

1. **Sources** – places to find legal rules, principles and values governing a branch of the law
 - 1.1. Constitution
 - 1.1.1. contains most of rules governing relationship between state organs *inter se* and state and individuals
 - 1.1.2. section 2 – supreme authority
 - 1.1.2.1. standard by which bearers of state authority must exercise authority
 - 1.1.2.2. prescription of limits on state authority
 - 1.1.2.3. prescription of penalties for improper exercise of state authority
 - 1.2. Legislation/statutes
 - 1.2.1. binding source of law is authoritative
 - 1.2.2. legislation is second source in hierarchy of binding sources
 - 1.2.3. because constitution's provisions can't be repealed or amended, it must be capable of growth and development
 - 1.2.4. sections of the constitution state that parliament must enact laws to give effect
 - 1.3. Common law
 - 1.3.1. no longer an important source of constitutional law (since 1996)
 - 1.3.2. courts required to develop common law in line with constitution
 - 1.4. Case law (*stare decisis*)
 - 1.5. International law
 - 1.5.1. court required to consider international law in determination of constitutional issues (39(1))
 - 1.5.2. important to bill of rights
 - 1.6. other sources – merely persuasive
 - 1.6.1. academic writing
 - 1.6.2. policy documents

- 1.6.2.1. green paper – consultative
- 1.6.2.2. white paper – final document (blueprint of government policy)
- 1.6.3. reports by “*state institutions supporting constitutional democracy*” such as public protector, human rights commission, etc.
- 1.6.4. foreign law – 39(1)(c) allows consideration of foreign law

2. **Birth of the constitution**

Principles –

- 2.1. constitutional democracy protected by independent judiciary
- 2.2. government founded on openness, accountability and equality
- 2.3. separation of powers
- 2.4. appropriate checks on governmental power
- 2.5. enjoyment of universally accepted fundamental rights
- 2.6. sovereign state structured at national, provincial and local levels
- 2.7. recognition of status, institution and role of traditional leadership
- 2.8. legal system ensuring equality of all persons before the law
- 2.9. representative government
- 2.10. protection of text from amendment except by special processes
- 2.11. provision for fiscal allocations to provincial and local governments
- 2.12. collective bargaining
- 2.13. non-partisan public service
- 2.14. security forces

3. **Concepts**

- 3.1. Section 1: SA is a sovereign democratic state founded on values of human dignity, non-racialism, non-sexism, supremacy of constitution, rule of law and universal adult suffrage
- 3.2. Section 2: constitution is supreme law of SA

- 3.3. Section 7: bill of rights is cornerstone, enshrining rights of all people, affirming values of dignity, equality and freedom, which state must respect, protect and promote (except as limited in section 36)
- 3.4. Section 8(1): bill of rights applies to all law, legislature, executive, judiciary and all organs of state
- 3.5. Section 172(1)(a): any law or conduct inconsistent with constitution is invalid to extent of inconsistency
- 3.6. Constitutional law: aggregate of binding rules relating to distribution and exercise of state authority
- 3.7. Public law regulates exercise of state authority in relationships of inequality (where state acts with state authority)
- 3.8. blurring of public and private law
 - 3.8.1. modern state is involved in private law (employment, landlord-tenant, spouses)
 - 3.8.2. bill of rights applicable between private parties
 - 3.8.3. semi-public corporations like Transnet, Telcom
- 3.9. ACTIVITY 7: s239 “organ of state” is department of state or administration in national, provincial or local govt or other functionary or institution exercising power/functioning in terms of constitution or exercising public power in terms of legislation (but not judicial officer) – UNISA expels by UNISA Act, private school does not act through in terms of legislation
- 3.10. Admin law deals with organisation, powers and actions of state administration, whereas constitutional is formulation of policy
- 3.11. Flexible vs. inflexible
 - 3.11.1. Flexible enjoys same status as other laws, requiring no special procedure of amendment
 - 3.11.2. Inflexible enjoys superior status and requires a special amendment procedure
 - 3.11.3. 1961, 1983 were flexible
 - 3.11.4. Now inflexible – at least 2/3 majority of National Assembly, plus six provinces in certain cases (such as chapter 2) and even 75% of National Assembly for Section 1

- 3.12. Supreme vs. not supreme
 - 3.12.1. Supreme – ranks above other laws, inconsistent laws are invalid, usually inflexible
 - 3.12.2. Not supreme – no special status, laws can be inconsistent, courts cannot question validity, usually flexible (Parliament is supreme)
- 3.13. Written vs. unwritten
- 3.14. Autochthonous vs. allochthonous
 - 3.14.1. autochthonous said to be indigenous, rather than borrowed
 - 3.14.2. can also define a reactive, resolving past problems (like SA), continuous and indigenous, like Netherlands, or superimposed, where content unrelated to history
 - 3.14.3. SA autochthonous, but drafters drew upon experience of other countries and were influenced by international law
- 3.15. State: requirements of statehood
 - 3.15.1. geographically defined territory
 - 3.15.2. community of people within territory
 - 3.15.3. legal order to which community is subject
 - 3.15.4. organised system of govt to uphold legal order
 - 3.15.5. measure of separate political identity if no sovereign status
- 3.16. Government: temporary bearer of state authority (primarily executive function, having a particular bearing on formation and implementation of policy) or tangible machinery of state
- 3.17. Sovereignty: mostly international law concept referring to autonomous and independent states

4. **Concepts continued**

- 4.1. Constitutionalism: government in accordance with the constitution
 - 4.1.1. state includes protection of fundamental rights, independent judiciary, separation of powers, general adult suffrage and regular multiparty elections

- 4.1.2. usually associated with supreme constitution (but not always, e.g. UK)
- 4.2. Rule of law: law reigns supreme constitutionalism is related to Anglo-American concept of rule of law and continental *Rechtsstaat* concept
- 4.3. *Rechtsstaat* principle: government by law, not by force
 - 4.3.1. Formal – compliance with formal criteria, such as due process
 - 4.3.2. Material – state authority is bound to higher legal values, embodied in constitutional, and exercise of state authority must result in a materially just legal condition
 - 4.3.3. SA is formal and material *Rechtsstaat*
- 4.4. Mechanisms to control governmental powers:
 - 4.4.1. bill of rights
 - 4.4.2. constitution subject to judicial control
 - 4.4.3. democratic election of parliament
 - 4.4.4. collective and individual responsibility of ministers to parliament
 - 4.4.5. separation of powers
 - 4.4.6. independent judiciary
 - 4.4.7. independent institutions like public protector, hrc, commission on gender equality, auditor-general, etc.
 - 4.4.8. demarcation of powers between national/provincial
 - 4.4.9. civilian control of military
- 4.5. Democracy: government by the people, where right to govern not vested in single person or class of persons, but in people as a whole
 - 4.5.1. Forms:
 - 4.5.1.1. direct – all major decisions taken by people themselves (for small democracies)
 - 4.5.1.2. representative – citizens elect representatives, who express will of people

4.5.2. Common to both forms:

4.5.2.1. free and regular elections

4.5.2.2. multiparty system

4.5.2.3. universal suffrage

4.5.2.4. protection of minorities

4.5.2.5. accountability of govt to electorate

4.5.3. Opposite is dictatorship

4.5.4. Constitutional democracy – representatives are bound to observe norms and values in Constitution

4.6. Parliamentary and presidential systems

4.6.1. Presidential:

4.6.1.1. head of govt is head of state

4.6.1.2. head of govt is not member of legislature and not responsible to it

4.6.1.3. elected directly by people

4.6.2. Parliamentary

4.6.2.1. head of govt is not head of state

4.6.2.2. less separation of powers between executive and legislature

4.6.2.3. head of govt is leader of party with majority in parliament

4.6.3. SA is both – president is head of govt and state, but president elected by parliament

5. **Separation of Powers (*trias politica*)/Checks and Balances**

5.1. **Constitutional sections

5.1.1. s43: legislative authority national – parliament, provincial – provincial legislatures, local – municipal councils

- 5.1.2. s85: president (executive authority), exercises authority together with Cabinet by:
 - 5.1.2.1. implementing national legislation
 - 5.1.2.2. developing and implementing national policy
 - 5.1.2.3. coordinating functions of state depts and administrations
 - 5.1.2.4. preparing and initiating legislation
 - 5.1.2.5. other function in constitution or legislation
- 5.1.3. s125: premier (executive authority of province)
- 5.1.4. S165: judicial authority (courts)
 - 5.1.4.1. independent, subject only to constitution and law
 - 5.1.4.2. no person or organ of state may interfere
 - 5.1.4.3. organs of state must assist and protect courts
 - 5.1.4.4. order or decision by a court bind all persons and organs of state to which applies
- 5.2. Separation of powers
 - 5.2.1. legislative authority – to create, amend and repeal legal rules
 - 5.2.2. executive authority – to execute and enforce legal rules
 - 5.2.3. judicial authority – to interpret legal rules and apply to concrete situation
 - 5.2.4. *Montesquieu*: there can be no political freedom where one person makes laws, implements them and judges when they are contravened
- 5.3. Separation of personnel and checks and balances
 - 5.3.1. one person or organ cannot simultaneously perform in more than one branch
 - 5.3.2. checks and balances makes each branch subject to some influence and control of others (i.e. US pres can veto legislation)

- 5.4. *De Lange* – allowing convenor of creditors (an administrator) to commit uncooperative witness to prison not constitutional because officers of executive branch not judicial/separation of powers problem
- 5.5. Separation of Powers entrenched in SA constitution
 - 5.5.1. Not express, but intent to establish constitutional state because C is supreme, contains justiciable BOR, requirements for valid administrative action and requires judges to regard C values
 - 5.5.2. C court has shown will not tolerate unconstitutional usurpation of one branch's functions by another
 - 5.5.3. overlap of executive and legislative ensures accountability of executive
 - 5.5.4. power of judicial review over legislation or administrative action
- 5.6. *Executive Council of WC Legislatures v President*: President couldn't make proclamations amending Local Government Transaction Act because violated separation of powers
- 5.7. Judicial Review and Democracy
 - 5.7.1. representation government power being exercised by representatives of the people on their behalf and with their consent
 - 5.7.2. C checks like separation of powers, freedom of press, information and association prevent a group from becoming too strong and promotes democratic debate and competition
 - 5.7.3. SA is representative democracy and constitutional democracy... representatives may not make laws that violate C
 - 5.7.4. Judicial review
 - 5.7.4.1. judiciary, which is not elected, can declare legislation invalid
 - 5.7.4.2. does this violate democracy?
 - 5.7.4.2.1. C was itself made by representatives
 - 5.7.4.2.2. democracy presupposes vigorous political debate, to which judicial review contributes

- 5.7.4.2.3. judges can invalidate law in terms of constitution, but can't substitute their own views (don't make a new law)
- 5.8. *Trias politica* means the branches – exec, legis, judiciary, whereas spheres are principle of cooperative govt – local, national and provincial
- 5.9. *Minister of health v Treatment Action Campaign*, judicial review of state policy in respect of Nevirapine... was state policy giving effect to its constitutional obligations? Insofar as was intrusion into executive, such was mandated by C. Policy constituted breach of 27(2)
- 5.10. Separation of powers becomes problematic when court must decide its own function, as approach to bill of rights has serious implications (should court regulate economy or distribute resources?)

6. Cooperative Government

- 6.1. International sense is a sovereign state with constituent parts enjoying autonomy, whereas in domestic sense is a constitutional arrangement allowing for territorial diversity in state structure
- 6.2. Another way in which power distributed by C – cooperative govt espouses political flexibility, negotiation, compromise and less reliance on rigid separation of powers. Requires synthesis and coordination of functions and endeavors
- 6.3. S40: spheres are distinctive, interdependent and interrelated, and must conduct activities in accordance with C
- 6.4. s41: how spheres must conduct themselves, Act of Parliament must promote intergovernmental relations, disputes must exhaust all mechanism before approaching courts, and court may refer back to organs of state if not exhausted
- 6.5. Unitary v Federal
 - 6.5.1. Unitary: one centre of authority, power concentrated in national sphere (France, Namibia, Zim) (advantages – conducive to central planning, helps with economic crises, homogeneity in economic and legal affairs, less costly, administratively and economically efficient)
 - 6.5.2. Federal: state power and income divided between 2 spheres, regions are given wider powers, national regulates defence, tax and custom excise, disputes usually resolved by an arbiter (advantages – minimises tyranny, efficient where

large land area, allows for social and economic experimentation, most appropriate for heterogenous society

6.5.2.1. Divided (classical) (US, Canada): separate sets of political institutions which interact through bargaining, few concurrent responsibilities (but sometimes exacerbates differences and makes it difficult to achieve common purpose)

6.5.2.2. Integrated (Germany): many concurrent/shared responsibilities, revenues/taxes shared, intergovernmental institutions charged with cooperation

6.6. SA C model

6.6.1. closer to integrated form, with bottom-up approach (those with most detailed knowledge make decisions) (principle of subsidiarity)

6.6.2. National govt v central govt (ch3 of C)

6.6.3. Spheres v levels – spheres more like partners than levels, which are hierarchical

6.6.4. Relationship between nat'l and provincial: (schedules 4 and 5)

6.6.4.1. in certain areas both competent to make law, need cooperation to avoid duplication/conflict, need to determine which admin to implement

6.6.4.2. provinces have limited revenue powers, but get equitable share

6.6.4.3. structures and institutions to promote intergovernmental relations

6.6.4.4. dispute resolution

6.6.4.5. National Council of Provinces, ensuring interests of provinces

6.6.4.6. somewhat centralised in that national govt coordinates activities and initiatives

6.7. Cooperative govt

6.7.1. “distinctive nature of govt” means that division between spheres must be respected by

6.7.1.1. all adhering to C status of other spheres

- 6.7.1.2. each can only exercise powers given in C
- 6.7.1.3. each respects institutional integrity and functions of others
- 6.7.1.4. sphere can't legislate on matters within competence of Parliament
- 6.7.1.5. but interdependent and interrelated, meaning that they must consult, coordinate and conduct in mutual support

6.8. Provincial autonomy

6.8.1. integrated model better for SA because: provinces have never been independent like in the US, institutional capacity of provinces can be developed within intergovernmental cooperation, and local governments were also splintered and racially fragmented in past, nat'l govt must support and strengthen provinces and municipalities

6.8.2. courts' attitudes:

6.8.2.1. *Certification*: C court said Assembly was free to choose cooperative gov't, that intergovernmental cooperation was implicit in system where power allocated to different levels, and reject contention that provincial powers too diminished (balanced by reciprocal reduction in national power)

6.8.2.2. *In re national Education Policy Bill*: court rejected argument that bill requiring MEC for education in each province to submit a plan to minister of education to remedy non-compliance with nat'l policy or C on standards of education provision, deliver or performance

6.8.2.2.1. cooperation applies to policy, so bill requiring province to cooperate, provide info and formulate plans where reasonably required are relevant

6.8.2.2.2. C allows province to address shortfalls in standards itself, and to suggest remedial action

6.9. *Premier of the Province of the Western Cape v President of the Republic of SA*

6.9.1. Facts: President amended Public Service Act 103 of 1994 to move provincial heads of departments out of the control of the provincial director general. Western Cape Premier said that it is part of the province's executive power to structure its own administration so the legislation infringed upon this power.

- 6.9.2. The court had to determine whether legislation violated section 41 of C
- 6.9.3. The court says distinctiveness lies in provision for different elected governments, whereas interdependence and interrelatedness from from founding provision that SA is one sovereign democratic state, and in C structure that allows framework provisions to be set by national sphere
- 6.9.4. s41(g) is concerned with how power exercised, not whether exists (which is determined by C), and in this case relevant that the C power to structure public service vests with national sphere. Aim of s appears to be to keep one sphere from exercising power in a way that undermines another sphere
- 6.9.5. Is C for P to assign functions to provincial director-generals
- 6.9.6. Is C for Pres, at request of Premiere, to establish or abolish a provincial dept
- 6.9.7. Not C for minister to have power to transfer functions from provincial government to national government
- 6.10. Establishing Institutional Framework for Cooperative Government
 - 6.10.1. P hasn't yet adopted comprehensive legislative framework for intergovt relations, but some institutions in place: Nat'l Council of Provs, Financial and Fiscal Commission, and some from before C such as Intergovtal Forum, Technical Intergovtal Committee and MINMECS
 - 6.10.2. P has adopted legislation for cooperation in environmental protection, fiscal, budgetary and financial matters

7. **Legislative Authority – national sphere**

- 7.1. Sections of C
 - 7.1.1. s42 Composition of P: National Assembly and National Council of Provinces. NA elected to represent people, chooses President, provides forum for issues, passes legislation oversees executive action. NCP represents interests of Provs, provides forum of Prov issues. Pres may summon P to extraordinary session at any time. Seat of P is CT, but that can be changed.
 - 7.1.2. S43 Legislative Authority of Republic: of national sphere, is P, of provincial sphere in Prov legis, of local sphere in Muni Councils.
 - 7.1.3. S44 National Legis Authority: vested in P, confers on NA authority: to amend C, pass legislation in Schedule 4, but not encroaching on Schedule 5, to assign

legis powers (except amending C) to legis body in any other sphere. Confers on NPC authority: to participate in amending C, to pass legislation in Schedule 4, consider legislation passed by NS. P must always act within C.

- 7.1.4. S55 Powers of NA: in exercising power NA may consider, pass, amend or reject legis, and initiate or prepare legis except money bills. NA must provide to enure executive organs in national sphere are accountable to it, must oversee exercise of national executive authority and any organ of state.
- 7.1.5. S57 Internal Arrangements of NA: NA may determine, control its internal arrangements, and make rules and orders concerning its business.
- 7.1.6. S58 Privileges: Cabinet Ministers, Dep Ministers and members of NA: have freedom of speech in Assembly and its committees (subject to P's rules), and are not liable to civil and criminal proceedings, arrest, imprisonment or damages for anything said in, produced before or submitted to NA or revealed as a result of foregoing.
- 7.2. Definition of Legis Authority power to enact, amend and repeal rules of law
- 7.3. P as seat of nat'l legis authority in SA: bicameral
 - 7.3.1. better representation in heterogenous society
 - 7.3.2. alleviates workload
 - 7.3.3. encourages thorough consideration of matters
 - 7.3.4. two houses act as check on each other
- 7.4. Functions of P (NA)– more than just law-making
 - 7.4.1. representation of electorate: represent people in national sphere, articulate their interests, serve as communication channel between national govt and electorate
 - 7.4.2. election of Pres
 - 7.4.3. Public consideration of issues: issues debated, such as bills, govt policy, performance of executive authority and state administration discussed. Business conducted in open manner in public. Can only exclude from committee if reasonable.
 - 7.4.4. Pass legislation (bills submitted by committees or individuals) – most important

- 7.4.5. Scrutinise executive action (state spending, state admin, analyses and criticises govt policy)
- 7.4.6. NCP: represent provinces in national sphere, participate in national legis process and public consideration of issues affecting provinces
- 7.5. Elections
 - 7.5.1. right to vote is underlying principle of representative democracy,
 - 7.5.1.1. but is not absolute and C allows imposition of certain qualifications (e.g. age)
 - 7.5.1.2. (*August v Electoral Commission* said unC to deny prisoners right to vote) Also, by omitting to take steps to register prisoners to vote, Commission failed to comply with C obligations.
 - 7.5.1.2.1. In *Minister Home Affairs v Nat'l Inst for Crime Prevention*, C to allow voting for prisoners awaiting sentencing and those because couldn't pay fine, but not for those imprisoned without fine option (had lost liberty in fair trial, gov't communicate to public crime not tolerated)
 - 7.5.1.2.2. limitations on right to vote have to be justifiable in terms of s36
 - 7.5.2. Electoral system is body of rules regulating:
 - 7.5.2.1. the franchise
 - 7.5.2.2. method of voting
 - 7.5.2.3. frequency of elections
 - 7.5.2.4. manner in which votes are converted into number of reps in legislature
 - 7.5.2.5. qualification and nomination of candidates
 - 7.5.2.6. determination and declaration of election results
 - 7.5.3. Electoral system must result in general in proportional representation
 - 7.5.4. Forms of electoral systems:

- 7.5.4.1. Territorial/regional: pre-96 in SA
 - 7.5.4.1.1. geographical units called constituencies
 - 7.5.4.1.2. each constituency elects a single member by majority vote
 - 7.5.4.1.3. may give influence to bigger parties
 - 7.5.4.1.4. constituency demarcation can exacerbate imbalance
 - 7.5.4.1.5. advantages – simple, conducive to strong govt, stronger bond with voter
- 7.5.4.2. Proportional
 - 7.5.4.2.1. used to have list system
 - 7.5.4.2.2. advantages: fairer reflection of voter opinions
 - 7.5.4.2.3. no delimitation of districts
 - 7.5.4.2.4. all votes carry same weight
 - 7.5.4.2.5. wider rep of parties
 - 7.5.4.2.6. minorities can form coalitions
 - 7.5.4.2.7. disadvantages: weak in that may be impossible for a party to get majority, impersonal, often complicated and fails to produce workable majority, no by-elections

7.6. Membership and term of office - Theories of representation

- 7.6.1. free-mandate theory that member of P is not bound by mandate given by electorate, opposes imperative-mandate theory
- 7.6.2. imperative mandate before 96, resulted in unassailable position of party
- 7.6.3. now 15 day window in September of 2nd and 4th years to cross floor

7.7. Functioning

- 7.7.1. Privileges

- 7.7.1.1. NA determines its own internal arrangements
- 7.7.1.2. freedom of speech, within own rules of debate – no offensive or unbecoming language (exempt from civil or criminal liability for anything they say or produce before NA).
- 7.7.1.3. can summon people to give evidence
- 7.7.1.4. entitled to enforce own internal disciplinary measures
- 7.7.1.5. no vote on matters on which have financial interest
- 7.7.2. Privilege subject to judicial review? *DeLille v Speaker of NA*: DeLille suspended 15 days for accusing ANC officials of being apartheid spies. Court held that exercise of privilege by P is still subject to C. Suspension not consistent with representative democracy. If privilege violates C, aggrieved party can appeal to courts. Unjustified limitation on C rights to freedom of speech, just admin action and access to court.
- 7.8. Committees: Needed to to size and complexity of matters. Also encourages transparency in government and encourages public input.
 - 7.8.1. Standing committee is for duration of parliament. Ad hoc committee appointed to execute a particular function, after which committee dissolves.
 - 7.8.2. Portfolio committees for every government department (health, safety, etc.) In NCP Select Committees.
 - 7.8.3. Committee on Public Accoutns in NA: prevention of corruption and mismanagement.
 - 7.8.4. Mediation Committee: resolves disputes between NA and NCP.
 - 7.8.5. Meet in public, and representatives same % as in P
- 8. **Legislative authority: Nat'l Sphere cont.**
 - 8.1. s73: any bill may be introduced to NA. Bill passed by NA referred to NCP if to be considered by NCP. Bill passed by NCP referred to NA.
 - 8.2. s74(1): bills amending s1 or s74 of C need 75% of NA and 6 provinces of NCP.
 - 8.3. s74(2): bills amending chapter 2 of C need 2/3 of NA and 6 provinces of NCP.

- 8.4. s74(3): bills amending other sections of C need 2/3 of NA and 6 provinces of NCP if: relates to matter affected NCP, alters provincial powers, boundaries, etc. or amends a provision dealing with provincial matter.
- 8.5. s75(1): other bills not affected provinces: NA passes, refers to NCP, if NCP amends, NA can pass or not... if pass refer to President.
- 8.6. s76(1): other bills affecting provinces: if NCP amends but NA won't pass, must refer to Mediation Committee to decide which version of bill to pass. If Mediation Committee can't agree, bill lapses and must be repassed.
- 8.7. s79(1): President must assent, but if questions about C refer back to NA.
- 8.8. Law-making powers of P
 - 8.8.1. Exclusive competence:
 - 8.8.1.1. amend and repeal its own laws
 - 8.8.1.2. expressly given to it by sections of C
 - 8.8.1.3. residual legislative capacity on areas not enumerated in C or Schedules 4 or 5
 - 8.8.2. Concurrent competence – matters in Schedule 4
 - 8.8.3. Power to intervene – Schedule 5 is for provincial legislatures, but national can intervene when necessary to maintain essential national standards
- 8.9. Nat'l legis process
 - 8.9.1. legis process is series of actions that must take place before law is formulated, considered, refined and approved.
 - 8.9.2. Procedure is decided by type of law to be enacted
 - 8.9.2.1. Use form and manner of s75 for exclusive competence
 - 8.9.2.2. Use form and manner of s76 if concurrent competence
 - 8.9.3. Initiation of legis:
 - 8.9.3.1. Stage 1 formulate and finalise bill with view to intro in P (usually by executive)

- 8.9.3.2. Stage 2 introduce bill in P (functionary must place bill on order paper)
 - 8.9.3.3. Stage 3 consideration by P (committees and at plenary sessions)
 - 8.9.3.4. Stage 4 vote
 - 8.9.3.5. Stage 5 presidential assent (becomes Act of Parliament), followed by publishing in Gov Gazette
- 8.10. Ordinary bills affecting provinces - *In re Constitutionality of Liquor Bill* C Court stated “any bill whose provisions in substantial measure fall within Schedule 4 functional area must be dealt with under s76” and affects provinces
- 8.11. Presidential assent: only has power to refer it back if doubts about C
- 8.12. 3 ways C of P legislation can come under judicial consideration: challenge by interested party in competent court, application of at least 1/3 members of NA, referral by Pres.
- 8.12.1. Should CC only consider Pres concern? Only concern
 - 8.12.2. Should CC consider every provision? no
 - 8.12.3. Does CC finding preclude later C adjudication once enacted? No, except Pres concern
- 8.13. Limits on P legis authority (by C)
- 8.13.1. Fundamental rights – bound by bill of rights
 - 8.13.2. federalism
 - 8.13.2.1. *Exec Council of WC v Minister for Provincial Affairs* can P make law about matters C entrusts to provincial legislatures and municipalities? No, gov argued that P has power in all except Schedule 5, so chapter 7 P has concurrent power. Court found provinces have exec and legis power to establish municipalities, so Municipal Structures Act giving nat'l govt say in establishing municipalities was unC
 - 8.13.3. separation of powers
 - 8.13.4. delegation

- 8.13.4.1. *Exec Council of WC Legislature v President* can P delegate legis powers to the exec or other functionaries? What must be exercised by P itself? Yes, but only subsidiary legislation. Not power to enact, repeal or amend Acts of P. If C says “national legislation must” or “as determined by nat’l legis” can’t delegate.
- 8.13.4.2. by Act P may delegate legis power, other than to amend C, to legis bodies in other spheres
- 8.13.5. power to amend C
 - 8.13.5.1. Not still bound by CPs of interim C
 - 8.13.5.2. basic structure doctrine – can’t amend if alters basic structure, even if follows procedure
 - 8.13.5.3. could be adopted, and CPs would likely have indirect influence as being understood as part of basic structure of C
 - 8.13.5.4. But s1 amendability refutes basic structure doctrine to an extent
- 8.13.6. procedural
- 8.13.7. extra-P consultation

9. **Executive Authority – National Sphere**

- 9.1. President with Cabinet, Premier of a province with executive council, Municipal Council
- 9.2. Executive authority is power to execute and enforce legal rules
- 9.3. Importance –
 - 9.3.1. nearly always occupied by political leaders
 - 9.3.2. extensive powers assigned to executive to create rules through subordinate legislation
 - 9.3.3. plan, coordinate and manage state activities
 - 9.3.4. in SA, devise policies and initiate legis to effect more equitable distribution of wealth and power
 - 9.3.5. still must act within C, other branches still exercise control over exec

- 9.4. Pres can exercise only power given to Pres, not to Cabinet
 - 9.4.1. entrusted by C
 - 9.4.2. entrusted by other legis
 - 9.4.3. implied powers (those necessary for powers expressly conferred by C or legis)
- 9.5. Pres elected by NA from among its members
- 9.6. Prerogatives
 - 9.6.1. any prerogatives not in 84(2)? Are 84(2) powers subject to C?
 - 9.6.2. Acts of state (relating to foreign relations such as acquisition of territory and recognition of other govts) are only prerogative powers
 - 9.6.3. Par 8 are only remaining prerogatives, and are subject to C
- 9.7. Exercise of Pres powers:
 - 9.7.1. must respect and promote bill of rights
 - 9.7.2. observe rules of admin law
 - 9.7.3. respect separation of powers
 - 9.7.4. respect constitutional status, institutions, powers and functions of government in provincial and local spheres
 - 9.7.5. Four requirements:
 - 9.7.5.1. exercise exec authority together with cabinet
 - 9.7.5.1.1. s85
 - 9.7.5.2. after consulting other functionaries
 - 9.7.5.2.1. appoints CC judges, Chief Justice and Dep Chief Justice and members of Judicial Service Commiss
 - 9.7.5.3. on the recommendation of/advice of/proposed by/called for by other functionaries institutions (bound to act as advised)
 - 9.7.5.3.1. appoints all other judges, removal of a judge

- 9.7.5.4. some decisions must be countersigned by cabinet members
- 9.7.5.5. personally exercised powers conferred by C or legis *Pres v SARFU*:
Pres had to appoint inquiry himself as is power delegated by C
- 9.7.6. Should Pres give evidence? Also SARFU, must balance judicial need to preserve dignity, status and efficiency of office and ensure court not impeded in administration of justice
- 9.8. Cabinet – Pres can appoint anyone
 - 9.8.1. Accountability – responsible for powers and functions assigned to them, and accountable individually and collectively to P
 - 9.8.2. Collective responsibility: Act in unison to outside world. If Min disagrees must support it in public or resign.
 - 9.8.3. Individual responsibility: P full and regular reports, acknowledge and rectify mistakes, resign in serious situations
 - 9.8.3.1. Resignation required:
 - 9.8.3.1.1. Min personally responsible
 - 9.8.3.1.2. Min vicariously responsible
 - 9.8.3.1.3. guilty of immoral personal behaviour
 - 9.8.3.2. P can't dismiss a minister but can exert influence to resign or for Pres to dismiss
 - 9.8.4. Conduct: s96 must comply with code of ethics, can't undertake other paid work, act inconsistent with office or risk conflict, use position or information to enrich selves or improperly benefit another
- 9.9. Control over executive:
 - 9.9.1. ministerial accountability and parliamentary oversight over Exec are central to C because of apartheid concentration of power in Exec, C moving away from authoritarian political culture, P is elected to ensure Exec governs in best interests of people
 - 9.9.2. s55(2) NA must maintain oversight of exercise of nat'l exec authority
 - 9.9.3. Other P control:

- 9.9.3.1. question time in P, members may ask Mins
- 9.9.3.2. Interpellations to ask Mins
- 9.9.3.3. P committees report on activities of exec
- 9.9.3.4. P approves exec legis
- 9.9.3.5. P authorises raising of taxes and spending of funds by exec
- 9.9.3.6. can remove Pres by 2/3 of NA on grounds of serious violation of C or law
- 9.9.3.7. motions of no confidence in Pres (+Cab) or Cab (-Pres)
- 9.9.4. Judicial control: Courts test exec conduct against:
 - 9.9.4.1. bill of Rights
 - 9.9.4.2. banning of ouster clauses, any dispute that can be resolved by law decided in fair public hearing
 - 9.9.4.3. openness – right access to info and admin action
 - 9.9.4.4. procedural requirements
 - 9.9.4.5. separation of powers
 - 9.9.4.6. respect other spheres
- 9.9.5. Admin law
 - 9.9.5.1. rules relate to person or body who may exercise a power, the scope and content of that power, the procedure to be followed in exercising that power and the reasonableness of admin decisions
 - 9.9.5.2. SARFU case, actions to develop policy and initiate legislation not administrative (appt of Commission adjust to policy, so not administrative)
- 9.10. Other institutions:
 - 9.10.1. Public protector can investigate any conduct of govt, independent but must report to P once a year

- 9.10.2. Audits accounts, independent submits reports to any legislature with direct interest in audity
- 9.10.3. Commissions of inquiry
- 9.10.4. Special Investigating Units and Special Tribunals to investage unlawful conduct by state employees and corruption
- 9.10.5. media – freedom of press guaranteed
- 9.10.6. general public, through debate and criticism

10. **Judicial Authority**

- 10.1. interprets and applies to concrete legal disputes, determines sanctions *ubi ius ubi remedium*
- 10.2. P sovereignty conflicts with testing rights of courts
 - 10.2.1. *Baloro v U of Bophuthatswana* courts now preserve and foster human rights under C – social engineers because called on to promote values of open, democratic society
 - 10.2.2. key watchdog function of exec
 - 10.2.3. Constitutional supremacy gives courts testing powers
 - 10.2.4. interpretation of statutes
- 10.3. Creation of C court
- 10.4. Jurisdiction – power or competence of a court to adjudicate on, determine or dispose of a dispute
 - 10.4.1. Constitutional
 - 10.4.1.1. allegations of bias of judicial officer
 - 10.4.1.2. exercise of public power
 - 10.4.1.3. bill of rights
 - 10.4.1.4. development or failure to develop common law
 - 10.4.1.5. powers of the High Courts

- 10.4.1.6. exclusive competence over disputes between organs of state in national and provincial spheres, constitutionality of parliamentary or provincial bills, referrals from NA or provincial legislature, C of amendments to C, decision on failure of P or Pres to fulfil C obligation, certify provincial C
- 10.4.2. Supreme Court of Appeal –
 - 10.4.2.1. C matters except those exclusive to CC (but where on Act of P, provincial Act or conduct of Pres must be confirmed by CC)
 - 10.4.2.2. same breadth of C jurisdiction as High Courts, and final appeal for non-C matters
- 10.4.3. High Courts same
- 10.4.4. Magistrates – P may enact legis to give Magistrates C matters
- 10.5. Appt of Judges
 - 10.5.1. JSC – Chief Justice, President of Supreme Court of Appeal, 1 Judge Pres, 1 Cabinet, 2 advocates, 2 attorneys, 1 law professor, 6 NA, 4 NCP, 4 Pres,
 - 10.5.2. Pres appts together with Cab, after consulting with JSC (but not bound by its recommendations)
 - 10.5.3. Chief J and Dep Chief J of CC after consulting with JSC and leaders of parties in NA
 - 10.5.4. Candidates must be SA citizens, fit and proper, reflecting racial and gender composition of SA
 - 10.5.5. CC must at all times have at least 4 judges who were already judges
- 10.6. Judicial Independence
 - 10.6.1. Independence and non-interference entrenched in C
 - 10.6.1.1. Functional Independence: incidence of separation of powers
 - 10.6.1.1.1. subject only to the C
 - 10.6.1.1.2. organs of state can't interfere, but must assist and protect to ensure independence

- 10.6.1.1.3. judges immune against civil actions and contempt of court in carrying out duties
- 10.6.1.2. Personal independence (institutional independence): making sure judicial officers satisfied
 - 10.6.1.2.1. manner of appointment (consult with JSC)
 - 10.6.1.2.2. term (fixed, non-renewable period) (CC 12 year term, must retire at 70, other courts dischargeable only by act of P, must retire at 75)
 - 10.6.1.2.3. security of tenure (need 2/3 of NA and gross misconduct to compel judicial officer to vacate)
 - 10.6.1.2.4. conditions (not determined by politicians in arbitrary manner) salaries can't be reduced
- 10.7. Impartiality
 - 10.7.1. presiding officers must recuse if there is reasonable apprehension of conflict
 - 10.7.2. can't have other occupations or official function not compatible with indep of jud
- 10.8. Control over judiciary
 - 10.8.1. Fact that appeal can be taken encourages good work
 - 10.8.2. JSC involvement instills accountability
 - 10.8.3. Can be removed for gross misconduct, incapacity or incompetence
 - 10.8.4. Public debate and criticism makes judges realise responsibility to public
 - 10.8.5. judges acting mala fide do not escape civil liability
- 10.9. Court powers in C matters
 - 10.9.1. Declaration of invalidity has retrospective effect
 - 10.9.2. Once invlaid, legislature must fix it – not court
 - 10.9.3. These factors cause courts to limit effect of invalidity rulings because disruptive
 - 10.9.3.1. court should decide on other than C grounds if possible

- 10.9.3.2. if provision has more than 1 meaning, 1 of which doesn't conflict with C, should be thus interpreted
- 10.9.3.3. any law inconsistent with C should be invalid only to extent of inconsistency
- 10.9.3.4. limit retrospective effect of invalidity
- 10.9.3.5. suspend invalidity to allow correcting