

# CLS2601 - CONSTITUTIONAL LAW

## Study Unit 1

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### **SOURCES OF CONSTITUTIONAL LAW, CLASSIFICATION OF CONSTITUTIONS AND THE CONCEPTS “STATE” AND “GOVERNMENT”**

Authoritative sources of South Africa’s constitutional law C.L.C.C.C.I

- **CONSTITUTION**

- **LEGISLATION**

- **COMMON LAW**

- **CUSTOMARY LAW**

- **CASE LAW**

- **INTERNATIONAL LAW**

- Constitution - refers to both written and unwritten rules governing the exercise and distribution of state authority on one hand, and on the other, governing relationship between organs of state *inter se* and also between organs of state and legal subjects.
- Legislation - is written law enacted by an elected body authorized to do so by the Constitution or other legislation.
- Common law - the unwritten law of SA, which in SA is Roman-Dutch Law
- Customary law - that system of law generally derived from custom, African indigenous law
- Case law - practical application of constitutional principles by our courts, our courts have full testing power making case law an authoritative source.
- International law - The Constitution provides that the courts must consider international law when determining constitutional issues.

Persuasive sources of South Africa’s constitutional law F.A.R.P

- **FOREIGN LAW**

- **ACADEMIC WRITINGS**

- **REPORTS BY INSTITUTIONS SUPPORTING CONSTITUTIONAL DEMOCRACY**

- **POLICY DOCUMENTS**

Discuss the history of the adoption of the Constitution of the Republic of South

**Supreme constitutions and constitutions which are not supreme**

<b>SUPREME CONSTITUTION</b>	<b>NOT SUPREME</b>
Ranks above all other laws in a state.	Does not enjoy any special status when compared with other laws.
Any law which is inconsistent with it will be declared invalid (referred to as the <i>Grundnorm</i> , against which all other legislation is tested for validity). Is usually (but not always) inflexible.	The legislature can pass laws which are inconsistent with the constitution. The courts cannot question the legality (or validity) of such laws, provided that the required procedure has been complied with.
Examples of supreme constitutions are those of the USA, Canada, Germany and South Africa (both the 1993 and the 1996 Constitution).	For example, Great Britain does not have a written constitution in the sense of a single document and is therefore regarded as a country with a constitution which is not supreme.

- The Constitution of the Republic of South Africa 1996 was the product of a long process of popular struggle, multiparty political negotiations and democratic deliberation in which politicians, lawyers, representatives of civil society and ordinary people all played a major role.
- Prior to 1994, there was Parliamentary Sovereignty.
- Events that led to the negotiations: Apartheid. FW De Klerk release of Nelson Mandela, unbanning of liberation movement. Eventually multi-party negotiations.
- The two stage process: First, the interim Constitution was adopted at the multiparty negotiations. Second, democratic elections for SA's first fully representative Parliament which double as the Constitutional Assembly.
- The Constitutional Principles, the *First Certification* Judgment and penultimately the final Constitution, The Constitution of the Republic of South Africa, 1996.

Classification of constitutions

- Flexible and inflexible, supreme and not supreme, written and unwritten, autochthonous and allochthonous constitutions.
- **Flexible constitutions and inflexible constitutions**
- Flexible constitutions require no special procedures or majorities for amendment and can be amended in the same manner as any other legislation. Eg. the interim Constitution 1993
- Inflexible constitutions require special amendment procedures and amendment majorities (contained in section 74 of the Constitution) before they can be amended. Eg. The 1996 Constitution, and constitutions of Germany, USA
- A constitution is supposed to be the embodiment of the values and principles to which a nation has committed itself, and contains rights and procedures which must protect individuals and

minorities against unfair treatment by the government. If it can be amended too easily, the majority party in parliament will be tempted to abolish (or at least water down) some of these protections if it is politically convenient to do so, as can be evidenced from South Africa's pre-democratic constitutions.

### **Written constitutions and unwritten constitutions**

- Very few countries do not have written constitutions. For example, Great Britain, which is often used as an example of a country without a written constitution, has a number of important statutory constitutional sources. On the other hand, even in countries where there is a single document called "the Constitution", there are always other constitutional enactments which supplement it. No single document can ever contain all the rules governing constitutional issues.

### **Autochthonous (homegrown) constitutions and allochthonous (foreign) constitutions**

- It is very difficult to find a constitution which can be said to be totally indigenous. Most of the "modern" constitutions in the world today are based on the government systems of the former colonial powers.
- Reactive constitutions originate as a result of specific problems in the past. Eg, Germany and RSA. Regarded as indigenous.
- Constitutions intended to maintain continuity of norms in the legal tradition of that society. Eg. Netherlands. Regarded as indigenous.
- Superimposed constitutions are largely unrelated to the history of the country concerned. Eg. Imposed on the colonies of Britain, by Britain.

Explain what is meant by "government", "state" and "sovereignty"

- **Government:** The government represents the state at a particular time and is the temporary bearer of state authority. In other words, "government" relates primarily to the executive function and having a particular bearing on the formation and implementation of policy.
- **State:** The state is the permanent legal entity (consisting of a territory, a community, a legal order, an organised government and a measure of political identity)
- **PITCLOG** **P**olitical Identity, **T**erritory, **C**ommunity, **L**egal Order, **O**rganised **G**overnment
- **Sovereignty:** "sovereign state" This means that the state is not subject to the authority of any other state — it has the sole right to own and control its own territory.
- "Parliamentary sovereignty" This simply meant that the highest legislative authority was vested in Parliament, this is no longer the case.

## Study unit 2

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### Basic concepts of constitutional law

Define and discuss all concepts in chapter 2 of the prescribed textbook

- **Constitutionalism:** refers to government in accordance with the constitution. This implies that the government derives its powers from, and is bound by, the constitution. The government's powers are thus limited by the constitution.
  - **The *Rechtsstaat* principle:** a defining feature of the German constitutional model. The concept establishes the constitution as the higher law with which all other laws and state conduct must comply, however, it demands more than mere formal constitutional compliance or procedural safeguards to prohibit arbitrary exercise of power. It demands that the law and state actors must 'strive to protect freedom, justice and legal certainty'.
  - **The rule of law:** is a founding value of the SA Constitution and is based on the notion that the law is supreme. Hence, public power can only be exercised in terms of the authority conferred by law and in a non-arbitrary manner. Inherent in this concept is the principle that everyone is equal before the law, the law must be applied equally to all persons irrespective of their status and all must be subject to the jurisdiction of the ordinary courts
- **Separation of powers:** this principle deals with the division of governmental powers across the three branches, namely the legislative branch (parliament), the executive (president and cabinet), and the judicial branch (courts). These branches ordinarily have separate functions and are staffed by different personnel. This allows the various branches to check the exercise of power of the other branches and thus ensures accountability.
  - **Co-operative government** refers to the system of government that defines the framework within which the relations between the three spheres of government must be conducted. Namely the national, provincial, and local spheres of government. In terms of this principle, the relationship is one of close cooperation within the larger framework that recognises the distinctiveness, interrelatedness and interdependence of the entire state component.
  - **Counter-majoritarian dilemma** This raises the question whether judicial review is undemocratic as it may be objected that it is undemocratic that the judiciary (which is not an elected body) has the power to declare legislation enacted by Parliament (which is an elected body) invalid.
    - However, on the other hand it is suggested that constitutionalism and democracy may complement each other, and that the existence of a supreme, justiciable Constitution is not necessarily incompatible with democracy. The following arguments can be made to defend judicial review against the charge that it is undemocratic:
      - (1) That South Africa's Constitution was itself made by the representatives of the people, assembled in the Constitutional Assembly. In fact, the Constitution had to be adopted by a two-

thirds majority of the members of the Constitutional Assembly, and was the product of a lengthy process of negotiations and democratic deliberations.

- (2) Judicial review may contribute to a democracy where citizens feel free to state their views and challenge widely accepted beliefs: by protecting people's political rights, or freedom of expression, judges may help to ensure a free and uninhibited public debate.

- 3) Judges may inquire into the constitutionality of legislation, but this does not mean that they can simply substitute their own views for those of the legislature. When a judge strikes down a law as unconstitutional, he or she does not make a new law or tell the legislature what a new law should look like. The discretion to amend a law that has been struck down belongs to the legislature – the only condition is that the amended law must be constitutional.

- **Democracy** is one of the core values on which the new constitutional order is based. In a democracy, the right to govern does not vest in a single person (president, PM or monarch) or class of persons (e.g. an aristocracy), but in the people as a whole. Democracy presupposes free political discussion, the toleration of differences between people, and the right of all citizens to participate in political decision making.

- **Direct democracy** means that all major political decisions are taken by the people themselves. This form of democracy may work in a very small political community where people can get together on a regular basis (eg in the town hall) to discuss and decide matters of common interest. However, in a modern state, direct democracy is hardly an option. Modern states are too populous for all citizens to meet regularly and discuss the affairs of a nation.

- **Representative democracy** is characterised by the fact that the citizens of a state elect the representatives of their choice, and these representatives then express the will of the people. A representative democracy is created via the process of elections. These elections should be held at regular intervals, and reasonably frequently. All citizens of majority and those not disqualified to vote should do so in the elections, to afford direct representation.

- **Constitutional democracy** means that the people's representatives in Parliament, in the provincial legislatures and in Municipal Councils are not free to make whatever laws they wish, but are bound to observe the norms and values embodied in the Constitution. Laws that are inconsistent with the Constitution will be declared invalid.

- **Presidential system of government**

- The head of government is also the head of state. Example, United States of America (USA).
- The head of government is not a member of the legislature and is not responsible to it. For instance, the American president is not a member of congress, and neither are the members of his or her cabinet.
- The head of government (president) is often elected directly by the people. In the USA, the president is popularly elected and his or her election is independent of the election of the legislature.

## - Parliamentary system of government

- The head of state and the head of government are two different persons. For instance, under the Westminster system, which is the archetypal model of a parliamentary system, there is a symbolic head of state (monarch), with the real power of government vesting in the prime minister.
- The head of government and his or her cabinet are members of the legislature and are responsible to it. One can therefore conclude that there is often a more complete separation of powers (in the sense of a separation of personnel) in a presidential system than in a parliamentary system.
- The head of government is the leader of the party with a clear majority in parliament.

Discuss why the doctrine of the separation of powers is important

- to secure liberty and democracy
- to prevent corruption, tyranny, despotic government or the suppression of all forms of liberty
- to energise government and make it more effective by creating a healthy division of labour
- to encourage functional specialisation of the branches of government
- to enhance a vision of democracy based on founding values such as accountability, responsiveness, and openness

Evaluate whether South Africa adheres to the principle of separation of powers in its system of government

- Although the 1996 Constitution does not expressly state in a single provision that this principle is part of our constitutional state, the Constitutional Court in the *first Certification* judgment, namely *In re Certification of the Constitution of the Republic of South Africa, 1996*, was satisfied that this doctrine was firmly established in the South African Constitution. South Africa has adopted a hybrid between a parliamentary and presidential system of separation of powers. Our Constitution has opted for a model which encourages a relationship between the legislative and the executive branches of government.

Compare the application of the separation-of-powers doctrine in indigenous communities vis-à-vis that in modern democracies

- The chief was the most important and powerful member of his nation, occupying such position by ancestry alone. The chief, ward headman and family heads exercised legislative, executive and judicial powers simultaneously, that is, they could be judge, jury and executioner in one sitting. This concentration of power was only restricted normatively by a duty to consult councillors, who checked self-interest, and who acted for the benefit of the people. The exercise of powers by the rulers was not subject to the scrutiny of an independent judiciary, but was

controlled by rituals, by the military power and by the patron-client relationship created by the loan of cattle.

- This form of government differs markedly from a modern democracy, since the all-inclusive powers of government are not differentiated in the Western manner into judicial, administrative and legislative categories. Although this system of government works within indigenous communities, it is unlikely to be replicated within a modern state where political, economic and social factors demand a more institutionalised form of government with the minimum or no overlap between the legislative, executive and judicial branches of government.

Identify and explain the most important check and balance that is in place

- Judicial review represents the most important check and balance on the exercise of power.
- Judicial review serves to control the abuse of power by either the legislature or the executive by declaring legislation and/or administrative action invalid if necessary.

Discuss whether or not the principle of judicial review is undemocratic

- The question arises objected whether it is undemocratic that the judiciary (which is not an elected body) has the power to declare legislation enacted by Parliament (which is an elected body) invalid. This problem is commonly referred to as the 'counter-majoritarian dilemma'.
- The it is suggested that constitutionalism and democracy may complement each other, and that the existence of a supreme, justiciable Constitution is not necessarily incompatible with democracy. The following arguments can be made to defend judicial review against the charge that it is undemocratic:

- (1) That South Africa's Constitution was itself made by the representatives of the people, assembled in the Constitutional Assembly. In fact, the Constitution had to be adopted by a two-thirds majority of the members of the Constitutional Assembly, and was the product of a lengthy process of negotiations and democratic deliberations.

- (2) Judicial review may contribute to a democracy where citizens feel free to state their views and challenge widely accepted beliefs: by protecting people's political rights, or freedom of expression, judges may help to ensure a free and uninhibited public debate.

- (3) Judges may inquire into the constitutionality of legislation, but this does not mean that they can simply substitute their own views for those of the legislature. When a judge strikes down a law as unconstitutional, the discretion to amend a law that has been struck down belongs to the legislature – the only condition is that the amended law must be constitutional.

Distinguish between parliamentary and presidential systems of government

- Both the 1993 Constitution and the final Constitution are examples of constitutions with both presidential and parliamentary features. Presidential features are that the president is both head

of state and head of government. Parliamentary features are that the president is elected by parliament, and not directly by the voters, and that he or she must also resign if parliament adopts a motion of no confidence in him or her. Another feature of a parliamentary system of government is that members of the supreme executive (the cabinet) must be members of parliament.

#### - **Presidential system of government**

- The head of government is also the head of state. This is, for instance, the case in the United States of America (USA).
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## **Study Unit 3**

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### **Separation of powers and the national legislature (parliament)**

Describe the composition of parliament and the two houses of parliament

- The South African national legislature (parliament) is a bicameral legislature, which means that it is divided into two houses, namely the National Assembly (NA) and the National Council of Provinces (NCOP) [Section 42(1) of the Constitution]



## Discuss the functions of the National Assembly and the National Council of Provinces

- The national legislature (parliament), aside from its legislative functions such as considering, passing, amending or rejecting legislation, also has the power to check the exercise of power by the national executive and other organs of state to ensure that the national executive and various other organs of state are held accountable.
- The National Assembly is elected to represent the people and to ensure government by the people under the Constitution. It does this by choosing the President, by providing a national forum for public consideration of issues, by passing legislation and by scrutinising and overseeing executive action. [Section 42(3) of the Constitution]
- The National Council of Provinces represents the provinces to ensure that provincial interests are taken into account in the national sphere of government. It does this mainly by participating in the national legislative process and by providing a national forum for public consideration of issues affecting the provinces. [Section 42(4) of the Constitution]

Critically evaluate, with reference to case law, the right to vote and in which circumstances citizens may be deprived of this right

- In *August v Electoral Commission*, the constitutionality of actions by the Electoral Commission, which had denied prisoners the right to vote, came under judicial scrutiny. The Court unanimously found that it was unconstitutional for the Electoral Commission to deny prisoners the right to vote.
- As a result of the judgment in *August*, shortly prior to the 2004 elections Parliament amended the Electoral Act, which prevent those imprisoned without the option of a fine from voting whilst in prison.
- The constitutionality of the amendment was questioned in *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders (NICRO) and Others*. The main issue was whether the amendments constituted a justifiable limitation of the right to vote in terms of section 36 of the Constitution. Government argued that its rationale for the limitation was to preserve the integrity of the voting process. To counter the risks placed on the process, special arrangements were required and the provision of which placed a strain on the logistical and financial resources available to the Electoral Commission. However, the Constitutional Court disposed of the logistics and costs leg of this argument on the basis that the state had failed to discharge its evidentiary burden in this regard, and therefore found it not necessary to take the issue further as the factual basis for the justification had not been established.
- While there may well be a situation in which a person could be deprived of his or her right to vote, such a limitation would have to be justified by the state, and the state would have to show that the limitation was narrowly tailored to achieve an important purpose.
- To date, all persons who have reached majority, have the right to vote in SA.

## Describe and discuss parliamentary privileges

- Parliamentary privileges are the powers and privileges enjoyed by members of Parliament that enable them to perform their functions without hindrance, some important privileges are:
- Members of the houses and cabinet enjoy certain inalienable privileges when appearing before the houses (parliamentary privilege). This is based on the notion that members of parliament (MPs) must be able to perform their duties in an uninhibited environment. They are guaranteed freedom of speech and are free from civil and criminal proceedings against anything they produce in the houses [Section 57(1) of the Constitution]. This privilege may be subject to judicial review if exercised in breach of a constitutional provision, as decided in the Constitutional courts decision in *De Lille v Speaker of the National Assembly*.
- Parliament and its committees are competent to summon persons to give evidence and submit documents.
- Parliament is entitled to enforce its own internal disciplinary measures for contempt of Parliament and other infringements of the Act. Eg. Disorderliness, failure to submit documents.

## Discuss whether, and in what circumstances, a court may intervene in the legislative process

- The judgment in *Speaker of the National Assembly v De Lille* shows the Court's recognition that the separation-of-powers principle cannot be used by the other organs of state as a shield against judicial intervention or what is termed the "principle of non-intrusion". The role of the Courts has changed under new dispensation. This means that the principle of non-intrusion, which is a fundamental aspect of the separation-of-powers principle, must give way to the need to provide protection for individual rights which lie at the heart of our democratic order.

## Study Unit 4

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### Separation of powers and the national legislature (parliament): functions of parliament

#### List and explain the functions of parliament

- Representation of the electorate: NA must act on behalf the electorate, the people, when carrying out its functions of parliament.
- Passing legislation: Parliament's most important function is to debate, amend and approve the Bills submitted to it by executive committees or individuals.
- The election of the President.

- Provide a forum of debate on important issues: in which bills, government policy, performance of state administration, and more, are debated on an ongoing basis in true democratic fashion. Parliamentary debate is not confined to MP's, the NA must facilitate public involvement in legislative and other processes.
- Scrutinising and overseeing executive action: The NA exercises control over state spending (through its scrutiny of the budget), inquires into state administration, and analyses and criticises government policy through questioning and debate.
- [section 42(3) and section 55 of the Constitution]

Explain the role of parliament in providing a forum for the public consideration of issues

- Parliament provides a forum in which bills, government policy, performance of state administration, and more, are debated on an ongoing basis in true democratic fashion.
- Parliamentary debate is not confined to MP's, the NA must facilitate public involvement in legislative and other processes. The business of the NA must be conducted in an open manner, held in public, and should not exclude the public (including the media) unless it is reasonable and justifiable to do so in a democratic society.

Explain the role of the National Assembly and the National Council of Provinces in holding the executive to account to parliament, and especially the role of the National Assembly in ensuring democratic control over the executive by passing a motion of no confidence in the president

- In terms of section 55(2) of the Constitution the NA has the power to scrutinise and oversee executive action. The NA exercises control over state spending (through its scrutiny of the budget), inquires into state administration, and analyses and criticises government policy through questioning and debate.
- The motion of no confidence can be found in section 102 of the Constitution, it states that if the NA, by a vote supported by a majority of its members, passes a motion of no confidence in the President, the President and the other members of the Cabinet and any Deputy Ministers must resign. If a motion of no confidence in the Cabinet excluding the President is adopted, the President must reconstitute the Cabinet.

Explain the role of parliament in maintaining an oversight role over the national executive and other organs of state

- The NA exercises control over state spending (through its scrutiny of the budget), inquires into state administration, and analyses and criticises government policy through questioning and debate.

Generally discuss parliament's function of passing legislation, including:

- parliament's legislative competence
- the process prescribed for the adoption of Bills amending the Constitution
- the process for the adoption of ordinary Bills affecting the provinces
- the classification or tagging of Bills

### - **parliament's legislative competence**

- The Constitution gives parliament 4 kinds of law-making powers only it can wield:
  - Parliament enjoys exclusive powers to amend and repeal its own laws.
  - Parliament enjoys exclusive powers to make laws with regards to those areas which have been assigned to it by various provisions of the Constitution.
  - Parliament has the exclusive competence to amend the Constitution in terms of section 74 of the Constitution.
  - Parliament has residual legislative capacity to make laws relating to those areas that are not enumerated in the Constitution or mentioned in Schedules 4 and 5 of the Constitution.
- When Parliament makes laws which fall within its exclusive legislative function as set out above, it must use the procedure prescribed in section 75 of the Constitution.

### - **the process prescribed for the adoption of Bills amending the Constitution**

- Bills amending the Constitution require special procedures and special majorities to pass the Bill to protect the Constitution from being amended too easily. Once both Houses of Parliament have passed the same version of a Bill, it is sent to the President for signature. The President can refer a Bill back to Parliament if he or she has reservations about the constitutionality of aspects of the Bill. If the reservations are not dealt with, the President can also refer the Bill to the Constitutional Court to determine whether the reservations are valid or not.
  - Section 1 of the Constitution can only be changed with a 75% support of the members of the NA and 6 of the 9 provincial delegations to the NCOP.
  - The Bill of Rights can only be changed with two-thirds support by the members of the NA and 6 of the 9 provincial delegates of the NCOP.
  - Any other provision of the Constitution may be amended by a Bill passed by the NA with a two-thirds supporting vote by its members.
- A Bill amending the Constitution can be tagged as a **section 74 Bill** because it is amending the Constitution.

## - the process for the adoption of ordinary Bills affecting the provinces

- Ordinary Bills affecting Provinces can be tagged as **section 76 Bills**, if it falls within a functional area listed in Schedule 4 of the Constitution or provides for legislation destined in particular sections of the Constitution.
  - Section 76(1) deals with the adoption of Bills that have been introduced in, and passed by, the NA. Such Bills must then be referred to the NCOP.
  - Section 76(2) deals with Bills introduced in, and passed by, the NCOP. Such Bills must then be referred to the NA.
  - If a Bill passed by one House is also passed by the other, the Bill obviously becomes an Act and is presented to the President for assent.
  - If a Bill is passed by one House with amendments, it must be sent back to the other House with said amendments for consideration. If the amendments are accepted it is presented to the President for assent.
  - If either House rejects a Bill, or an amended Bill sent back to it by the other House, the original Bill and the amended Bill (if relevant) are referred to a Mediation Committee.

## - the classification or tagging of Bills

- A Bill amending the Constitution can be tagged as a **section 74 Bill**.
- Bills can be tagged as **section 75 Bills** or ordinary Bills that do not affect the Provinces.
  - Section 75 Bills can ONLY be introduced in the NA. A section 75 Bill does not affect the Provinces and therefore can be overridden by the NA, if the NCOP rejects the Bill, or the NA rejects the NCOP amendments. Once passed by the NA, the NCOP must vote on the Bill but not by delegation. In terms of section 75(2) of the Constitution, each delegate per province has one vote and the majority decides (wins) provided a quorum of one-third is present.
- Bills can be tagged as **section 76 Bills** or ordinary Bills affecting the Provinces.
  - A section 76 Bill can be introduced in either the NA or NCOP. Bills that fall within a functional area listed in Schedule 4 of the Constitution or provides for legislation destined in particular sections of the Constitution. It will also be tagged as a section 76 Bill if it intervenes in Schedule 5 matters and other financial matters affecting the Provinces.
- Bills can be tagged as **section 77 Bills** or money Bills.
  - These Bills deal with the imposition of taxes, levies, duties and surcharges to raise money for the state, and with the allocation of the money raised in this way for a particular purpose, such as spending it on education, policing or health care.

Explain when the president may

- refer a Bill back to the National Assembly (NA) for reconsideration
  - refer a Bill to the Constitutional Court for a decision on its constitutionality
- Section 79 deals with assent to Bills. Once both Houses of Parliament have passed the same version of a Bill, it is sent to the President for signature. The president may refer a Bill back to the NA for reconsideration if he or she has reservations about the constitutionality of the Bill. The president can also refer the Bill back if he or she believes that it does not meet the substantive requirements of the Constitution. However, the President does not have the power to refuse to sign a Bill. If the reconsidered Bill fully accommodates the president's reservations, then he or she must sign it. If not, the President must either assent to and sign the Bill, or refer it to the Constitutional Court for a decision on its constitutionality. If the Constitutional Court decides that the Bill is constitutional, the president must assent to and sign it. In 1999, the president referred the *Liquor Bill* to the Constitutional Court for a decision on its constitutionality. In *Ex Parte the President of the Republic of South Africa: In re Constitutionality of the Liquor Bill*, the Constitutional Court spelled out: (1) the circumstances in which the president is allowed to refer a Bill to the Constitutional Court, and (2) the scope of the Court's power to consider the constitutionality of a Bill.

Critically discuss whether parliament is permitted to delegate its legislative powers to another body or functionary in government

-The delegation of legislative authority to other bodies or functionaries is a regular feature of modern states. Parliaments often leave it to provincial legislatures or members of the national executive to "fill in the gaps" in parliamentary legislation by means of proclamations or regulations. The question arose however whether there are limits to Parliament's authority to delegate its legislative power.

This question was answered in the affirmative by the Constitutional Court in *Executive Council of the Western Cape Legislature v President of the Republic of South Africa*. The Court stated that in a modern state, Parliament cannot be expected to deal with all such matters itself and it is therefore necessary for effective law making to read this power into the Constitution. However the Court held that Parliament cannot delegate its original law-making power to the executive, it can only delegate the making of subordinate legislation such as presidential proclamations and ministerial regulations.

# Study Unit 5

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## Separation of powers and the national executive authority

State who is responsible for the exercise of executive authority in the national sphere of government

- The President is vested with powers that are conferred on him or her by the Constitution in his or her capacity as the head of the national executive. When the President exercises head of the executive powers, he or she acts in consultation with his or her Cabinet.

Discuss the powers and functions of the president

- The powers and functions of the president are laid out in section 84 of the Constitution, and could be broadly categorised in to the following powers:
  - powers entrusted by the Constitution
  - powers entrusted by other legislation
  - implied powers — powers necessary for the exercise of powers expressly conferred by the Constitution or other legislation
- The powers vested in the president enable him or her to act in order to fulfil his or her constitutional responsibilities, which are intertwined with the duties to refrain from acting in a way that may undermine the state itself and the rule of law. The exercise of these constitutional powers is, moreover, subject to constitutional review. This follows from the fact that the Constitution is supreme (section 2), and that all branches of government, including the executive, are bound by the Constitution [section 8(1)].
- Sections 83(a) and 84(1) distinguish between powers exercised by the president as head of state and those exercised by the president as head of the national executive, while section 85(2) mentions some of the president's functions in exercising executive authority. The President is required to exercise certain powers "together with" the other members of the Cabinet in terms of section 85(2).

Explain how the president must exercise his or her powers

- There are formal limits and substantive limits explicitly placed on the exercise of powers by the President (and the executive).
- Several constitutional provisions place formal limits on the manner in which he or she must exercise some of the Head of State and head of executive powers.
- The Constitution also places more substantive limits on the exercise of power by the President. The courts can review the exercise of power and set aside any decision by the President on

certain substantive grounds, this conclusion flows from the fact that the Constitution is supreme and that the rule of law is a founding value of the Constitution.

- One of the most important ways in which the exercise of powers is controlled is through the requirement that when exercising any duly appointed power, the President has to act rationally and in good faith. This is because the President (and the executive) must act in accordance with the Bill of Rights and according to the principle of legality as is implicit in the Constitution.

Discuss the question whether the president can be ordered to give evidence in a civil matter in relation to the performance of his or her official duties

In *President of the RSA v South African Rugby Football Union*, the Constitutional Court had to consider the question whether the President can be ordered to give evidence in a civil matter in relation to the performance of his official duties. Moseneke (at 352) indicates the importance of President Mandela's appearance in Court, stating that it was:

“a symbolic and important act because it underscored the rule of law and the principle that we are all equal before the law and it is the Constitution that requires us to obey, respect and support the Courts not because the judges are important or entitled to special deference but because the institution they serve in has been chosen by us collectively in order to protect the very vital interests of all and in particular of those who are likely to fall foul of wielders of public or private power [see Moseneke at 341–353].”

The President, as is the case with ordinary citizens, has to give respect to the judiciary in order to promote the constitutional values and principles which accord equal responsibility for all actions taken, which may be interpreted as including actions undermining the rule of law.

### **FYI...**

In this case, *President of the RSA v South African Rugby Football Union*, the constitutional validity of the appointment of a commission of inquiry into the administration of rugby was in issue. It is a well-established legal principle that a functionary entrusted with a particular power must exercise that power personally, unless there has been a valid assignment of the power in question in terms of the Constitution.

It was found in the Court *a quo* that the President had abdicated his responsibility to appoint a commission of inquiry in terms of section 84(2)(f) of the Constitution, and that the decision to appoint such a commission was taken by the Minister of Sport. The President merely rubber-stamped the Minister's decision. The Constitutional Court agreed that the President had to exercise the power personally, since both the Constitution and legislation confer the power to appoint commissions on the President alone. The appointment of the commission was therefore found to be invalid.



Explain what is meant by individual and collective ministerial responsibility

[Section 92 (2) of the Constitution]

The Cabinet is collectively accountable to Parliament, as they have a duty to act together. Cabinet members may disagree on an issue during debate, but once the decision has been taken, they have to take collective accountability for the decisions and actions of the executive.

Individual members of the executive (members of the Cabinet at national level) are responsible for their own portfolios and are accountable for what occurs in their departments. Individual accountability ensures Parliament can identify the Cabinet member responsible for a particular issue and can take action to hold that member accountable.

[Section 92 (3) of the Constitution]

The notion of individual responsibility entails three duties on the part of the Minister concerned:

- To explain to Parliament what happens in his or her department - Cabinet members are under an obligation to provide Parliament with full and regular reports concerning matters under their control.
- To acknowledge that something has gone wrong in the department and to see to it that the mistake is rectified.

Discuss parliamentary, judicial and other forms of control over the executive

There are several forms of control over the executive, the main forms are Parliamentary control, judicial control, administrative law, and control by other institutions such as the Public Protector, Auditor General and other Chapter 9 institutions.

Parliamentary control:

Parliament requires members of the Cabinet to provide full and regular reports concerning matters under their control. During question time in the Houses of Parliament, members may put questions to ministers on any aspect of the exercise of their powers and functions. Interpellations (interruptions in Parliament) are used to open short debates with ministers on particular aspects of their responsibilities. Committees can also be formed to investigate and report on the activities of the executive. Section 89 of the Constitution provides for the removal of the president with a two-thirds majority of the NA, on the grounds of serious misconduct, violation of Constitutional law, or the inability to perform the functions of the office.

Judicial control:

The executive is bound by the Constitution as the supreme law, and any executive conduct which is inconsistent with the Constitution is invalid. The Courts therefore have an important role to play in ensuring that the executive respects and observes the Constitution, and may test conduct against various criteria eg. the Bill of Rights, and section 33 'just administrative action'.

### Administrative law:

The rules of administrative law constitute one of the most important checks on or controls over the power of the executive. Administrative law comprises rules and principles governing the performance of executive and administrative functions. It binds not only the executive authority, but also the state administration and private institutions wielding authority over their members. The rules of administrative law relate to the person who or body which may exercise a given power, to the scope and content of that power, to the procedure to be followed in exercising that power, to the reasonableness of administrative decisions, et cetera.

### Other forms of control:

Chapter 9 institutions such as the Public Protector, Auditor General, South African Human Rights Commission among others have control over the executive in various ways. Another important form of control comes from the media, exercising its right to freedom of the press and other media guaranteed in section 16(1), the media reports on and criticises the performance of public officials. General public may also control the executive through public debate and criticism, and through a variety of interest groups and pressure groups such as trade unions, churches, consumer groups and cultural organisations.

Explain when the president will be bound to comply with section 33 (just administrative action) of the Constitution

Section 33 of the Constitution guarantees the right to just administrative action. Executive organs of state and administrative officials are under a constitutional obligation to act in a manner which is lawful, reasonable and procedurally fair.

In *President of the RSA v South African Rugby Football Union* (the *Sarfu* case), which dealt, *inter alia*, with the question whether all acts of the executive must comply with section 33 of the Constitution. It was argued in the *Sarfu* case that the President, in appointing a commission of inquiry into the administration of rugby, did not act in a manner that was procedurally fair. This was because the President did not give *Sarfu* the opportunity to make representations to him before deciding to appoint the commission. The judge in the High Court agreed with this contention. However, the Constitutional Court found that the appointment of a commission in terms of section 84(2)(f) does not constitute “administrative action” as contemplated by section 33. We must distinguish from Head of State powers conferred on the president in terms of section 84(2), and head of executive powers.

In conclusion, when exercising Head of State powers (section 84(2)), the requirements of administrative law (section 33 just administrative action) are not applicable, therefore the president will only be bound to comply with section 33 when he or she is not exercising powers under section 84(2).

Distinguish the traditional system of governance from the broader approach of executive authority as envisaged in the Constitution

- Executive authority is defined as the power to execute rules of law on matters that do not fall within the functional areas of other branches of government (legislature and judiciary).
- The two corresponding systems, that is the modern and the traditional system of authority in the national sphere, have many similarities, and some distinct differences.
- Both have a national House so to speak, the Houses of Parliament, and the National House of Traditional Leaders. However, they follow a different election process, in the broader approach of executive authority, members are elected by the people (popular rule), but in the traditional authority it is by virtue of being born within the royal family.
- The system of cooperative governance applies equally in the traditional authority, and has a double-edged function to develop the principles of governance within the institution itself, and in matters involving the broader system of governance.
- The collective system of responsibility apply equally to both the systems, as does the constitutional values of openness, accountability and the rule of law.
- The Constitution recognises and protects the institution of traditional leadership, which creates a dual system of governance.
- The Constitution prohibits Parliament from making laws that will interfere with the institution of traditional leadership, but this does not create 'divided legitimacy' as the Constitution endorses the basis for traditional leadership that was, and continues to be, rooted in moral and social authority by making organised communities the primary focus of authority.

Discuss the limitation of the powers of the chairperson and the executive of the National House of Traditional Leaders

- Despite the powers vested in the Chairperson by natural birth, his or her executive powers are regulated by legislation as mandated by the Constitution. Section 212(2) of the Constitution lays down that national legislation may provide for the establishment of houses of traditional leaders and establish a council of traditional leaders. Therefore, the Chairperson of the House is required to exercise the powers entrusted to him or her in terms of section 9 of the National House of Traditional Leaders Act.
- However the most important limitation is placed by constitutional supremacy, and any actions of the executive, including the corresponding traditional authority, that are in violation of the constitution will be deemed invalid.

## Study Unit 6

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### Separation of powers and judicial authority

Define “judicial authority”

- The judiciary performs an adjudicatory function. Adjudication takes place when a Court or a tribunal resolves legal disputes or controversies between subjects of the state, or between the state and its subjects, in accordance with the facts and the law and not according to the presiding officer’s personal views and opinions. In exercising this function, the Courts are involved in interpreting and applying legal rules to concrete legal disputes, and thus enforcing legal rules with a view to imposing a sanction if they find that a rule has been breached.

Sketch the history of the judicial system in South Africa

- 1910 - 1994 South Africa had a constitutional system based on parliamentary sovereignty.
- Judiciary seen as subordinate to the law-making authority of Parliament.
- Undemocratically elected Parliament enacted laws that could not be tested by the Courts.
- Judiciary was viewed with great distrust and suspicion, as it effectively shared the responsibility for implementing the segregation and apartheid policies that originated with Parliament.
- The Courts predominantly accepted apartheid laws and the legal order as normal, right and the *boni mores* of society.
- Despite numerous attempts by the judiciary to oppose the government, such as in the second *Harris* case, it became clear that the power of the judiciary to test legislative and executive conduct was severely reduced by the untrammelled power wielded by Parliament and by the absence of a Bill of Rights and a Constitution as the supreme law.
- The judiciary could only test whether the provisions or the procedure for the enactment of an Act of Parliament had been complied with, and not whether the Act was invalid or unconstitutional.
- The judiciary was predominantly staffed by conservative, elite, white males. Suggested that their ideological inclinations were consistent with the rest of the white state. There were a few black magistrates in the homelands and townships, but they were not in a position to influence the legal culture and functioning of the Courts.
- The interim constitution
- Constitutional Assembly
- The 1996 Constitution, heralded a new era of democratic government based on a constitution that is supreme.

Illustrate why judicial independence is indispensable to a constitutional state

- The independence of the judiciary is a vital ingredient of the constitutional state. The reason is obvious: if judges can be told what to do by politicians (or by business or other interest groups), then there is little chance that the Courts can be an effective mechanism for preventing the abuse of power.
- The independence of the judiciary requires that every judge be free to decide matters placed before him or her in accordance with the assessment of facts in relation to the relevant law without any interference whatsoever from other bodies, persons or parties.
- The role of the judiciary is fundamental in the constitutional law context, where it serves to adjudicate constitutional rights claims by individuals against their government. The judiciary can only perform these functions if its independence is secured.

Now what is meant by the phrase “counter-majoritarian dilemma” and be able to explain whether it is actually a dilemma

**Counter-majoritarian dilemma** raises the question whether judicial review is undemocratic as it may be objected that it is undemocratic that the judiciary (which is not an elected body) has the power to declare legislation enacted by Parliament (which is an elected body) invalid.

**-However**, on the other hand it is suggested that constitutionalism and democracy may complement each other, and that the existence of a supreme, justiciable Constitution is not necessarily incompatible with democracy. The following arguments can be made to defend judicial review against the charge that it is undemocratic:

-That South Africa’s Constitution was itself made by the representatives of the people, assembled in the Constitutional Assembly. In fact, the Constitution had to be adopted by a two-thirds majority of the members of the Constitutional Assembly, and was the product of a lengthy process of negotiations and democratic deliberations.

-Judicial review may contribute to a democracy where citizens feel free to state their views and challenge widely accepted beliefs: by protecting people’s political rights, or freedom of expression, judges may help to ensure a free and uninhibited public debate.

-Judges may inquire into the constitutionality of legislation, but this does not mean that they can simply substitute their own views for those of the legislature. When a judge strikes down a law as unconstitutional, he or she does not make a new law or tell the legislature what a new law should look like. The discretion to amend a law that has been struck down belongs to the legislature – the only condition is that the amended law must be constitutional.

Define, explain, apply, contrast and evaluate the hierarchy of the courts and the composition, powers, responsibilities and limits of the Constitutional Court, the Supreme Court of Appeal, the High Courts and the Magistrates' Courts with regard to constitutional jurisdiction

In brief, the Supreme Court of Appeal, the High Courts and a Court of a status similar to a High Court may make an order concerning the constitutionality of an Act of Parliament, a provincial Act or any conduct of the President. However, such an order of invalidity has no force of law unless it is confirmed by the Constitutional Court. The magistrate's courts can decide any matter defined by an Act of Parliament, except any matter involving an enquiry into its constitutionality.

- Constitutional Court:

This is the highest (apex) court of the Republic. It may decide constitutional matters and any other matter if it grants leave to appeal on the grounds that the matter concerned raises an arguable point of law of general public importance which ought to be considered by it. It is also the final instance of appeal in all constitutional matters, even though other Courts may entertain appeals regarding constitutional matters. The Court has concurrent jurisdiction with the High Courts and the Supreme Court of Appeal in respect of direct challenges to the constitutionality of all forms of legislation, as well as in respect of issues concerning the interpretation and application of legislation, common law or customary law and is obliged to confirm any orders of invalidity by a lower court before the decisions become final.

In *President of the Republic of South Africa v South African Rugby Football Union*, the Constitutional Court held that constitutional matters could include the following:

- Allegations of bias on the part of judicial officers
- All aspects of the exercise of public power
- The interpretation and application of laws that give effect to a right in the Bill of Rights
- The development, or failure to develop, the common law
- Any matter concerning the nature and ambit of the powers of the High Courts

Section 167(4) sets out the matters over which the Constitutional Court exercises exclusive competence. This means that only the Constitutional Court is authorised to adjudicate on matters that fall within this section.

The Constitutional Court is headed by the chief justice who is also the head of the judiciary, assisted by the deputy chief justice. Together, the chief justice and deputy chief justice are the most senior judges in the judicial arm of government.

- Supreme Court of Appeal:

As the name suggests, this court only has jurisdiction to hear appeals from High Courts. The Supreme Court of Appeal has both constitutional and non-constitutional jurisdiction and can dispose of an appeal on non-constitutional grounds without reaching the constitutional issue.

Section 168 of the Constitution provides that the Supreme Court of Appeal can hear any matter. This means that:

- The Supreme Court of Appeal is allowed to hear and decide constitutional issues, except those matters that fall within the exclusive jurisdiction of the Constitutional Court
- The Supreme Court of Appeal has the same breadth of constitutional jurisdiction as the High Courts
- The Supreme Court of Appeal will be the final Court of appeal in non-constitutional matters

The Fourteenth Constitutional Amendment Bill advanced the idea that the Constitutional Court should be the highest Court in all matters, with the Supreme Court of Appeal acting as an intermediate Court of appeal. This is a departure from the current system as discussed above. Conflicting views exist on this proposal.

- High Courts:

The High Court consists of divisions determined by an Act of parliament, has geographically limited jurisdiction (according to the nine provinces), and consists of a judge president and one or more deputy judge presidents. These courts function as superior courts and act both as courts of first instance and as courts hearing appeals from lower courts. Section 172 sets out the jurisdiction of the High Courts. The High Courts have wide constitutional powers and may decide any constitutional matters except those that fall within section 167(4) of the Constitution.

- Magistrates Courts:

Magistrates Courts are now creatures of the Constitution, empowered by section 170 of the Constitution to decide any matter determined by an Act of parliament, **except** any matter which involves an enquiry into or a decision on the constitutionality of any legislation or the conduct of the president.

Understand and explain the selection and appointment of members of the judiciary with specific knowledge of the mandate of the Judicial Service Commission

Decisions of judges have far-reaching political consequences, and hence the appointment of the judiciary cannot be entirely insulated from the political process. The danger of a politicised judiciary, however, is that it would be reluctant to strike down legislation and the acts of members of the executive. As a compromise the Constitution created the Judicial Service Commission (JSC), which is involved in the appointment of superior court judges.

The criteria for the selection of judges for appointment can be gleaned from section 174(1) of the Constitution which stipulates that a person must be “**appropriately qualified**” and “**a fit and proper person**” to be appointed as a judge. A further criterion in respect of a Constitutional Court judge is that the appointee must be a South African citizen. Section 174(2) of the Constitution goes on to state that there is “the need to transform the judiciary better to reflect the racial and gender composition of South Africa”. The JSC itself has developed a set of additional criteria that it takes into account when considering appointment to the judiciary.

If the premier of a province is absent when the JSC makes a decision regarding either the appointment or the disciplining of a judge serving in that province, the decision of the JSC will be invalid, as it is contrary to the rule of law.

- When vacancies occur in a court, the chief justice, as chairperson of the JSC, calls for nominations, and publicly interviews shortlisted candidates. Thereafter, non-binding recommendations are made by the JSC to the president. The president as head of the national executive has a relatively wide discretion when he or she appoints the chief justice and the deputy chief justice. The president appoints the person of his or her choice **after consulting the JSC** and leaders of parties represented in the National Assembly. This consultation must take place **before deciding** on a candidate for appointment, but the decisions remain the president's alone. The case of *Ex Parte: Freedom Under Law, In re: The Appointment of the Chief Justice* created a lot of controversy, because former Chief Justice Sandile Ngcobo was nominated by President Zuma long before the JSC could finalise its interviews and provide the president with recommendations for his consideration. *Ex post facto* consultation is therefore not acceptable.
- When appointing the president and deputy president of the Supreme Court of Appeal (SCA), the president, as head of the national executive, appoints the person of his or her choice after consulting the JSC (but there is no requirement to consult the leaders of the parties represented in the National Assembly).
- Consultation: Although the Constitution does not define the notion of consultation, it has been argued that "at least it must entail the good faith exchange of views, which must be taken seriously". It does not, however, mean that the president must follow the advice of those consulted.
- The president, as head of the national executive, appoints the other judges of the Constitutional Court after consulting the chief justice and the leaders of parties represented in the National Assembly. While the JSC plays a more important role in these appointments, the president retains the decisive role. The JSC prepares a list of nominees with three names more than the number of appointments to be made submits the list to the president. If the president refuses a nominee, he or she must provide the JSC with reasons for the decision. If this happens, the JSC is required to supplement the list with further nominees and the president must make the remaining appointments from the supplemented list.
- With respect to the appointment of all other judges to the SCA, High Courts and other specialised courts, the president has no discretion and is required to appoint the candidates selected by the JSC.

Recognise that, while the National Prosecuting Authority is not part of the judiciary, it plays an important role in ensuring the integrity of the judiciary and supporting the effective functioning of the judiciary

It is essential to comprehend that the National Prosecuting Authority (NPA) is not part of the judiciary. Neither is it part of the legislature or the executive. The NPA and the office of the National Director of Public Prosecutions are *sui generis*. It is intended to play a pivotal role in the effective and impartial functioning of the criminal justice system. Section 179 of the Constitution, read with



the National Prosecuting Authority Act 32 of 1998 (and its amendment), establishes the framework within which the NPA should operate.

All powers to institute, conduct and discontinue criminal proceedings on behalf of the state vest in the NPA. Therefore, the minister may not interfere with the process, as it is dangerous to allow a political appointee to overrule a decision to prosecute. However, the NPA is legally and constitutionally required to report to the minister of justice on its activities and decisions.

The national director of public prosecutions (NDPP) is the head of the prosecuting authority and is appointed by the president in his or her capacity as head of the national executive. Such appointment must comply with the objective criteria set out in the NPA Act, that is, the person so appointed must be “fit and proper” (referring to the incumbent’s moral and ethical fitness to hold the position). This was the principal issue in the case of *Democratic Alliance v President of South Africa and Others* where the Democratic Alliance argued that the appointment of Menzi Simelane as the NDPP was fatally flawed because Mr Simelane had been appointed notwithstanding the fact that he could not be described as a conscientious person of integrity and honesty, which is the minimum character trait of a person holding the office of the NDPP.

## Study Unit 7

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### **Cooperative governance / multilevel (sphere) government in South Africa**

This unit deals with the horizontal division of power across the spheres of government. It is important to understand that in a federal or quasi-federal system, the division may be based either on a divided model of federalism or an integrated model of federalism:

#### Divided model of federalism

In a divided model of federalism the Constitution strictly divides subject matters in respect of which policies and laws may be made each spheres of government. Each sphere has its own exclusive powers, and very few shared powers. Examples: USA, Australia, Canada

#### Integrated model of federalism

In an integrated model of federalism is where some subject matters are allocated exclusively to one sphere of government, but most powers are concurrent or shared. Policies and laws are not strictly divided between the different levels/spheres. Examples: Germany, South Africa

#### Quasi-federal system

The horizontal and vertical separation of powers in the South African system renders it a quasi-federal government. Although the South African system show several characteristics of a federal system, it could best be described as a quasi-federal system. In a quasi-federal system, the national government retains more power and influence over law making and policy formulation than is usually the case in a fully fledged federal system, and the power of provincial government is limited.

Define and discuss the term “cooperative government” and explain this in detail

- Definition: Cooperative government refers to the system of government that defines the framework within which the relations between the three spheres of government must be conducted. The Constitution makes provision for a system of intergovernmental co-ordination to manage any potential conflict between the different spheres exercising concurrent competences. Chapter 3 entrenches the notion of co-operative government which recognises distinctiveness, interdependence and interrelatedness. It also makes provision for the regulating principles of cooperative government as entrenched in section 41, which requires, *inter alia*, the different spheres to cooperate with one another in mutual trust and good faith.
- In detail: South Africa is neither a union nor a federation. Its structure is influenced by the German Constitution. It therefore takes the form of an integrated quasi-federation as it provides for three levels of governance, being national, provincial and municipal. These three levels are intended to co-operate with each other and not compete with each other. South Africa’s system of co-operative government is entrenched by the Constitution which holds that the three spheres of government are described as ‘distinctive, interdependent and interrelated’.
- Based on the mutually beneficial co-operative relationship that is created by the Constitution there is a certain amount of shared responsibility amongst and between the three levels of government. For example, the Constitution usually allocates legislative and executive powers concurrently to the national and provincial government. When it comes to competencies that are shared by the provincial and national governments, in the context of legislative authority, both the provinces and national government may make laws in areas such as housing, health, education (except at tertiary level), industrial promotion, environment, trade, public transport, urban and rural development and welfare services, although it must be borne in mind that national legislation overrides provincial legislation in the event of a conflict between the two. Likewise, the allocation of executive authority also follows a system of co-operative federalism in that the national government can execute laws falling within the areas of concurrent competence. In general, provinces and local government are responsible for executing national and provincial laws.
- To compensate for the fact that the provinces have restricted law-making powers (and that their laws may be superseded by national laws), the provinces play a role in the adoption of national legislation through their representatives in the second house of Parliament, the National Council of Provinces (NCOP).
- A notable case concerning South Africa’s integrated quasi-federation is the case of **Premier of the Province of the Western Cape v the President of the Republic of South Africa**. The significance of this case is that it reinforces the co-operative relationship between the national and provincial governments. This case also raises the imperative of co-ordination of legislative and executive activities in this system of government.

Discuss the principles of cooperative government

The principles of co-operative government are contained in section 41 of the Constitution which provides that all spheres of government must facilitate co-operation and must:

1. preserve the peace, national unity and the indivisibility of the Republic
2. secure well-being of the people of the Republic
3. provide effective, transparent, accountable and coherent government
4. be loyal to the constitution and its people
5. not assume any power except those conferred on them in terms of the Constitution
6. exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere
7. co-operate with one another in mutual trust and good faith.

The categorisation of government into different spheres indicates the hierarchical relationship that exists between the levels of government. These principles are based on mutual respect for one another's constitutional status, powers and functioning and on consultation of one another on matters of common interest. This relationship requires the spheres of government to observe and give effect to these principles encapsulated in the Constitution. Devenish holds that the cooperative principles:

- enable the lower sphere of government to influence the policy that it will have to execute
- imply, at provincial level, cooperation to ensure that legislative processes are harmonized in order to guarantee the significance of the operation of the NCOP
- provide mechanisms to reduce the political tensions between, the central government and the provinces on the one hand, and among the provinces themselves on the other.

The basis for the distinction between the different spheres of government is that the national government functions on a nationwide basis, the provincial governments function within the demarcated regions, and local governments function within the smaller areas.

The significance of the principles of cooperative governance lies in the fact that all spheres of government are interrelated and interdependent, in the sense that the functional areas of each sphere (national, provincial and local) are not distinct from one another.

In conclusion, it can be deduced from the above that cooperative government can be regarded as one of the cornerstones of the new constitutional dispensation. Moreover, the intersection of government relations can be regarded as an essential instrument for the delivery of services by the three spheres of government as is required by section 7, which not only entrenches respect for rights, but also requires the state to go beyond this and ensure their fulfilment.

Discuss the executive and legislative powers of the national sphere of government

The Constitution provides that the national executive authority is vested in the President in terms of section 85. The President is the Head of State and of the national executive.

The national sphere has two houses of national legislature, namely the National Assembly (NA), and the National Council of Provinces (NCOP). The NCOP plays an important role in co-ordinating the legislative activities of the three spheres of government. The national legislature has exclusive legislative authority in all matters that meet the criteria of section 146 of the Constitution, and concurrent powers shared with the provincial legislature in terms of functional areas listed in Schedule 4 of the Constitution, except of course if one of the criterion is met in section 146.

Discuss the executive and legislative powers of the provincial sphere of government

The structures of government for the 9 provinces largely mirror that of the national executive. A Premier elected by the provincial legislature heads the provincial executive and can also be removed by the provincial legislature. A province has executive authority in terms of those functional areas listed in Schedule 4 (concurrent powers shared with the national executive) and Schedule 5 (exclusive powers) of the Constitution. Their interests are represented at national level by the NCOP. When both the national legislature and provincial legislature pass legislation on one of those areas listed in Schedule 4, the provincial legislation shall prevail unless it meets the criterion of section 146 in which case national legislation will prevail. The test to determine whether a Bill falls within Schedule 5 or Schedule 4, is the pith and substance test.

Discuss the executive and legislative powers of the local sphere of government

- The Constitution determines that a municipality has executive authority in respect of and has the right to administer the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5 and any other matter assigned to it by national or provincial legislation. Also, municipalities may make and administer by-laws for the effective administration for the matters for which they have the right to administer. Conflicts between national and provincial laws and municipal laws are resolved in terms of section 156(3) of the Constitution, this section provides simply that subject to section 151(4), a by-law that conflicts with national or provincial legislation is invalid. An important consequence of this provision is that a municipality must exercise its executive and legislative authority within the parameters set by national and provincial legislation. In the absence of any national or provincial law regulating a local government matter, municipalities are free to determine the content of its legislative and executive decisions.

Explain which constitutional provisions deal with conflicts between the different spheres of government

- **Conflicts between national and provincial legislation relating to Schedule 4 matters:**

- Section 146(2) provides that national legislation that applies uniformly with regard to the country as a whole prevails if any of the conditions mentioned therein are met.
- Section 146(3) also states that national legislation prevails over provincial legislation if the national legislation is aimed at preventing unreasonable action that is prejudicial to another province or the country as a whole or, if it impedes the implementation of national policy

- **Conflicts between provincial and national legislation relating to Schedule 5 matters:**

- In the normal course of events there will not be legislative conflicts relating to Schedule 5 since provincial legislatures have exclusive power to pass legislation relating to these matters.

However, section 44(2) provides that Parliament may pass legislation on a matter falling within a functional area listed in Schedule 5 when it is necessary to:

- maintain national security
  - maintain economic unity
  - maintain essential national standards
  - establish minimum standards required for the rendering of services
  - prevent unreasonable action taken by a province which is prejudicial to the interests of other provinces or to the country as a whole
- Section 147(2) provides that national legislation referred to in section 44(2) prevails over provincial legislation.
- **Conflicts between national and provincial laws and municipal laws:**
- Conflicts between national and provincial laws and municipal laws are resolved in terms of section 156(3) of the Constitution, this section provides simply that subject to section 151(4), a by-law that conflicts with national or provincial legislation is invalid.

# Study Unit 8:

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## Provincial Government

Discuss whether, and to what extent, the Constitution recognises provincial autonomy

The final Constitution recognises some degree of provincial autonomy, and displays the following federal characteristics:

- The Constitution provides for certain matters over which the provinces have exclusive legislative authority.
- It recognises that provinces have exclusive executive authority to implement provincial legislation in that province.
- It recognises the authority of provinces to adopt their own constitutions.
- It institutes the NCOP which represents the provinces in the national sphere of government.
- It does provide definite limitations on the autonomy of provinces:
  - by setting out conditions in which national legislation will prevail over provincial legislation when a conflict occurs in a matter where they share concurrent authority.
  - by allowing national legislature to intervene in a matter where provincial legislature enjoys exclusive authority, if it is necessary to realise objectives of national security or economic unity.
  - Government in the national sphere may intervene when a province cannot fulfill its duties.
  - Provincial legislatures have only limited powers of taxation.

Discuss the legislative authority of the provinces

The legislative authority of each province is vested in its provincial legislature, which is elected in accordance with the same electoral system that applies to the election of members of the National Assembly. The size of each of the legislatures is determined in terms of a formula prescribed by national legislation relating to the population size of that province, bearing in mind that a province's permanent delegates to the National Council of Provinces (NCOP) are not members of the provincial legislature.

The provincial legislature has the power to pass a provincial constitution and to pass legislation for its province with regard to the following enumerated and clearly defined matters:

- any aspect within a functional area listed in Schedule 4.
- any aspect within a functional area listed in Schedule 5.
- any aspect outside those functional areas and that is “expressly assigned” to the province by national legislation.
- any aspect for which a provision of the Constitution “envisages” the enactment of provincial legislation.

Discuss the executive authority of the provinces, and ways in which the provincial executive can be held accountable

**- Executive authority:**

- The structures of government for the 9 provinces largely mirror that of the national executive. A Premier elected by the provincial legislature heads the provincial executive and can also be removed by the provincial legislature.
- The Premier exercises his/her executive authority together with the other members of the Executive Council.
- The provincial executive must act in accordance with the Constitution, and the provincial constitution, if one has been passed for the province.
- A province has executive authority only to the extent that the province has administrative capacity to assume effective responsibility.
- A province has executive authority in terms of those functional areas listed in Schedule 4 (concurrent powers shared with the national executive) and Schedule 5 (exclusive powers) of the Constitution.

**- The provincial executive and accountability:**

- The members of the Executive Council of a province are responsible for the functions of the executive assigned to them by the Premier.
- Members of the Executive Council of a province are accountable collectively and individually to the legislature for the exercise of their powers and the performance of their functions.
- Members of the Executive Council of a province must:
  - act in accordance with the Constitution, and the provincial constitution if one has been passed for the province.
  - provide the legislature with full and regular reports concerning matters under their control.

Discuss the power of the provinces to adopt provincial constitutions

- Section 142 states that a provincial legislature may adopt a constitution for the province if at least two-thirds of its members are in favour of it.
- Section 143 makes it clear that a provincial constitution must not be inconsistent with the Constitution.
- However, a provincial constitution may provide for provincial legislative or executive structures and procedures that differ from those provided for in the Constitution. It may also provide for the institution, role, authority and status of traditional leaders.

- Such provisions must, however, comply with the values in section 1 (the values upon which the Republic is based) and Chapter 3 (cooperative government), and may not confer on the province greater powers than those conferred by the Constitution.
- Section 144 states that a provincial constitution or constitutional amendment must be submitted to the Constitutional Court for certification and does not become law until the Constitutional Court has certified that it has been passed in accordance with section 142, and that the text complies with section 143.
- Only two provinces in South Africa have adopted their own constitutions: KwaZulu-Natal and the Western Cape. However, the KwaZulu-Natal constitution never came into force. That constitution was held by the Constitutional Court to usurp powers not due to the province and was therefore not certified. The constitution of the Western Cape was initially not certified, but after amendments, it was.

Explain when parliament can adopt legislation dealing with a Schedule 5 matter

Section 44(2) provides that Parliament may pass legislation on a matter falling within a functional area listed in Schedule 5 when it is necessary to:

- maintain national security
  - maintain economic unity
  - maintain essential national standards
  - establish minimum standards required for the rendering of services
  - prevent unreasonable action taken by a province which is prejudicial to the interests of other provinces or to the country as a whole
- Section 147(2) provides that national legislation referred to in section 44(2) prevails over provincial legislation.

Explain what happens in the case of a conflict between national and provincial legislation

- **Conflicts between national and provincial legislation relating to Schedule 4 matters:**
- Section 146(2) provides that national legislation that applies uniformly with regard to the country as a whole prevails if any of the conditions mentioned therein are met.
- Section 146(3) also states that national legislation prevails over provincial legislation if the national legislation is aimed at preventing unreasonable action that is prejudicial to another province or the country as a whole or, if it impedes the implementation of national policy



- **Conflicts between provincial and national legislation relating to Schedule 5 matters:**

- In the normal course of events there will not be legislative conflicts relating to Schedule 5 since provincial legislatures have exclusive power to pass legislation relating to these matters.

However, section 44(2) provides that Parliament may pass legislation on a matter falling within a functional area listed in Schedule 5 when it is necessary to:

- maintain national security
  - maintain economic unity
  - maintain essential national standards
  - establish minimum standards required for the rendering of services
  - prevent unreasonable action taken by a province which is prejudicial to the interests of other provinces or to the country as a whole
- Section 147(2) provides that national legislation referred to in section 44(2) prevails over provincial legislation.

Familiarise yourself with the preconditions required for the national parliament to intervene in the exclusive competences of the provincial legislatures

(Section 100?)

When a province cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, the national executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation, including:

- Issuing a directive to the provincial executive, describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations; and
- Assuming responsibility for the relevant obligation in that province to the extent necessary to:
  - maintain essential national standards or meet established minimum standards for the rendering of a service;
  - maintain economic unity;
  - maintain national security;
  - prevent that province from taking unreasonable action that is prejudicial to the interests of another province or to the country as a whole.

# Study Unit 9

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## Local Government

Discuss the reason behind the creation of local government as an “autonomous” sphere of government

- Autonomous (definition: freedom to govern itself)
- The recognition of local government as an autonomous sphere of government is necessary to improve the quality of life experienced by members of the community and to give community members a sense of involvement in the political processes that govern their daily lives. If they are to live up to their promises, the national and provincial spheres of government must do all that they can to develop the capacity and integrity of municipalities.

The use of the word “sphere” in section 151(1) has two important consequences:

- First, the recognition of local government as a sphere of government means that it cannot be abolished by either the national or provincial governments.
- Secondly, the use of the word “sphere” signifies a shift away from the hierarchical divisions of government authority towards a vision of government in which each sphere has equivalent status, is self-reliant and possesses constitutional latitude to define and express its unique character

Illustrate the effect of Chapter 7 of the 1996 Constitution on the legal status of local government

- In terms of Chapter 7, the constitutional recognition in terms of local government and the vesting of a range of original powers in local authorities have transformed the legal status of local government. For the first time in South African history, provision is made for autonomous local government with its own constitutionally guaranteed and independent existence, powers and functions. This means that the functions of government are not only exercised at national or provincial level, but are also decentralised to local government to take it closer to the people.
- In *Fedsure v Greater Johannesburg Metropolitan Council* the Constitutional Court stated:

Under the interim Constitution (and the 1996 Constitution) a local government is no longer a public body exercising delegated powers. Its council is a deliberative legislative assembly with legislative and executive powers recognised in the Constitution itself [at para 26].

The constitutional status of a local government is thus materially different to what it was when Parliament was supreme, when not only the powers but the very existence of local government depended entirely on superior legislatures. The institution of elected local government could then have been terminated at any time and its functions entrusted to administrators appointed by the central or provincial governments. That is no longer the position. Local governments have a place in the constitutional order, have to be established by the competent authority, and are entitled to certain powers, including the power to make bylaws and impose rates.

- Chapter 7 is an extension of the principle of cooperative government.

- The provisions contained in Chapter 7 are designed to promote intergovernmental relations between local and provincial government.
- Chapter 7 also functions as the framework for the implementation and application of the new local government legislation.

Compare the term “sphere” with the term “level” of government and explain the connotation of each term in constitutional law

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- First, the recognition of local government as a sphere of government means that it cannot be abolished by either the national or provincial governments.
- Secondly, the use of the word “sphere” signifies a shift away from the hierarchical divisions of government authority towards a vision of government in which each sphere has equivalent status, is self-reliant and possesses constitutional latitude to define and express its unique character.

Discuss whether local government is nothing more than an administrative “handmaiden” to national government

- Some provisions in the Constitution confirm that local government is an autonomous sphere of government which has an important role to play in the democratisation process.
- Other provisions linked to the objects, powers and duties of local government and which tend to suggest that local government is, in fact, nothing more than an administrative “handmaiden” of the other spheres of government:
- section 156(3), which states that local government cannot legislate in conflict with national and provincial legislation
- section 156(4), which states that national and provincial government must assign to local government (Schedules 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
- section 156(5), which gives municipalities any power reasonably necessary for, or incidental to, the effective performance of their functions
- Pimstone states that this is an unfortunate definition, that suggest that local government is nothing more than the administrative arm of the other spheres of governments, because it gives the impression that local government plays a predominantly administrative role, which is at odds with the description of local government as a sphere that is relatively autonomous, and one that enjoys expansive or original powers.

Discuss the role, composition, functioning and powers of the local sphere of government

- Role

- The local government plays a seminal role in the democratisation process, by improving the quality of life experienced by members of the community and to give community members a sense of involvement in the political processes that govern their daily lives.

- Composition

- Section 157 governs the election of Municipal Councils. It is important to note that proportionality is the overriding principle in terms of which municipal councillors must be elected. Legislation provides that municipal elections may be held either in terms of a list system or a proportional electoral system combined with ward representation.
- Section 155 of the Constitution distinguishes between three different categories of municipalities, namely;
  - **category A** municipalities with exclusive municipal executive and legislative authority in their area and which are referred to as **metropolitan municipalities**
  - **category B** municipalities which share their municipal executive and legislative authority in their area with a category C municipality and which are referred to as **local municipalities**
  - **category C** municipalities with municipal executive and legislative authority in an area which includes more than one municipality and which are referred to as **district municipalities.**

- Functioning

- Section 153 regulates the functions of a municipality:
  - A municipality must structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community.
  - A municipality must structure and manage its administration and budgeting and planning processes to promote the social and economic development of the community.
  - A municipality must participate in national and provincial development programmes.

- Powers

- The executive and legislative powers of a municipality are set out in section 156 of the Constitution. This section provides that a municipality has executive authority in respect of, and has the right to administer:
  - the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5
  - any other matter assigned to it by national or provincial legislation