
<td>PART A</td>
<td>Abattoirs</td>
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<tr>
<td></td>
<td>Ambulance services</td>
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<td></td>
<td>Archives other than national archives</td>
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<td>Libraries other than national libraries</td>
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<td>Liquor licences</td>
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<td>Museums other than national museums</td>
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<td></td>
<td>Provincial planning</td>
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<td>Provincial cultural matters</td>
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<td>Provincial recreation and amenities</td>
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<td>Provincial sport</td>
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<td>Provincial roads and traffic</td>
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<td>Veterinary services, including regulation of the profession</td>
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<tr>
<td>PART B:</td>
<td>local government matters to the extent set out for provinces in section 155 (6) (a) + (7):</td>
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<tr>
<td></td>
<td>Beaches, Billboards</td>
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<td>Cemeteries, funeral parlours and crematoria</td>
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<td></td>
<td>Cleansing, Control of public nuisances, Control of undertakings that sell liquor to the public</td>
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<td></td>
<td>Facilities for the accommodation, care and burial of animals</td>
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<td></td>
<td>Fencing and fences</td>
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<tr>
<td></td>
<td>Licensing of dogs, Licensing sell food to the public, Local amenities, Local sport facilities</td>
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<tr>
<td></td>
<td>Markets, Municipal abattoirs, Municipal parks +recreation, Municipal roads</td>
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<tr>
<td></td>
<td>Noise pollution, Pounds, Public places</td>
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<td></td>
<td>Refuse removal, refuse dumps +solid waste disposal</td>
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<td></td>
<td>Street trading Street lighting</td>
</tr>
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<td></td>
<td>Traffic and parking</td>
</tr>
</tbody>
</table>
11.1 Legislative Authority @ Provincial Level
Legislative authority - sec 104
Composition, election, membership, functioning – 105 -124

Activity 60
Study section 104 and then answer the following questions:
(1) In which body is the legislative authority of a province vested?  (1)104(1)
(2) Discuss the legislative powers of the provincial legislatures (6)104a&b
(3) Mention two functional areas in which a provincial legislature has exclusive legislative authority, and two areas in which it shares concurrent legislative authority with Parliament. (4) Schedule 4/5

11.2 Executive Authority
• Executive authority is the power to execute and enforce legal rules.

11.3 Provincial Constitutions
142: Provincial legislature can adopt their own constitutions if agreement of 2/3 majority by its members.

11.4 Legislative Conflicts NNNBBB
Provincial legislatures have legislative authority to pass legislation for its province with regard to;
• Schedule 4 matters; (Concurrent power)
• Schedule 5 matters; (exclusive power)
• Matter expressly assigned to the province by national legislation;
• Matters for which a provision of the Constitution envisages the enactment of provincial legislation.

What happens if the provincial legislature AND Parliament pass legislation on the same subject matter? Which Act will override the other?

IT IS INCORRECT TO SAY THAT AN ACT OF PARLIAMENT WILL ALWAYS PREVAIL OVER AN ACT OF THE PROVINCIAL LEGISLATURE.
11.4.1 Conflict in the event of Schedule 5 matters

- Conflict Schedule 5 matters: s 44(2) is applicable

When does national legislation prevail over provincial legislation in a Schedule 5 matter?

147(2) National legislation referred to in 44(2) prevails over provincial legislation.

- Normally there will not be conflict of Schedule 5 matters as provincial legislature has exclusive power.
- However, Parliament may pass legislature when is it necessary ito section 44 (2)
  - Maintain national security;
  - Maintain economic unity;
  - Maintain essential national standards;
  - Establish minimum standards required for the rendering of services;
  - Prevent unreasonable action taken by a province which is prejudicial to the interest of the provinces / the country.

11.4.2 Legislative conflicts relating to Schedule 4 matters

- Conflict Schedule 4 matters: s 146(2) is applicable

When does national legislation prevail over provincial legislation in a Schedule 4 matter?

146(2): National legislation applies if any one of the following conditions are met;

- National legislation deals with matter that cannot be effectively regulated by individual province.
- The national legislations deals with matter that requires uniformity across the nation by establishing;
  1. Norms & standards;
  2. Frameworks;
  3. National policies.
- The national legislation is necessary for;
  1. Maintenance of national security;
  2. Maintenance of economic security;
  3. Protection of common market i.r.o. mobility of goods, services, capital & labour.
  4. Promotion of economic activities across provincial boundaries;
  5. Promotion of equal opportunity/access to government services;
  6. Protection of the environment.
- If the national legislation is aimed at preventing unreasonable action by a province that;
  1. Is prejudicial to the economic, health / security interests of another province /the country.
  2. Impedes the implementation of national economic policy.

146(3): national legislation prevails over provincial legislation if national legislation is aimed at preventing unreasonable action that is:

  1. Prejudicial to another province/the country.
  2. If it impedes the implementation of national policy.

When does provincial legislation prevail over national legislation in a Schedule 4 matter? - Provincial legislation therefore prevails if s 146(2)/(3) does not apply

Schedules 4 + 5 similar: 4 = ``road traffic regulation'' and 5 = ``provincial roads and traffic'' = problems of interpretation.

Conflicts between national legislation & provincial constitution:

147(1): If the conflict relates to:

- A matter of which the Constitution specifically requires/envisages national legislation;
- National legislative intervention i.t.o. s 44(2), the national prevails over a provision in the provincial constitution.
- A matter in a functional area listed in Schedule 4, s 146, applies as if the affected provision was in fact, provincial legislation referred to in that section.
The national legislation referred to in section 44 (2) prevails over provincial legislation as far as matters included within the functional areas listed in Schedule 5 are concerned.

**Conflicts that cannot be resolved:**

148: If a conflict cannot be resolved by a court, the national legislation prevails.

**Status of legislation that does not prevail:** (What happens to legislation that doesn’t prevail?)

149: Legislation not prevailing in the event of a conflict is not invalidated, but becomes inoperative for as long as the conflict remains.

**Interpretation of conflicts:** (How do the courts deal with legislative conflict?)

150 When a court considers an apparent conflict between national and provincial legislation, or between national legislation and a provincial constitution, a reasonable interpretation of the legislation or Constitution that avoids a conflict must be preferred over any alternative interpretation that results in a conflict.

**LEGISLATIVE CONFLICT RELATES TO LEGISLATION ALREADY ENACTED, AND NOT TO BILLS THAT STILL NEED TO BE PASSED BY PARLIAMENT.**
### LOCAL GOVERNMENT

#### 151 Status of municipalities

1. Local sphere of gov consists of municipalities, established for whole of the Republic.
2. Executive & legislative authority of municipality vested in its Municipal Council.
3. Municipality right to govern local affairs of its community, subject to national & provincial.
4. National/provincial gov can’t compromise/obstruct a municipality's ability or right to exercise its powers or perform its functions.

#### 152 Objects of local government

1. The objects of local government are to-
   - (a) provide democratic + accountable government for local communities;
   - (b) ensure services to communities in a sustainable manner;
   - (c) promote social and economic development;
   - (d) promote a safe and healthy environment; and
   - (e) encourage involvement of communities in matters of local government.
2. Municipality try reach its financial & admin to achieve objects set in subsection (1).

#### 153 Developmental duties of municipalities

A municipality must-
- (a) structure, manage its admin + budgeting to promote social & economic development.
- (b) participate in national and provincial development programmes.

#### 154 Municipalities in co-operative government

1. National government + provincial governments to support capacity of municipalities to manage their own affairs & exercise their powers to perform their functions.

#### 156 Powers and functions of municipalities

1. A municipality has executive authority, and has the right to administer-
   - (a) local government matters listed in Part B of Schedule 4 & 5
   - (b) any other matter assigned to it by national or provincial legislation.
2. Municipality may make by-laws
3. Subject to section 151 (4), a by-law that conflicts with national/provincial legislation is invalid.
4. The national & provincial governments assign a municipality, by agreement administration matter listed in Part A of Schedule 4/Part A of Schedule 5 which relates to local government, if-
   - (a) that matter would most effectively be administered locally; and
   - (b) the municipality has the capacity to administer it.
5. A municipality has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions.

#### 159 Terms of Municipal Councils

1. Municipal Council may more than five years
2. M.C = dissolved into national legislation/expires - election 90 days from dissolved or expired.
3. M.C = Competent to function until newly elected Council has been declared elected.

#### 160 Internal procedures

1. A Municipal Council-
   - (a) decisions on powers & performance of functions of the municipality;
   - (b) must elect its chairperson;
   - (c) elect an executive committee, subject to national legislation; and
   - (d) employ personnel as needed for the effective performance of its functions.
2. The following functions may not be delegated by a Municipal Council:
   - (a) The passing of by-laws;
   - (b) the approval of budgets;
   - (c) the imposition of rates and other taxes, levies and duties; and
   - (d) the raising of loans.
3. (a) Majority of the members of a M.C must be present before a vote may be taken on any matter.
   (b) Decision taken by a M.C with a supporting vote of a majority of its members.
   (c) other questions of M.C are decided by a majority of the votes cast.
4. No by-law may be passed by a Municipal Council unless-
   - (a) all the members of the Council have been given reasonable notice; and
   - (b) the proposed by-law has been published for public comment.
5. National legislation may provide criteria for determining-
   - (a) the size of a Municipal Council;
| (b) | if Municipal Councils may elect executive committee/other committees |
| (c) | the size of the executive committee/other committees |
| (6) | A Municipal Council may make by-laws which prescribe rules and orders for- |
| (a) | its internal arrangements; |
| (b) | its business and proceedings; and |
| (c) | establishment/composition/procedures/powers & functions of committees. |
| (7) | M.C conduct its business in an open manner |
| (8) | Members of a M.C entitled to participate in proceedings of its committees in a manner that- |
| (a) | allows parties & interests reflected in Council to be fairly represented; |
| (b) | is consistent with democracy; and |
| (c) | may be regulated by national legislation. |

### 162 Publication of municipal by-laws

| (1) | by-law may enforced only after published in the official gazette of the relevant province. |
| (2) | Provincial Official Gazette to publish municipal by-law on request of municipality. |
| (3) | Municipal by-laws must be accessible to the public. |

### 12.1 Introduction

- **3 rd sphere of government - local government.**
- Local sphere of government is regarded as the cornerstone of modern democracies

### 12.2 Local Government In Historical Context

- B4 93 - apartheid policies at local level = fragmented, dysfunctional system of local gov, with division btwn developed, well serviced in white areas, and underdeveloped, underserviced in black areas
- Mid 80’s - apartheid in deep crisis, negotiations btwn white and black = 3 principle outputs aimed at restructuring local gov.:
  - Agreement of Local Government Finances and Services,
  - the Local Government Transition Act
  - Interim Constitution of South Africa.

### 12.3 Importance Of Participatory Government NNNB

- Sri Lanka, Belgium, Germany, Australia – try improving democratic decision-making mechanisms
- Brynard ID reason why public input is NB if it affects the pubic:
  - facilitates access to information about local conditions, needs, desires, and attitudes
  - Public input give people who will be affect to express their views on the proposed policies.
  - Public input entails educating the public, thus ensures they become committed to a policy/
  - This inputs also ensures the democratisation of the planning process
  - Balances demands of central control vs the requirements of local government and administration, as the more distant, the more likely it is that government projects, programmes, and policies will be unpopular.
  - Participation functions as a watchdog – openness decreased corruption

Problems: language problems, difference in attitudes and expectations, and mutual feelings of distrust, suspicion and resentment.

**Organised local government plays a consultative role in the following forums:**

1. 10 Part-time representatives from different municipal categories participate in NCOP proceedings. This allows local government to have a small say in the national legislative process. **s 163 with 67.**
2. 2 Nominees may serve on the Financial & Fiscal Commission – opportunity to address equitable division of nationally raised revenue. **s 163 with 221.**
3. Section 4 of Organised Local Government Act allows for consultation between the SA Local Government Assoc. which promotes and protects the interests of local government. **s 163 with 154 (2).**

- Capacity of any sphere of gov to function in such interactive manner depends on following:-
  - Legal allocation of power
  - Financial & managerial capacity
  - Interpretation of powers of other spheres of gov
  - Extent to which local gov actions are controlled & regulated
“Autonomous local government” versus “administrative handmaiden”

- Local government is an autonomous sphere of government
- 156 (3), which states that local government cannot legislate in conflict with national and provincial legislation.
- 156 (4), national/provincial government must assign to local government (Schedule 4 and 5, part A) those local government matters that would be most effectively administered locally, and where the local government structure has the capacity to administer it.
- 156 (5), which gives the municipalities any power reasonably necessary or incidental to the effective performance of their functions.

Establishment of Municipalities

- Sec 151(1) municipalities must be created for the entire Republic, different categories for different regions

Composition and Election of Municipal Councils

Sec 157: Composition and election of municipal councils - either be held in terms of a list system or a proportional electoral system combined with ward representation.