

Constitutional Law Exam Notes

BY Nigel T. Sithole- 071 039 7526

Study Unit 1

Overview of Unit

1.1 Sources of Constitutional Law

CONCEPT	KEYPOINTS
Definition	Sources of law refer to the places where you can find legal principles, and values and govern a particular branch of law.
Meaning, limits, consequences.	On one hand it could refer to an entire body of rules, both written and unwritten which govern the exercise of state authority. On the other hand it may refer to a written document which contains some or most of the constitutional rules. It also prescribes the limits that are imposed on the exercise of state authority. In some instances, the constitution also prescribes the consequences that may arise in the event of state authority being improperly exercised.* It cannot be repealed or amended but it must leave room for growth.(That's why it only sets out the framework, the principles, and lets the changeable legislation spell out the rest.
Legislation/statute	It constitutes the second source in the hierarchy of binding sources. The constitution does not contain all the rules that are needed to deal with the interaction of state authority. It only sets out the broad language and sets for the provision of the legislation to then fill in.
Common law	It is the unwritten law of South Africa, it is not contained in any statutes. Since the inception of the constitution, common law has ceased to be an important source of SA law, it still existed and is applicable though. English common law somewhat enforced parliamentary sovereignty, when constitutional supremacy came up, it became substituted. Refer to section 39(2) of constitution.
Customary law	It is a system of law generally derived from custom, long established practices that have acquired the force of law by common adoption acquiescence. It is empowered in section 39(2) and 211(2) of the constitution. Note Pharmaceutical Manufacturers Association of SA case. By recognizing customary law, the constitution has put it at par with common law. Indigenous African law, previously seen under common law lens, now has its own formal standing and should be seen through the constitution now. However because of the multi-cultural diversity of SA, it is difficult to determine pure indigenous law. It is accepted that custom law comes in three forms (a) that practiced by a community, (b) that which is stipulated by legislation and case law (c) academic indigenous law used for teaching purposes.
Case law	It illustrates the practical application of the constitutional principles, rules and principles. In the past its application was limited but this has

	changed now. The constitution and its written provisions for how state authority is exercised and the justifiable bill of rights has led to an increase in case law
Other sources	International law: section 39(1) makes it compulsory for a court to consider international law in the determination of constitutional issues. With its conventions and practices, they help protect and promote the Bill of rights. Academic writings: writings in books and journals. Policy documents: Current gvt policy expressed in green papers. White papers and other documents issued by the organs of state. These are often translated to legal norms. Reports by state institutions: chapter 9 institutions reports and recommendations. Foreign law: section 39 1 ©, discretionary, the courts MAY choose to use it.

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW
Section 39(2)	“When Interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights”	This shows how common law, even after the constitution still exists in SA. It is the empowering provision to the development and use of the constitution in today’s legal framework. It also empowers the use and development of common law in our courts.	
Section 211(3)	“The courts must apply customary law when that law is applicable, subject to the constitution and any legislation that specifically deals with customary law”	An empowering provision to the constitutional right of the application of customary law. Note, it governs and applicable mostly in the framework of traditional leaders.	
Section 39(1) (b) and (c)	“When interpreting the bill of rights, a court, tribunal or forum (b) must consider international law (c) may consider foreign law”	Provision for the use of international law to interpret the bill of rights, also provides for the OPTIONAL use of foreign law.	

STUDY UNIT 3

Summary of Case

Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa 1996(10) BCLR 1253 (CC); 1996 (4) SA 744 (CC)

The formal purpose of this judgment is to pronounce whether or not the Court Certifies that all the provisions of South Africa's proposed new constitution comply with certain principles contained in the country's current constitution (IC). Acknowledged the deadlocks in the negotiations that included whether it was necessary to formulate a new constitution, the fact that those who were drafting the IC were not elected individuals therefore giving rise to the IC just being temporary and providing for the 1st democratic election in SA and the compilation of the final constitution thereafter. The other problem was the fear by other constituencies (whites) that the process might not take into cognisance their fears and anxieties and bulldoze them by majority and thereby rendering the negotiation process redundant. The gvt was willing to hand over power as long as they had a hand in the formulating the new constitution, the opposition being the ANC were adamant and claimed no one had the right to limit the power of the majority for any reason and that should be the only mode used in formulating the new law. A compromise was reached, this is where the two-stage transition came up, the IC and the constitutional assembly, and the elections that would be held fairly, thereafter forming a representative NA, the new constitution would be drafted.

The CA adopted the new constitution after an 86percent of its majority and handed it in to the CC for deliberation and certification. The court then gave numerous stakeholders and civil society a chance to contest or support the new constitution by handing in written submissions and right of audience. The CC had a judicial and not a political mandate as spelt out by the IC but only to see if the choices made by the different parties in the Constitutional draft complied with the CP's. The court could not certify the New Text as it stood because there were several respects in which there had been non-compliance with the CP's

The court went on to outline the approach that should be used to interpret the CP's: Measuring NT vs CP's, must be applied purposeful to give expression to the new order of fundamental rights and any interpretation that does not impede that realization should be avoided, they must not be interpreted with technical rigidity, they must be read holistically, no CP should be interpreted in a manner that is in conflict with another, NT provisions should be given a meaning to give it construction.

The court's Objection's:

The Labour relations Act of 1965 and the Promotion of National unity and Reconciliation Act 34 of 1995 immunity from constitutional scrutiny, goes against CP's provision of constitutional supremacy and fundamental rights protection and promotion. The amendment of the constitution, the NT provides for special majorities but not special procedure. The Courts feel it is necessary to provide for the latter,

again on the provisions of the CP's. The majority voting provisions of parliament. The Bill of rights provisions in the NT are not as strong as the ones set out in the CP's.

CONCEPTS OF CONSTITUTIONAL LAW

3.1 CONSTITUTIONAL LAW

CONCEPT	KEYPOINTS
Definition	Constitutional law is defined as the legal rules and principles relating to the distribution and exercise of state power. These are the rules of the relationship between the organs of state (<i>inter se</i>) and between the organs of state and individuals.
Where does it fit into the legal system?	It is said to be part of public law, since an organ of state is always involved where there is Con law. Whenever there is a relationship of authority and inequality (subordinate). Also note that a state does act in a non-authoritative manner for example when they buy a product from someone, in a case like this, this relationship would be governed by private law. Gvt would be a pvt legal subject and cannot impose its state power to that contract or transaction. However, lately that line btwn public and pvt law is getting blurred with the gvts constant involvement in pvt law, eg, labour law application of civil servants, regulating pvt company activities, privatisation of services (Eskom) but the gvts constant regulation of the company. The outcome is that pvt and pblc law has become connected.
Note	Sections 1, 2, 7, 8 and 172!!

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW
Section 1-Republic of SA	"The RSA is one sovereign, democratic state founded on the following values: (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms (b) non-racialism, non sexism. (c) Supremacy of the constitution and the rule of law. (d) Universal adult Suffrage, a national common voters role, regular elections and multi-party system of	This is an absolute need to know. Outlines the basic intention and over lining principles and values of the new south Africa through the constitution.	

	democratic gvt, to ensure accountability, responsiveness and openness”		
Section 2-Supremacy of the Constitution	“This constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid and the obligations imposed by it must be fulfilled.”	Provides for the supremacy of the constitution, unchallenged, beyond reproach.	
Section 7-Rights	“(1) The Bill of Rights is a cornerstone of democracy in SA. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom. (2) The state must respect, protect, promote and fulfill the rights in the Bill of Rights. (3) The rights in the bill of rights are subject to limitations contained in s 36 or elsewhere in the Bill”	Overview of Bill of Rights	
Section 8-Application	“The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.”	Umbrella characteristic of Bill of rights.	
Section 172(1)(a)- Powers of the Courts in Constitutional matters	When deciding a constitutional matter within its power, a court:- (a) must declare that any law or conduct is inconsistent with the constitution is invalid to the extent of its inconsistency.”	Power of the courts to declare a provision or any law unconstitutional.	

Activity Answers

3.2 CLASSIFICATION OF CONSTITUTIONS

3.2.1 FLEXIBLE AND INFLEXIBLE CONSTITUTIONS

CONCEPT	KEYPOINTS
Flexible and Inflexible Constitutions	The difference between these two really relates to the difficulty of amending them. Flexible constitutions require no special procedure or majorities for amendment and can be in the same nature as any other legislation. Inflexible constitutions require special amendment procedures and special amendment majorities. Special procedures are there to prevent hasty and arbitrary amendments of the constitution that might be influenced by the political climate at the time. The idea is the harder it is, the more serious and thought out and representative the decision will be. In the SA situation, 74 (1) (a) and (b), it takes a 75% NA majority and 6 of 9 NCOP province votes for the amended of Section 1. In 74 (2) (a) and (b), it takes a supporting vote in the NA of 2/3rds and 6 of 9 of the NCOP to amend the Bill of Rights. In 74 (3) it takes 2/3rds of NA and 6 of 9 NCOP to amend any other constitutional provision, the NCOP ONLY IF the matter affects their powers and functions, their boundaries or any provincial matter.
Supreme Constitutions and constitutions which are not supreme	A distinction is often drawn between constitutional supremacy and parliamentary supremacy. When a constitution is not supreme, parliament is. This means that legislature can pass any law provided that it complied with the correct procedure for passing the law. When a constitution is supreme on the other hand, the courts have a testing power over legislation to establish whether the law complies with substantive requirements set out in the constitution, usually in a bill of rights. A non-supreme constitution, the parliament passed laws cannot be questioned in merit by the Courts as long as they complied with procedure.
Written and Unwritten Constitutions	A distinction is drawn up between written and unwritten constitutions. This is not an absolute distinction, very few countries have written constitutions. On the other hand even in a country that has a single document called the constitution, there are always other constitutional enactments which supplement it.
Autochthonous (Indigenous) and Allochthonous (Foreign) constitutions	Autochthonous constitutions are said to be indigenous or home grown rather than borrowed constitutions. It is hard to find one that is totally autochthonous, most world constitutions are governed by past colonial masters systems. A there are 3 kinds origins and motivations of constitutions. There is the <u>reactive constitution</u> which originated as a result of specific problems in the past and seeks to resolve those problems (Indigenous). Then there is the <u>maintain continuity with</u>

	established norms in the legal tradition (indigenous). Then there is the <u>superimposed</u> constitution, largely unrelated to the history of the country, former colonial power influence (foreign). SA autochthonous because it was a product of those negotiations.

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW
Section 74 (1) Bills Amending the Constitution	“Section 1 and this subsection may be amended by a Bill passed by (a) the NA with a supporting vote of at least 75% of its members and (b) the NCOP with a supporting vote of at least 6 provinces.”	This is the special majority to amending section 1 of the constitution that stipulates the founding provisions of the constitution. These are basically the over-arching principles of the constitution and constitutionalism in SA	
Section 74 (2)	“Chapter 2 of may be amended by a Bill passed by (a) the NA with a supporting vote of at least two thirds of the of its members and (b) the NCOP with a supporting vote of at least six provinces”	This is the special majority to amending the Bill of rights. Interestingly it is slightly less stringent that the amendment of S 1.	
Section 74 (3)	“Any other provision of the Constitution may be amended by a Bill passed – (a) by the NA with a supporting vote of at least two thirds of its members and (b) also by the NCOP with a supporting vote of at least six provinces if the amendment (i) relates to a matter that affects the Council; (ii) alters provincial boundaries, powers, functions or institutions or (iii) amends a provision that	Empowering provision to the amendment of any other CONSTITUTIONAL provisions.	

	deals specifically with a provincial matter.”		
Section 74 (4)	“A Bill amending the Constitution may not include provisions other than constitutional amendments and matters connected with the amendments”	A stringent limitation to the scope and focus of an amendment.	
Section 74(5)	“At least 30 days before a Bill amending the constitution is introduced in terms of s 73 (2), the person or committee intending to introducing a bill must (a) publish in the national gvt gazette and in accordance with the rules and orders of the NA, particulars of the proposed amendment for public comment (b) submit, in accordance with the rules and orders of the NA, those particulars to the provincial legislature for their views and (c)submit in accordance with the rules and orders of NCOP, those particulars to the Council for a public debate, if the proposed amendment is not an amendment that is required to be passed by council	The regulation and process of what should be done by the person introducing the bill prior to tabling it in parliament.	
Section 75 (6)	“When a bill amending the Constitution is introduced, the person or committee introducing the Bill must submit any written comments received from the public and the	The regulation and process to be done when actually introducing the bill in parliament	

	provincial legislature (a) to the speaker for the tabling in the NA and (b) in respect of amendments referred to in subsection (1), (2) or (3) to the Chairperson of the NCOP for tabling in the Council.”		
Section 74 (7)	“A bill amending the constitution may not be put to the vote in the NA within the 30days days of (a) its introduction if the assembly is sitting when the bill is introduced or (b) its tabling in the assembly, if the assembly is in recess when the bill is introduced”	Another requirement of the tabling and introduction process of a bill	
Section 74 (8)	“If a bill in subsection (3) (b) or any part or any part of the Bill concerns only a specific province or provinces, the NCOP may not pass the Bill or any relevant part unless it has been approved by the legislature or the legislatures of the province or provinces concerned.”	The regulations go down to the provinces as well, as much as the NA is not allowed to take a vote without the NCOP vote on an issue that involves the provinces, the same applies to the Provinces with the NCOP.	
Section 74 (9)	“A bill amending the constitution has been passed by the NA and, where applicable by the NCOP must be referred to the President for assent”	The last step in the process.	

Activity Answers

3.3 STATE AND GOVERNMENT

3.3.1 STATE

CONCEPT	KEYPOINTS
Definition- "Statehood"	A specific geographical territory, a community of people who live within the territory, a legal order to which the community is subject to, an organized system of gvt which is able to hold the legal order, a certain measure of political entity within another state(USA,Nigeria).
The government of a state	The concept gvt can be better understood if it is distinguished from the concept "state". The state is the permanent legal entity (consisting of a territory, a community, a legal order, an organized gvt and a measure of political identity) while the gvt is the temporary bearer of state authority. The gvt represents the state at a particular time. Gvt is all the organs and functions of state. Gvt relates primarily to the executive function and having a particular bearing on the formation and implementation of policy.
Sovereignty	Today used in international law to refer to states who are autonomous and independent. This means that they are not subject to any other state. It has the sole right to own and control its own territory.

Study unit 4

CONCEPTS OF CONSTITUTIONAL LAW (PART 2)

Overview of Unit

4.1 COSTITUTIONALISM, THE RULE OF LAW AND THE RECHTSSTAAT PRINCIPLE

CONCEPT	KEYPOINTS
What is Constitutionalism	Refers to the government in accordance with the constitution. This implies that the gvt derives its powers from, and bound by, the constitution. The gvt's powers are thus limited by the constitution. The constitution, in a gvt of constitutionalism has certain features. These include the protection o fundamental rights (chapter 2, s 7 and 8), an independent judiciary (chapter 8 s 165), the separation of powers (all over constitution) and certain democratic principles.
The rule of law	This means that the state authorities are bound by the rule of law. According to Dicey, the rule of law rests on the following three premises: (1) the absence of arbitrary power-no person is above the

	law. (2) Equality before the law- every individual is subject to the ordinary law and the jurisdiction of the ordinary courts.(3) a judge-made constitution- the general principles of British constitutional law are the results of judicial decisions confirming the common law
The <i>Rechtsstaat</i> Principle	The German <i>rechtsstaat</i> concept refers to the principle of gvt by law and not by force. A distinction is often drawn btwn the formal and material <i>rechtsstaat</i> . The formal <i>rechtsstaat</i> requires compliance with formal criteria, such as due process, separation of powers and legal certainty. The material <i>rechtsstaat</i> goes further: the state authority is bound to higher legal values, which are embodied in the constitution, and the exercise of state authority must result in a materially just legal condition. With the adoption of the 1993 or 1996 constitution, SA became a formal and material <i>rechtsstaat</i> . The fact that the constitution is supreme, contains a justifiable Bill of Rights, spells out the requirements for valid admin action (s 33 (2)) and requires judges to have regard to constitutional values (s 1, 36,39) is testament to this.

4.2 DEMOCRACY

CONCEPT	KEYPOINTS
Definition	It is one of the core values on which the new constitutional order is based.(Found in the preamble). See section 1 proclaims that SA is a democratic state, section 36 states the limitations of the rights of the bill of rights must be reasonable and justifiable in an open democratic society based on human dignity, equality and freedom. Section 195(1), the public administration “must be governed by the democratic values and principles in the constitution”. The definition is difficult, one should have their own definition.
Forms of Democracy	Direct or representative democracy. Direct:- means that all the decisions are taken by the people themselves. This can be applied in a small community, town hall meetings to decide matters (hardly applicable in a modern state, population size). Representative:- is characterized by the fact that the citizens of a state elect their choices and these representatives will express the will of the people. It is done via elections. These should be held at regular intervals and reasonable frequency. It requires consent from the people. Critics say it cant be a serious form of people governance with elections once every four years, lobbying of big business and influence of stronger groups like trade unions won't benefit the weaker ones like the elderly and unemployed. Supporters of it say it is the only workable way of exercising democracy in the modern society. Moreover constitutional checks and balances such as separation of powers, freedom of speech, of press, of information, of association may prevent monopoly and abuse of power from any single group. There is also more citizen participation in the provinces and local municipality.
Democratic gvt features	Free and regular elections, a multi-party system, universal suffrage, the

	protection of minorities, mechanisms to ensure the accountability of gvt to the electorate. The 1993 and 1996 Constitutions have these features.
*NOTE	In addition to being a representative democracy SA is also a constitutional democracy. This means that the people's representatives in parliament, in the provincial legislature and in the Municipal Council are not free to make whatever laws they wish but are bound to observe the norms and values embodied in the constitution. Anything less will be invalid
Parliamentary and Presidential system of government	The relationship between the legislature and executive determines whether a country has a parliamentary or presidential system of gvt.
	The SA Constitution is an example of one that is both presidential and parliamentary. Presidential in the fact that the president is both leader of gvt and state. Parliamentary in the fact that the president is elected by parliament.

Presidential system	Parliamentary system
The Head of State is also head of gvt	The head of state and head of gvt are two different people.
The head of gvt is not a member of the legislature neither are his cabinet members	The head of gvt and his or her cabinet are members of the legislature
The head of gvt is often elected directly by the people	The head of gvt is the leader of the party with a clear majority in parliament

STUDY UNIT 5

THE SEPERATION OF POWERS AND THE CHECKS AND BALANCES

CONCEPT	KEYPOINTS
Definition	Separation of powers principle is one of the oldest constitutional principles in political and constitutional law, and its global prominence is proved by the fact that it is a guiding constitutional principle in almost all democracies. Deals with gvt authority, It prevents a concentration of power in the hands of one body and introduces a system of checks and balances in gvt to ensure that state authority is constitutionally controlled and not in an arbitrary fashion. In line with constitutionalism and rechtsstaat principle. The 1996 constitution does include a single provision which confirms the SA endorses this principle within the constitution. However, there are a number of provisions if tired and read together in that context provide this endorsement. These include section 43, 44, 85, 125 and 165.

--	--

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW
Section 42 (3)- Composition of parliament	“The NA is elected to represent the ppl and to ensure gvt by the ppl under the C. It does this by choosing the President by providing a national forum for public consideration of issues, by passing legislation and scrutinizing and overseeing the executive action	SOP in the composition of parliament, checks and balances on presidential power as well as NA election.	
Section 43-Legislative authority of the Republic	In the Republic, the legislative authority: (a) of the national sphere is vested in parliament, as set out in s 44; (b) of the provincial sphere is vested in the provincial legislature as set out in s 104; and (c) of the local sphere of gvt is vested in the Municipal Councils, as set out in s 156.	SOP of legislation. Checks of balances by breaking It down into the three spheres	
Section44 (1)- National legislative authority	The National legislative authority as vested by parliament:- (a) confers on the NA the power:- (i) to amend the constitution (ii) to pass legislation with regard to any matter, including a matter within a functional area listed in schedule 4 but excluding, subject to subsection (2), a matter within a functional area	The specific powers of the NA, note the functional areas in schedule 4 and 5 Separating powers between the province and national	

	<p>listed in schedule 5; and (iii) to assign any of its legislative powers except the power to amend the constitution, to any legislative body in another sphere of gvt and</p>		
	<p>(b) confers on the NCOP the powers:- (i) to participate in amending the C in accordance with section 74 (ii) to pass, in accordance with s 76 legislation with regard to any matter within a functional area listed in schedule 4 and any other matter required by the constitution to be passed in accordance to s 76 and (iii) to consider, in accordance with s 75, any other legislation passed by the NA</p>		
<p>Section 44(4)- National legislative authority</p>	<p>When exercising its legislative authority; parliament is bound only by the C and must act in accordance with and within the limits of the C</p>	<p>The limitation of the NA to confine within the bounds of the C as a check and balance.</p>	
<p>Section 54- Rights certain members of Cabinet and deputy Ministers in the NA</p>	<p>The President and any member of cabinet or any deputy Minister who is not a member of the NA may, subject to the rules and orders of the Assembly attend and speak in the assembly but may not vote</p>	<p>The checks and balance to ministerial power, note the inability of a member of cabinet who is not a member of the NA not being allowed to vote, goes to the principle of representative democracy, they do not have a mandate.</p>	
<p>Section 55 (1)- Powers of the National Assembly</p>	<p>In exercising its legislative powers, the NA may:- (a) consider,</p>	<p>Limitation on money bills, that's a specialized and technical state</p>	

	pass, amend or reject any legislation before the Assembly and (b) initiate or prepare legislation except money bills	interest, vested elsewhere.	
Section 55(2)	The NA must provide for mechanisms:- (a) to ensure that all executive organs of state in the national sphere of gvt are accountable to it; and (b) to maintain oversight of (i) the exercise of national executive authority, including the implementation of legislation; and (ii) any organ of state.	The NA told by the constitution to install checks and balances	
Section 85-Executive authority of the Republic	(1)The executive authority of the republic is vested in the president. (2) The president exercises the executive authority, together with other members of the Cabinet, by:- (a) implementing national legislation except where the C or Act of parliament provides otherwise; (b) developing and implementing national policy; (c) coordinating the functions of the state department and administrations; (d) preparing and initiating legislation; and (e) performing any other executive function provided for in the C or in national legislation	Functions of the Executive	
Section 91-Cabinet	(1)The cabinet consists		

	<p>of the President, as head of cabinet, a deputy president and Ministers.(2) The President appoints the Deputy President and Ministers, assigns their powers and functions and may dismiss them.</p> <p>(3) The president (a) must select the Deputy President from among the members of the NA (b) may select any number of Ministers from among the members of the NA and (c) may select no more than two ministers from outside the assembly.</p> <p>(4) The President must appoint a member of the Cabinet to be the leader of gvt business in the NA (5) The deputy president must assist the president in the execution of the functions of the gvt.</p>		
<p>Section 165-Judicial Authority</p>	<p>(1)The judicial authority of the republic is vested in the courts (2) The courts are independent and subject only to the constitution and the law, which they must apply impartially and without fear or prejudice.(3) No person or organ of state may interfere with the functions of the courts. (4) Organs of state, through legislative and other measures must assist and protect the courts to ensure the independence,</p>	<p>The power of the courts protected from any other branch of gvt, this is a check and balance.</p>	

	impartiality, dignity, accessibility and effectiveness of the courts. (5) An order or decision issued by a court binds all persons to whom and organs of state to which applies		
--	---	--	--

Activity Answers

5.1 DEFINITION, ORIGIN AND JUSTIFICATION OF THE PRINCIPLE OF SEPERATION OF POWERS

CONCEPT	KEYPOINTS
Definition	It is an essential principle of constitutionalism and democracy. Refers to the division of state authority amongst the 3 branches of gvt. The principle originated from philosophical and political thinking. First mentioned in writing by John Locke, but Montesquieu is regarded as the father of the principle. It is important to secure liberty and democracy, prevent corruption, despotic governance and tyranny, healthy division of labour to achieve effectiveness, to encourage functional specialization, section 1 values.
The four tenets:	Broken down in to four tenets, namely: Trias politica- separation among the 3 branches. Separation of personnel- one organ or person cannot perform a function in another organ. Separation of functions- prevents ursaptions of one function by another branch. Checks and balances- each organ has got special powers to keep an eye on the other.

5.3 SEPERATION OF POWERS IN SA

CONCEPT	KEYPOINTS
Is separation of powers present in the SA constitution	The pre-1994 dispensation was not based on SOP principles. The only thing then was the formal classification of the 3 branches. During 1910-1993, the impact and development of the separation of powers principle were suppressed by all-powerful legislative and executive institution and an absence of a system of checks and balances against legislative executive activities; we cannot look at this period for SOP principles. It was then introduced into the foray in SA BY CP number 6, in the Interim Constitution. In the 1996 C, there are no specific provisions for it but it is all over the place, note the acknowledgment in the classification judgment.
Absolute or relative separation of Powers	Most complete SOP in US constitution, however not complete, president can veto congress bill, courts can impeach president. Relative SOP in British system. SA has its own distinct hybrid system, it encourages a relationship between the branches

--	--

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW
Principle 6 of IC	“There shall be a separation of powers between the legislature, Executive, judiciary authority with appropriate checks and balances to ensure accountability, responsiveness, openness.”		
		Legal precedence. Courts confirmation of hybrid system.	<i>De Lange v Smuts(1998)(CC)</i> – SOP cannot be adopted in its purest form., the courts are developing a hybrid system. A cooperative SOP.

De Lange v Smuts NO and Others 1998 (3) SA 785 CC

Concerns the Constitutional validity of the Insolvency Act section 66(3), the about finding someone in contempt of court if they are summoned and refuse to answer questions put to them. Referred to the CC by the Cape Good Hope High Court, made up s 172(2)(a) of C. The applicant was summoned under a provision of the Insolvency Act. Under this same provision 64(3) he was required to produce amongst other things financial records and books of accounts. The interrogation took place, he failed to produce the books or answer the questions adequately. The respondents applied for a warrant of imprisonment. There were two issues before Conrad J, one was not a constitutional matter, the other was an order declaring s 66(3) to be constitutionally invalid and on that ground to review and set aside the committal. Conrad J found that there was no merit to the applicants non-constitutional review attack and in those circumstances, correctly held that the issue of the constitutional invalidity of s 66(3) would, one way or the other dispositive of the case. He held that the section was invalid because of its inconsistency with s 12(b) of the C guarantees the right not to be detained without trial. The only trial envisaged by s 12(b) was a trial in a court of law, not the interrogation in this case. That “just cause” was only justifiable in the case of a prevention of a crime and not non-punitive coercion. Also emphasizes the Independent of the Courts by quoting s 165 (2) (3) and (4) of the constitution that provides for this independence. Key to this judgment is the separation of power issue, this judgment claims that the SOP doctrine cannot be

enforced in its purest form but should be developed over time, by the courts, in its context, the power to imprison someone who is uncooperative as a witness is up to the judiciary, until such a time as the SOP doctrine is further developed. The judgment agrees with the evaluation by judge on the character of the judicial function that supports magistrates and judges to make the decision.

5.4 CONSTITUTIONAL JURISPRUDENCE ON THE SEPARATION OF POWERS

5.4.1 RELATIONSHIP BETWEEN THE LEGISLATURE AND THE EXECUTIVE

CONCEPT	KEYPOINTS
Can legislature delegate powers of law-making to executive?	According to the below mentioned case, no!

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW
		Key case to show SOP application.	<i>Executive Council of the Western Cape Legislature v President of RSA(1995)(CC)</i> –Court found that the legislature cannot delegate its powers of amending legislation to the Executive.

Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others 1995

The case arises from a dispute between the Executive Council of the Western Cape and the National gvt relating to the validity of the Local gvt transitional Act. The validity of the proclamations embodying the amendments was challenged on constitutional and non-constitutional grounds. It was an urgent application, if not resolved the local gvt elections in the Cape Town area could not be held. A separate review of the validity of the proclamations as an abuse of authority vested in the president. The Judge dismissed the case. The application was asking for the court to order to declare certain unconstitutional amendments to the transitional Act, setting aside the appointment of the fourth and 5th respondent as members of the Provincial committee for local gvt for the Western Cape and costs against the respondent. The argument by the applicant was that the proclamations were unconstitutional because they invaded the “functional or institutional integrity” of the Western Cape Province, transgressing the schedules 4 and 5, separating national and provincial mandate. Section 16A of the Local Gvt Transition Act gives the President power to amend the act by proclamation in the gazette, approved by the NA

committee. The legislative authority vested in parliament under s 37, in modern states detailed provision is are often required for the purpose of implementing and regulating laws, and parliament cannot be expected to deal with all such matters itself. There is nothing in the constitution which prohibits parliament from delegating subordinate regulatory authority to other bodies. There is however a difference between delegation of subordinate regulatory legislation and plenary legislation. There are court cases which are English law empowered which gave parliament power to delegate plenary legislation to the Executive, but these were during parliamentary sovereignty days (West minister system) before the 1996 C. This court had to decide whether this delegation was still lawful under the new C. They had to consider s 56,60 and 61, the supremacy clause in s 4 and s 37. I.t.o section 4 of C, the C established a different order than before, parliament can no longer claim supremacy. It must confirm strictly to the powers bestowed on it by the Constitution, in this case being section 37. This stipulates the strict power and function of parliament. Remember, difference between, subordinate legislation and plenary legislation, this was plenary and President did not have power to amend it, the principle of necessary implication do not apply here, as provisions in s 4 and s 37 are clear

5.5 RELATIONSHIP BETWEEN THE LEGISLATURE AND THE JUDICIARY

CONCEPT	KEYPOINTS
	The role of the courts changed in the new political dispensation. This means that the principle of non-intrusion, which is a fundamental aspect of separation of powers principle must give way to the need to provide protection for individual rights which lie at the heart of our constitutional order.

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW
			<i>Speaker of the National Assembly v De Lille</i> - Importance of case, it showed that an organ of state cannot use separation of powers to escape judicial review.
			<i>Pharmaceutical Manufacturers Ass of SA: In Re Ex Parte Application of the President of RSA</i> The decision was not an admin action, the power vested in the president is somewhere between law-making

			and administrative process, this decision required some political judgment. In substance, the exercise of power is closer to the legislature than to the admin process.

5.6 RELATIONSHIP BETWEEN THE EXECUTIVE AND THE JUDICIARY

CONCEPT	KEYPOINTS
	One of the most difficult to define, remember the executive is about the day-to-day running of the country. Fine line between implementation and making of law.
	Difficulty to balance a constitutional order, to protect the domain of the executive and the judiciary's mandate to protect the rights of people. That was the bone of contention in the Kaunda case.

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW
		Executive vs Judiciary	<i>Kaunda v President of RSA (2004)(CC) 69 SA</i> citizens landed in zim, extradition, prison conditions, the political mandate of the executive vs the judiciary mandate of rights protection

5.7 JUDICIAL REVIEW AND DEMOCRACY

CONCEPT	KEYPOINTS
	SOP an essential ingredient in preventing an excessive concentration of power and abuse of power by legislature and executive branches within a constitutional democracy. However the Judiciary also has to be sensitive about the interests and mandate of other branches.
Representative democracy and separation of powers	Representative democracy is characterized by the fact that the citizens of a state elect the representative of their choices and these representatives express the will of the people. It is created via the process of elections. These should be held at regular intervals and reasonably frequently.
Constitutional democracy and the separation of powers	This means that a peoples representative in parliament, in the provincial legislature and in the Municipal Councils are not free to make whatever laws they wish, but are bound to observe the norms and values embodied in the C. Laws that are inconsistent are invalid.

5.8 *****NOTE THE DIAGRAMMATIC SUMMARY*****

Study Unit 6

Premier of the Province of the Western Cape v President of the Republic of South Africa 1999 (4) BCLR 383 (CC)

The Western Cape challenged the Constitutionality of an amendment to the Public Service Act. I.t.o the act, provincial heads of department are given the same broad functions as heads of national departments, and no longer fall under admin control of the provincial DG. The WC argued that this was part of their executive power to structure its own administration. They argued that the detailed provision of the amended legislation encroached on the “geographical, functional and institutional integrity” of provincial gvts, contrary to s 41(1)(g) of C. Court found that, national legislature is more powerful than provincial legislature, national gvt has responsibility to oversee the provinces in their functions. Section 3 emphasises common interest decisions and settling out of court. The Court found that the Western Cape gvt had not been deprived of any power vested in it under the constitution, the new scheme is rational and cannot be said to have been enacted arbitrarily, they do not infringe the provinces functional or institutional integrity.

COOPERATIVE GOVERNMENT

CONCEPT	KEYPOINTS
Definition	The distribution of state authority is informed by the principle of cooperative government which seeks to determine the relationship between aforementioned spheres of government. (National, provincial and local gvt). In terms of this principle the relationship is one of close

	<p>cooperation within the larger framework that recognizes the distinctiveness, interrelatedness, and interdependence of the entire state component. Further characterised by consultation, coordination and mutual support. The principle of cooperative governance is further distinguished by the different forms of gvt systems namely unitary and federal. Cooperative governance is shaped and secured in chapter 3 s 40(1) of the constitution. The development of CG in ch 10 s 195(1), the Public Service Commission in s 196 is guaranteed independence and is meant to promote a high level of professional ethics and effective governance.</p>

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW
Section 40- Government of the Republic	(1)In the Republic gvt is constituted as national, provincial and local spheres of gvt which are distinctive, independent and interrelated.(2) All spheres of gvt must observe and adhere to the principles in this chapter and must conduct their activities within the parameters that the chapter provides	The three spheres of gvt	
Section 41(1)- Principles of cooperative gvt and intergovernmental relations	All spheres of gvt and all organs of state within each sphere must (a)preserve peace and unity(b)secure wellbeing of ppl(c) provide effective, transparent, accountable and coherent gvt as a whole(d) loyalty to C & ppl(e)respect the C, institutions, powers and functions of other spheres(f) ultra vires(g)respect geographical integrity(h)cooperate in good faith by (i)fostering friendly relations(ii)assist & supporting (iii) informing and consulting (iv) coordinate legislation & action(v)adhering to agreed procedure(vi) avoid legal proceeding against each other	The details of how relationships should be conducted by principle.	
Section 41(2)	An Act of parliament must:- (a) establish and provide for structures and institutions to promote and facilitate intergovernmental relations; and (b) provide for appropriate	The empowering provision for legislation and working regulations on cooperative governance	

	mechanisms and procedures to facilitate settlement of intergovernmental disputes		
Section 41(3)	An organ of state involved in a intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose and must exhaust all other remedies b4 it approaches the courts to resolve a dispute.	Avoiding the courts, as also set out in s 41 (1). Promotes that closeness and in home dispute settlement.	
Section 41(4)	If a court is not satisfied that the requirements in s41(3) have been met, it may refer a dispute back to the organs to be resolved	Forced by the courts to exhaust cooperativeness.	
Section 195- Basic values and principles governing the public administration	(Public admin must be governed by the democratic values enshrined in the C, including the following: (a) high standard of ethics(b) economic use of resources(c) development orientated pblic admn.(d)impartial, fair and equitable, without bias provision of services(e) public participation in policy promoted and their needs responded to(f)accountability(g)transparency, timely access to information. (h)career development in HR. (I) PA must be broadly representative, employment on ability, objectivity, fairness and redress past imbalances.(2) These principles apply to organs of state &, public enterprises. (3)National legislation to promote subs 1.(4) the appointment of public administrator must be regulated(5) Legislation regulating public admin may differ between different sectors.(6) The nature of functions of different sectors,admin or institutions should be considered when regulating public admin.		
Section 196- Public Service Commission	(1)There is a single PSC 4 SA(2) It must be independent and		

	<p>impartial, without fear or prejudice to maintain efficient PA. It must be regulated by legislation.(3)Other organs of state must assist PSC, no person may interfere.(4) The powers of the Commission are to;(a)promote values of 195 principles.(b) to monitor, investigate, evaluate the Public service.(c) propose improvement measures(d) to give direction on section 195 application and adherence.(e)report findings.(f) either on its own or on receipt of any complaint;- (i)investigate, evaluate personnel practices and report to relevant legislature or executive authority.(ii) investigate public grievances.(iii) monitor and evaluate adherence the application of procedures.(iv) advise national and provincial organs of state regarding PS and their employee relations. (g) to perform an additional empowered powers.(5) the commission is accountable to the NA. (6) The Commission must report at least once a year in terms of subsection (4)(e);-(to NA,in respect of activities to relevant legislature. (7) appointment of 14 commissioners (a)5 commissioners approved by NA i.t.o subs 8(a). (b)1 from each province nominated by Premier i.t.o subs 8(b). 8(a) a lay out of how commissioner is appointed, proportionally by a committee. 8(b)lay out of provincial appointment, same as above. (9) An Act of parliament must regulate the procedure for the appointment of commissioners. (10) conditions of appointment for commissioner, 5 year term, renewable once, SA citizen and</p>		
--	---	--	--

	knowledge and experience. (11) Removal of commissioner, grounds, misconduct, incapacity, incompetence		
Section 197-Public Service	(1) Within public administration there is a public service for the Republic, which must function and be structured, in terms of legislation, and which must loyally execute the lawful policies of the gvt of the day. (2) The terms and conditions of employment in the public service must be regulated by the national legislation. Employees are entitled to a fair pension as regulated by legislation. (3) No employee of the public service may be favoured or prejudiced only because that person supports a particular political party or cause. (4) Provincial gvts are responsible for the recruitment, appointment, promotion, transfer and dismissal of members of the public service in their administration within a framework of uniform norms and standards applying to the public service.		

Activity Answers

6.1 DEFINITION AND PRINCIPLES OF “COOPERATIVE GOVERNMENT”

CONCEPT	KEYPOINTS
	Cooperative gvt refers to the system of gvt that defines the framework within which the relations between the three spheres of gvt must be conducted. Chapter 3 makes and stipulates these principles which require cooperation in good faith between the spheres. These principles set the framework for the regulation and distribution of gvt power, which can never be entrusted to a single body. The national sphere plays an over-arching role in this relationship. The province in turn empowered to monitor the local sphere, so it's a somewhat regulated trickling effect. The local sphere then carries a broader mandate in the area of service delivery.
	S 151, which gives the local municipality its “controlled independence” was not the case pre-1994, instead the LM was under the PG. This has

	since allowed for the breakdown of authority among the 3 spheres.
	The categorization of the gvt into different spheres indicates the hierarchical relationship that exists between the levels of gvt.(see s41). Cooperative principles also allow the lower sphere to influence policy that it will have to execute, provide mechanisms to reduce political tension between the spheres and other provinces. The significance of the principles of lies in the fact that all spheres of gvt are interrelated and interdependent, in the sense that the functional areas of each sphere are not distinct from one another.

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW
Section 151	A municipality has a right to govern on its own initiative, the local affairs of its community, subject to national and provincial legislation as provided in the C. The national or provincial gvt may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions	This gives the local municipality its independence from the national and provincial spheres, which was not in the case pre-1994.	

6.2 THE DIFFERENT FORMS OF GOVERNMENT

6.2.1 THE UNITARY FORM OF GOVERNMENT

CONCEPT	KEYPOINTS
Definition	The distribution of gvt authority may determine the form of the state. There are two types, unitary or federalism, the difference is on the degree of interaction and the division of power the spheres.
The Unitary form of gvt	In a unitary system the state authority is centralized in one sphere, all other gvt bodies subject to it. The essential features are: power concentrated in central gvt, centralization of state activities over decentralization, Provinces enjoy limited autonomy, and provinces are subordinate the national sphere. Advantages are uniformity and unity of policy and implementation, minimal conflict of authority, speedy action and responses, less expensive with no duplication of authority. Disadvantages are; concentration leads to absolute power, lack of

	urgency on domestic issues, central gvt potentially detached from on the ground local issues. This was the dispensation present pre-1994.
The federal form of gvt	Characterised by the distribution of gvt authority among different spheres of gvt. The authority is constitutionally distributed. The methods of federalism to achieve these are; defining authority in a constitution, defining the powers of provinces in the constitution, defining powers of both central and provincial level and indicate superiority and subordinate, providing concurrent spelt out jurisdiction between the central and provincial gvts. The essential features are: distribution of state power among various levels of gvt, broader mandate to provinces, limited jurisdiction to provinces of essential issues, disputes between spheres being solved by an independent arbiter such as the CC court.(s41(1)). These features affirm, the supremacy of constitution, the division of power among the spheres of gvt, the rigidity of constitution, the independence of the judiciary.* In essence, the federal gvt system entails the sharing of legal sovereignty among the different spheres, with each sphere having constitutional and legislative authority to make decisions independently but which do not conflict with one another. This is the situation in SA.
Advantages of federalism	It develops intergovernmental relations, promote and facilitate cooperation in decision-making, coordination of budgets, policies, priorities across interrelated sectors and functions, smooth flow of information towards implementing policies, prevent and resolve conflicts and disputes. It provides for devolution of powers
The relationship between the various spheres of government	The governance of the relationship between the various spheres of gvt is dealt with in s 41 of the C. The intergovernmental relations are inevitable in the light of the fact that the constitution provides for the concurrent legislative powers, which, in some instances, may give rise to disputes. The intergovernmental relationship has also entails the independent exercise of governmental authority, which is not subject to interference by an outside territory of each sphere, except through the normal checks and balances that regulate government conduct in public administration. Note schedule 4 and 5. Also note NCOP mechanism of distributing wealth evenly amongst all provinces.

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW
		This precedent has a vast application, 1 st it emphasises s 41 (1) (g) of approaching the courts after exhausting all	<i>Premier Western Cape v President of the Republic of RSA & another(1999)</i> “The provisions of chapter 3

		internal remedies, second, it gives the concurrency of legislative powers a right.	of the C are designed to ensure that in fields of common endeavour the different sphere of gvt cooperate with each other to secure the implementation of legislation in which they all have a common interest. The cooperation called for goes as far as to require that every reasonable effort be made to settle disputes before a court is approached to do so”

6.3 INTERGOVERNMENTAL RELATIONS AND PUBLIC ADMINISTRATION

CONCEPT	KEYPOINTS
	These are essential to the successful execution of many public initiatives. The constitutional values and principles of public administration are in section 195
Principles	The promotion and maintenance of a high standard of professional ethics, Efficient, economic and effective use of resources, accountable public administration, good human resource management and career development practices.
	The accountability of officials has also has endorsed the reasonableness of gvt action. The development of substantive principles of cooperative governance requires “legitimacy” or reasonableness.

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW
		Application of s 1, s 195, s 92 of the constitution on public power accountability	<i>Mthembe-Mahanyele v Mail & Guardian Ltd & another</i> The court held that;- “ it is necessary to hold members of the gvt accountable to the

			public order to allow robust and frank comment in the interest of keeping members of society informed about what the gvt does”

Activity Answers

Mthembi-Mahanyele v Mail and Guardian Ltd and Another (2004) 3 All SA 511 (SCA)

A newspaper article by the respondent about a report card or evaluation of members of cabinet in 1997, the applicant was given an F with a bit of choice words added to it. The applicant was suing for defamation of character, claiming 3mil. Her case was on the claim that she awarded a housing contract to a close friend. The respondents claimed that as a gvt minister the applicant did not have standing to sue for defamation, that the claim was substantially true and that its publication was in the public’s interest. Second responded claimed the statement was made in good faith and made an alternative plea of journalist protection and privilege, s 16-freedom of expression and press. The court did the reasonability test, whether a reasonable person might understand the meaning. Both rights of dignity of the applicant and freedom of expression and press of the respondent are fundamentally protected. The minister was denied standing to sue for defamation on review of performance of her work unless she can prove malice. Freedom of expression in political discourse is necessary in order to hold members of gvt accountable.

Study Unit 7

NATIONAL LEGISLATIVE AUTHORITY

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW
Section 42- Composition of Parliament	(1)Parliament consists of:- (a) the NA; and (b) the NCOP. (2) The NA and the NCOP participate in the legislative process in the manner set out in the C. (3) The NA is	The function of parliament and what their mandate is.	

	<p>elected to represent the ppl & to ensure gvt by the people under the C. It does this by choosing the President, by providing a national platform for the consideration of issues, by passing legislation and by scutinising and overseeing executive action. (4) The NCOP represents the Provinces to ensure that provincial interests are taken into Account in the national sphere of gvt. 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. (5) The President may summon parliament to an extra ordinary sitting at any time to conduct special business. (6) The seat of parliament is Cape Town, but an act of parliament in accordance with s 76(1) and (5) may determine that the seat of parliament is elsewhere.</p>		
<p>Section 43-Legislative authority of the Republic</p>	<p>In the Republic, the legislative authority:- (a) of the national sphere of gvt is vested in parliament, as set out in s 44; (b) of the provincial sphere of gvt is vested in the provincial legislature, as set out in s 104; and (c)</p>	<p>The constitutional provision of where the legislature gets its power</p>	

	of the local sphere of gvt is vested in the Municipality Councils, as set out in s 156.		
Section 44- National legislative authority	(1) The national legislative authority as vested in parliament:- (a) confers on the NA the power:- (i) to amend the C. (ii) to pass legislation with regard to any matter, including a matter within a functional area listed in schedule 4, but excluding, subject to subsection (2), a matter within a functional area listed in schedule 5 (iii) to assign any legislative powers, except the power to amend the constitution, to any legislative body in another sphere of gvt; and (b) confers on the NCOP the power:- (i) to participate in amending the C in accordance with s 74; (ii) to pass in accordance with s 76, legislation with regard to any matter within a functional area listed in schedule 4 and any other matter required by the C to be passed in accordance with s 76; and (iii) to consider, in accordance with s 75, any other legislation passed by the NA.	Power of National legislators, both NA and NCOP.	
Section 44(4)	When exercising its legislative authority, parliament is bound only by the C, and must act in accordance with, and within the limits of,	Provision for constitutional democracy.	

	the C.		
Section 46(1)- Composition and elections	(1)Subject to schedule 6A, as amended by 5.1 of Act 2 of 2003 the NA consists of no fewer than 350 and no more than 400 women and men elected as members in terms of an electoral system that;- (a) is prescribed by national legislation; (b) is based on the national common voters role; (c) provides for a minimum voting age of 18years; and (d) results, in general, in proportional representation.	Setting out the election	
Section 55-Powers of National Assembly	(1)In exercising its legislative power, the NA may:- (a) consider, pass, amend or reject any legislation before the Assembly and (b) initiate or prepare legislation, except money bills. (2) The NA must provide for mechanisms:- (a) to ensure that all executive organs of state in the national sphere of gvt are accountable to it; and (b) to maintain oversight of (i) the exercise of national executive authority, including the implementation of legislation and (ii) any organ of state	The legislators power over the organs of state	
Section 57-Internal arrangements, proceeding s and procedures of the NA	(1)The NA may:- (a) determine and control its internal arrangements, proceedings and		

	procedures;- and (b) make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement.		
Section 58-Privilege	(1)Cabinet Ministers, Deputy Ministers and members of the NA:- (a) have freedom of speech in the Assembly and in its committees, subject to its rules and orders; and (b) are not liable to civil and criminal proceedings, arrest, imprisonment or damages for:- (i) anything that they have said in produced before or submitted to the Assembly or any of its committees; or (ii) anything revealed as a result of anything that they have said in, produced before or submitted to the Assembly or any of its committees.		

Activity Answers

7.1 DEFINITION OF LEGISLATIVE AUTHORITY

CONCEPT	KEYPOINTS
Definition	In a modern state which subscribe to a system of gvt based on cooperative federalism, legislative authority is not granted to a single institution. Instead it is divided amongst the three spheres of gvt. There are three players in the law-making processes, the parliament, head of state and the electorate.
	The national legislature is increasingly involved in the formulation of statutory guidelines and norms with which subordinate legislation and

	rules must comply.

7.2 PARLIAMENT AS THE SEAT OF NATIONAL LEGISLATIVE AUTHORITY IN SA

CONCEPT	KEYPOINTS
	The SA constitution, clearly sets out the legislative authority of the Republic, in the national sphere of gvt is vested in parliament. The SA parliament is a bicameral legislature, this means it consists of two houses, NA and NCOP.
Reasons for the two houses	Better representation if the houses differ, if a particular province is underrepresented in one house it will most likely be compensated in the other, share workload, the two act as a check on the other.

7.3 THE FUNCTIONS OF PARLIAMENT

CONCEPT	KEYPOINTS
	It is more than just a legislative function, the SA constitution recognizes that the national legislative authority which is embodied in parliament has a greater role to play than just-law making. Analyse s 42(3), s 55 for NA and s 42(4) for NCOP. Core functions of NA include:
Representation of electorate	Is based on the concept that qualified voters will choose certain individuals to act for them for a fixed period of time. To decision make, articulate their interest, communication channel btwn gvt and electorate.
The election of the President	Section 86
Public consideration of issues	Vigorous public debate is the lifeblood of a democracy. Parliament provides platform for policy discussions and debate. S 59(1) and s 72(1). Sittings held in public, steps may be taken to regulate proceedings. Public has to right to know what's going on.
Passing legislation	Parliaments most important function is to debate, amend and approve the Bills submitted to it by its committees and individuals.
Scrutinizing and overseeing executive action	The NA exercises control over state spending, through scrutiny of budget, criticising gvt policy.
Functions of SA	S 42(4) representation of the provinces in national spheres of gvt, participation of the national legislative process, public consideration of issues affecting the provinces.

	<p>This means that, like the NA, NCOP is constitutionally mandated to facilitate public involvement in its legislative and other processes and those of its committees. This is referred to as “participatory democracy” and simply means that individuals or institutions must be given an opportunity to take part in the making of decisions that affects them. S 59(1)-NA 72(1)-NCOP.</p>
--	---

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW
Section 118(1)	<p>A provincial legislature must- (a) facilitate the involvement of the public in the legislative and other processes of the legislature and its committees and (b) conduct its business in an open manner and hold its sittings, and those of its committees in public, but reasonable members may be taken....regulation of media and right to search.</p>	<p>This is the provision for the public access of parliamentary activities that is constitutionally empowered, by both s 118 and section one of the C. ‘accountability, responsiveness and openness’.</p>	<p><i>Matatiele Municipality & Others v President of RSA & Others</i> “Our C contemplates a democracy that is representative and that also contains elements of participatory democracy. As the preamble openly declares, what is contemplated is “a democratic and open society in which gvt based on the will of the ppl”. Consistent with the constitutional order, 118(1)(a) calls upon the provincial legislature to facilitate involvement in their legislative and other processes”</p>
		<p>The given consideration in each case on the scope of the duty to provide for public participation and that the intensity of the effect on a certain group has to be considered.</p>	<p><i>Doctor for Life International v Speaker of the National Assembly & Others</i> “The nature and degree of public participation that is reasonable in a given case depends on a number of factors. These include the nature and importance of the legislation and the intensity of its impact on the public”</p>
Section 72(1)- Public access and Involvement	(1)The NCOP must (a) facilitate public		

in National Council	involvement in the legislative and other process of the Council and its committees. (b) conduct its business in an open manner, and hold its sittings and those of its committees, in public but reasonable measures may be taken.....regulation of media and right to search.		

Doctors for Life International v The Speaker of the National Assembly and Others

One of the issues that the court had to decide on was the nature and scope of the duty to facilitate public involvement comprehended in s 72(1) and 118(a) of the C. The court decided that parliament had failed to comply with its constitutional obligation to facilitate public involvement before passing the Choice of Termination of Pregnancy Amendment. The adoption was inconsistent with the constitution and thus invalid.

7.4 ELECTIONS

CONCEPT	KEYPOINTS
	S 19(2) guarantees the right of every citizen to “free and fair” and regular elections for any legislative body established i.t.o the Constitution. Section 190 provides for the electoral commission, which manages the elections.

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW
Section 19(2)	guarantees the right of every citizen to “free and fair” and regular elections for any legislative body established i.t.o the Constitution.	Stipulation of guarantee of free and fair elections.	
Section 190-Electoral Commission	The electoral Commission must: (a) manage elections in all three spheres of gvt in	Provision of Electoral Commission	

	accordance of national legislation (b) ensure elections are free and fair (c) declare results i.t.o of national legislation and in a reasonable time.		

7.4.2 THE RIGHT TO VOTE

CONCEPT	KEYPOINTS
	The underlying principle of representative democracies is that people must elect a person to represent them in parliament, this can be achieved by the right to vote. This right is not absolute, there are voting qualifications like minimum voting age provided they don't derogate bill of right provisions.
Are prisoners entitled to vote?	<i>August v Electoral Commission</i> It was found to be unconstitutional to deny prisoners to vote. The right to vote imposes an obligation on gvt to see it done. The Electoral Commission Act also imposes n affirmative obligation on the commission to take necessary steps to ensure that eligible voters are registered. By omitting to take steps, the Commission failed in their obligation to see to it that prisoners were registered. They had also unlawfully disenfranchised the prisoners, the CC ordered them to see to it that the prisoners could register. The CC said that, yes the right could be limited but by application and not by omission. Later, the Electoral Act was amended to say people serving jail sentences without an option for fine could not vote, only those who had an option for a fine but were in prison because they could not afford it.
Are expats entitled to vote?	Ritcher judgement The Court decided unanimously that South Africans living abroad had the right to vote if they were registered. They found that s 33 of Electoral Act unfairly restricted the right to cast special votes while abroad to a very narrow class of citizens. It was declared unconstitutional and invalid. If you were registered already, and were out of the country on the date of the elections, you were allowed to vote in national, but not provincial elections, provided they give notice of their intention to do so i.t.o Electoral regulations to the Chief Electoral Officer and identify the embassy they intend to apply for special vote.

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW
		Listed enough above	<i>August v Electoral Commission(1999)(CC)</i>
		Listed enough above	<i>Richter v Minister of</i>

			<i>Home Affairs and Others(2009)</i>

7.4.3 ELECTORAL SYSTEMS

CONCEPT	KEYPOINTS
Definition	An electoral system is the mechanism by means of which the electorate exercises its right to vote for the representative of its choice. A body of rules of the procedures for the election of political representative, how votes are cast and translated into sits in the legislature. The rules regulate: the franchise, method of voting, frequency of elections, translation of votes into sits, qualification and nomination of candidates, determination and declaration of results. Section 46(1).
Forms of electoral systems	There are numerous forms, here are the main two used in SA
Territorial/regional representation	Characteristic of Westminster system electoral system, used in SA before 1996 Constitution. It works: national territory divided into constituencies, voters in each constituency elect a single member to represent them in parliament, candidate with most votes is elected. Advantages: it is simple, conducive in a strong, stable gvt, closer bond between representative and voter (visible accountability). Disadvantages: does not reflect the relative strength of the parties, favours stronger parties to the detriment of weaker ones.
Proportional Representation	All parties participating in an election obtain representation in parliament that directly reflects the votes cast for these parties in such an election. It can be regarded as the most inclusive system of representation. Advantages: fair reflection of voters opinion, eliminates delimitation of electoral districts as they are all the same Gauteng or Limpopo, votes carry same weight, carries wider representation of parties than territorial representation, coalitions can be formed against the power of a majority party. Disadvantages: may lead to weak unstable gvt as no party can have absolute majority, impersonal no link between representation and voter, complex and difficult to understand, no by-elections to test political trends.
Which one is followed in SA?	Prior 1994, we had a Westminster type of system (territorial). This has been replaced by a listed-based proportional representative system. The current electoral system has been criticized mainly for not promoting the values of accountability and representation. In the absence of constitutional representatives the voters feel alienated from the elected representatives.

7.5 MEMBERSHIP AND TERM IN OFFICE

CONCEPT	KEYPOINTS
Definition	S 47(1) and (2) prescribes who is eligible to be a member of the NA, while s 47(3) stipulates the conditions under which a person loses membership of the NA. S 61-how delegates to the NCOP are appointed s 62(1)-(3) who is eligible and s 62(4) when someone ceases to be a permanent members.
Theories of representation	Free or imperative mandate, which one applies on parliamentary reps? Free mandate, reps are not bound by mandate from electorate but must act in a manner with the interests of the country. Imperative mandate is they are bound by the mandate given to them by the electorate.
Which one is followed in SA?	Before 1994, the imperative mandate, if you leave the party, you vacate your sit, in 2002 after amendments in the current constitution, at certain stipulated times members of parliament are allowed to cross the floor to other parties without losing their sits. AND now again in 2008, floor crossing has been abolished, so the imperative mandate stands again.

7.6 FUNCTIONING OF PARLIAMENT

CONCEPT	KEYPOINTS
	S 51-59 of the C contains how day-to-day functioning of the NA. s 63 to 72 for the NCOP.
Privileges(internal procedures)	These are the powers and privileges enjoyed by members of parliament that enable them to perform their function without hindrances. Developed in Britain to protect parliament from Monarch, today. These include; power to hold someone in contempt and punish, freedom to say anything in parliament without fear of prosecution, set out in the C. They are set out in the C. They have the right to determine their own internal procedures with due regard to transparency and openness. Although it is allowed its own processes it is still subject to judicial review, note De lille judgment.
Committees	The need for parliamentary committees arises from the size of parliament and the range and complexity of the matters before it. They cant fulfill all business in the plenary sessions, thus committees handle the finer details of certain issues. The committee system encourages transparency in gvt and also allows and encourages public input into the law making process. There is a distinction between ad hoc and standing committees. Examples are; portfolio committees in the NA-there is a portfolio committee for every gvt department. Select committees in the NCOP- similar to portfolio committees. The committee on public accounts- considers financial statements of all organs of state. The Mediation Committee- joint committee meant to settle disagreements on bills between NCOP and NA.

Study Unit 8

NATIONAL LEGISLATIVE PROCESS

CONCEPT	KEYPOINTS
Definition	The national legislative authority is exercised within the framework of the constitution and the principles of cooperative government embodied in section 40 and 41 of the constitution. In other words, parliament shares legislative with the provincial legislature and municipal Councils and is not the sole bearer of state authority.

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW
Section 73(1)- All Bills	Any Bill may be introduced in the NA		
Section 73(5)	A bill passed by the NA must be referred to the NCOP if it must be considered by the Council. A Bill passed by the Council must be referred to the NA.	The shared legislative power between the NA and NCOP, this is the national legislature.	
Section 74(1)-Bills amending the constitution	S 1 and the subsection may be amended by a Bill passed by:- (a) the NA with a supporting vote of 75% of its members and (b) the NCOP with a supporting vote of at least six provinces.	The requirements when you amend section one, which is the founding provision of the constitution.	
Section 74(2)	Chapter 2 may be amended by a Bill passed by: (a) the NA, with a supporting vote of at least two thirds of its members and (b) the NCOP with a supporting vote of at least six provinces.	The requirements when you amend the provision of the Bill of rights, chapter 2 in the constitution.	

Section 74(3)	Any other provisions of the Constitution may be amended by a Bill passed:- (a) the NA with a supporting vote of at least two thirds of its members and; (b) also by the NCOP with a supporting vote of at least six provinces, if amendment:- (i) relates to a matter that affects the Council; (ii) alters provincial boundaries, powers, functions or institutions or (iii) amends a provision that deals specifically with a provincial matter.	Requirements for the passing of any other legislation	
Section 75(1)-Ordinary Bills not affecting provinces	When the NA passes a Bill other than a Bill to which the procedure set out in s 74 and 76 applies, the Bill must be referred to the NCOP and dealt with in accordance with the following procedure: (a) the Council must:- (i) pass the Bill; (ii) pass the Bill subject to amendments proposed by it; or (iii) reject the Bill (b) If the Council passes the Bill without proposing amendments, the Bill must be submitted to the President for assent.(c) If the Council rejects the Bill or passes it subject to amendments, the Assembly must reconsider the Bill, taking into account an amendment proposed by the Council, and	Requirements for ordinary legislation adoption.	

	<p>may:- (i) pass the Bill again, either with or without amendments; or (ii) decide not to proceed with the Bill. (d) A Bill passed by the Assembly in terms of paragraph (c) must be submitted to the President for assent.</p>		
<p>Section 76(1)- Ordinary Bills affecting provinces</p>	<p>When the NA passes a Bill referred to in subsection (3),(4) and (5), the Bill must be referred to the NCOP and dealt with in accordance with the following procedure:- (a) The Council must:- (i) pass the Bill; (ii) pass an amended Bill; or (iii) reject the Bill. (b) If the Council passes the Bill without amendment, the Bill must be submitted to the President for assent. (c) If the Council passes an amended Bill must be referred to the Assembly, and if the Assembly passes the amended Bill, it must be submitted to the President for assent. (d) If the Council rejects the Bill, or if the Assembly refuses to pass an amended Bill referred to it in terms of paragraph (c) the Bill and where applicable, also the amended Bill, must be referred to the mediation committee which must agree on; (i) the Bill as passed by the Assembly; (ii) the</p>		

	amended Bill as passed by the Council; or (iii) another version of the Bill (e) If the Mediation Committee is unable to agree within 30 days of the Bill's referral to it, the Bill lapses unless the Assembly again passes the Bill but with a supporting vote of at least two thirds of its members.		
Section 79(1)-Assent to Bills	The President must either assent to and sign a Bill passed in terms of this Chapter or, if the President has reservations about the constitutionality of the Bill, refer it back to the NA for reconsiderations	This is somewhat a veto, the President has the right to send the Bill back to the legislature if he is not happy with it.	

Activity Answers

8.2 LEGISLATIVE CAPACITY OF PARLIAMENT

CONCEPT	KEYPOINTS
Exclusive Competence of parliament	The C gives parliament four kinds of law making powers that only it can wield, these are: exclusive power to amend and repeal its own laws, exclusive power to make laws on those areas which have expressly been given to it by various provisions of the Constitution. They also have power to amend the Constitution according to s 74 of Constitution; it also has legislative capacity to areas in schedule 4 and 5. When parliament makes all this , it must do use the procedure in s 75 of C.
Concurrent legislative competence of Parliament	Parliament has concurrent legislative authority with the provinces on schedule 4 matters. Should a conflict arise between national law and provincial law relating to a concurrent matter, then the national law usually prevails over the provincial law, provided that the criteria set out in s 146 (2) and (3) is met.
National legislative power to intervene	Schedule 5 sets out those matters over which the provincial legislature enjoys exclusive competence. This means that only the provincial legislatures may make any laws dealing with those matters that are listed in schedule 5. However, this power is not absolute, its subject to parliament at certain times for e.g to maintain essential national standards.

--	--

8.2 THE NATIONAL LEGISLATIVE PROCESS

CONCEPT	KEYPOINTS
Definition	The legislative process is a series of actions that must take place before a law is formulated and considered, refined and approved by the competent government body in order to be valid and to have the force of law
Legislative process	Bill is formulated and finalized- Bill is introduced to parliament- Consideration of Bill-Bill referred to NA and NCOP-Assent by President- Act published in gvt Gazette.

8.3 BILLS AMENDING THE CONSTITUTION

CONCEPT	KEYPOINTS
Section 1	It is difficult to amend because it contains the values and principles which are given effect to by various provisions throughout the constitution. It is necessary to protect it. South African is an example of an inflexible constitution that requires special majorities and special procedures.

8.4 ORDINARY BILLS AFFECTING THE PROVINCES (S 76 BILLS)

CONCEPT	KEYPOINTS
	Section 75 and 76 deal with the adoption of ordinary Bills, that is, Bills that do not amend the Constitution. S 75 sets out the procedure for the adoption of ordinary Bills not affecting the provinces, while section 76 deals with ordinary Bills affecting the provinces. The test in deciding which type of act belongs to which section lies in the impact it has on the province rather than the substance. Question to consider are: Does the Bill expect any part of it to be carried out by the Provinces, does it contain provisions that would normally fall under the provinces, does it conflict with provincial law, does it make a change to any law that the province is already implementing? If the answer is yes on all these, the section 76 should be implemented. A bill dealing with a matter set out in schedule 4 must therefore be regarded as one affecting the provinces, and must be adopted in accordance with s 76(1) for bills introduced by the NA and (2) for bills introduced by the NCOP.

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW
-------------	-------------	-------------	----------

		Allocation of what Bills in schedule 4	<i>Ex Parte the President of RSA: In Re Constitutionality of Liquor Bill (2000)(CC)</i> "Any Bill whose provisions in substantial measure fall within a functional area listed in schedule 4 must be dealt with under s 76"

8.5 ORDINARY BILLS NOT AFFECTING THE PROVINCES (S 75 BILLS)

CONCEPT	KEYPOINTS
	If an ordinary Bill does not fall within a functional area listed in schedule s 4 and 5 and does not provide for legislation envisaged in any of the other sections mentioned in section 76 (3-5), it is considered a Bill not affecting the provinces and must be adopted in terms of section 75.

8.6 ASSENT BY THE PRESIDENT (S 79)

CONCEPT	KEYPOINTS
	Section 79 deals with assent of Bills. In terms of subsection (1), 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 C does not go as far as give him a veto, meaning he cannot refuse to sign a Bill, but only refer it back to parliament for reconsideration, if parliament does not act on his recommendations, he can then send it to the CC for review.

8.7 LIMITATIONS OF PARLIAMENT'S LEGISLATIVE AUTHORITY

CONCEPT	KEYPOINTS
Definition	The power of parliament like that of any other branches of government is derived from the constitution. This implies that parliament power is also limited by the constitution. These are
Fundamental rights limitations	Parliament may not limit the Bill of rights except those spelt out in section 36.
Federalism limitations	This is sticking to the geographical jurisdiction that creates the difference between the national, provincial and local gvts. (Schedule 5 is strictly provincial matters). Executive Council of Western Cape

	<p>decision is key. The court considered whether parliament can make law about matters which the constitution entrusts on the provinces. Court found that except for matters spelt out in schedule 5, parliament has concurrent powers with the provinces.</p>
Delegation limitations	<p>The delegation of legislative authority to other bodies or functionaries is a regular feature in modern states. Parliament often leave it to provincial legislature or members of the national executive to “fill in the gaps” in parliamentary legislation by means of proclamation or regulations. There are limitations to executive power to delegate. There is nothing in the constitution that prohibits parliament from delegating subordinate regulatory authority to another gvt bodies. However not this is for subordinate legislation and not plenary or original legislation, this can only be done by parliament. The parliament cannot delegate the power to amend or repeal Acts of parliament, to the Executive or anyone. As for delegation of legislative powers by the parliament to provincial and municipal legislatures section 44 (1) (a)(iii) stipulating the authority of the NA to delegate powers to the another sphere of gvt except the power to amend the constitution, such delegation is done by an act of parliament.</p>
Procedural limitations	<p>Parliament must correctly identify which bill amends the constitution, which bill affects the provinces, one not affecting the provinces and must then follow the appropriate procedure for the adoption of said Bill.</p>
Constitutional amendment	<p>Prescribed in s 74, certain procedures and majorities</p>

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW
Section 44 (1)(a) (iii)	<p>(1)The national legislative authority as vested in parliament (a)confers the NA with the power to (iii) to assign any of its legislative powers, except the power to amend the constitution, to any legislative body in another sphere of gvt.</p>	<p>This answer the question whether the national legislature can delegate power to another legislative sphere of gvt.</p>	

Study Unit 9

The Executive Authority: National Sphere

Overview of Unit

9.2 THE DISTRIBUTION OF EXECUTIVE AUTHORITY

9.2.1 THE NATIONAL EXECUTIVE AUTHORITY

CONCEPT	KEYPOINTS
Definition	It is the power to execute rules of law on matters that do not fall within the functional areas of the legislature or the judiciary. There are also traditional leaders, regulated by legislation, their role is not limited to a focus on developing legislation, but is also to ensure that such legislation gives due recognition to the treasures of African heritage that have evolved since time immemorial. They are now elected to a National House of Traditional Leadership as well as being born to it.
The distribution of executive authority	The executive authority of the Republic is exercised by, and is vested in various executive bodies such as the President, ministers and public officials. The president must be confined to those powers conferred to him by the constitution in s 85. The constitution as well recognizes and protects the institution of traditional leadership, which creates a dual system of governance. Effectively the C prohibits parliament from making laws that will interfere with the institution of traditional leadership (211 and 212) of C. The president is not the sole bearer of responsibility of executive authority; he should exercise it together with cabinet (s 90). The cabinet members and president have an individual and joint responsibilities to carry out their duties diligently as stipulated by the C.

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW
Section 83-The President	(a)The President is the Head of state and the head of the national executive.....		
Section 84-Powers and the Functions of the President	(1)The President has the powers entrusted by the Constitution and the legislation including those necessary to perform the functions of Head of State and Head	Function of the Presidency, everything laid out here is a presidential function	

	<p>of the national executive. (2) The President is responsible for (a) assenting to and signing bills (b) referring a bill back to the NA for reconsideration of the Bill's constitutionality, (c) referring a bill to the CC for a decision on its constitutionality.(d) summoning the NA and NCOP or parliament to an extraordinary sitting. (e) making any appointments that the C or L requires the President to make other than as head of the National executive. (f) appointing commissions of enquiry (g) calling a national referendum I.t.o an act of parliament (h) receiving and recognizing foreign diplomatic representatives (i) appointing ambassadors and diplomats (j)pardoning offenders (k) conferring honours.</p>		
<p>Section 85-Executive authority of the Republic</p>	<p>(1)The executive authority of the Republic is vested in the president.(2) The president exercises the executive authority, together with other members of cabinet by (a) implementing national legislation except where the constitution or an Act of parliament provides otherwise; (b) developing and implementing national policy; (c)coordinating the</p>	<p>Functions of the Executive and its stretch.</p>	

	<p>functions of state departments and administrations; (d) preparing and initiating legislation and (e) performing any other executive function provided for in the Constitution or national legislation</p>		
<p>Section 91-Cabinet</p>	<p>(1)The cabinet consists of the President, as head of the cabinet, a deputy President and ministers. (2)The President appoints the Deputy President and Ministers, assigns their power and functions and may dismiss them. (3) The president (a) must select the deputy president from among the members of the NA.(b) may select any number of ministers from among the members of the assembly and (c) may select no more than two ministers from outside the NA. (4) The president must appoint a member of the cabinet to be the leader of gvt business in the NA. (5) The deputy president must assist the president in the execution of the functions of gvt.</p>		

9.2.2 THE ELECTION, TERM OF OFFICE AND REMOVAL OF THE PRESIDENT

CONCEPT	KEYPOINTS
President	S 86- election of president, section 87- assumption of office, s 88- terms of office, s 89- removal of president on the grounds of a serious violation of C, serious misconduct and inability to perform the functions of his office, removed by the NA with adopted by supporting vote of two thirds of its members.
Traditional leader	Used to be born to it and left after death in a succession system, that has since changed with the Introduction of the election system to the NHTL. This should be distinguished between holding public office and holding office as <i>Inkosi</i> . The NHTL is a public office and is deemed executive authority. The executive authority is vested in the chairperson of the house with support of its members
Acting President	S 90, either the deputy president or a designated minister either by president or by cabinet. Or if neither, it will be the Speaker of the House.

9.3 POWERS AND FUNCTIONS OF THE PRESIDENT

CONCEPT	KEYPOINTS
S 84(1) gives President:	Power entrusted by constitution, by legislation, implied powers necessary 4 the exercise of his powers expressly conferred in the C & L. This is however not an exhaustive list of his powers. Some claim that the president has common law (prerogative) powers vested in the presidency; they are still subject to constitutional review.
Traditional	Despite the powers vested in the chairperson by natural birth, his or her executive powers are regulated by legislation as mandated by the Constitution. S 212(2)

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW
		The subjectivity of presidential power by the constitution	<i>In Re: Certification of the Constitution of RSA(1996)</i> "The president derives his power not from antiquity but from the constitution itself that proclaims its own supremacy. Should the exercise of the power in any particular

			instance be such as to undermine it, that conduct would be reviewable

9.3.1 THE EXERCISE OF PRESIDENTIAL POWER AND FUNCTIONS

CONCEPT	KEYPOINTS
	The constitution not only sets out the powers of the president but also prescribes how such powers must be exercised. Thus he has to follow a set of constitutional provisions namely: respect the Bill of rights, observe rules of admin law, respect the doctrine of sop, respect the status of provincial and local authorities and their degree of autonomy. In this section we are concerned with the procedural requirements, they are four categories of these, 1- the 'together with' cabinet requirement when exercising his powers, these are powers as head of the national executive. 2- the 'after consultation with' other bodies, only required to consider a recommendation not necessarily take it 3- the 'on the recommendations or advice' sometimes he is bound to follow recommendations. 4- Decision taken by president must be in writing and signed off by relevant cabinet member.

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW
		The president can countersign not transfer power to a member of cabinet.	<i>Minister of Justice and Constitutional Development v Chonco</i> The president may not transfer his power to a cabinet member.
		The president also has to take personal responsibility for his decisions and functions. He should have taken the decision.	<i>President of SA v SA Rugby Union</i> constitutional validity of appointing a commission. The minister appointed the commission and the President only rubber-stamped it, it was therefore invalid

9.4 THE PRESIDENT AND THE COURTS

CONCEPT	KEYPOINTS
	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.

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW
		Precedence on whether President can be made to testify.	<i>President of SA v SA Rugby Union</i> Courts had to consider whether the president can be ordered to give evidence in a civil matter in relation to the performance of his duties. They ruled that he could appear and should in order to symbolically show that he is also subject to the rule of law

9.5 THE CABINET

9.5.1 COMPOSITION AND FUNCTIONING OF THE CABINET

CONCEPT	KEYPOINTS
	S 91 deals with the composition of cabinet, president, deputy president and ministers. President as Head of Cabinet. S 85(2) affirms that the president exercises his or her functions together with members of the cabinet

9.5.2 ACCOUNTABILITY

CONCEPT	KEYPOINTS
	Section 92(1) stipulates that the DP and ministers are responsible for the powers and functions of the executive assigned to them by the P.
	Section 17 of NHTL endorses accountability of chairperson, submitting reports to parliament every year.

	Section 92(2) provides that members of the cabinet are accountable individually and collectively, to parliament for the exercise of their powers and the performance of their functions.
Collective accountability	Acting in unison
Individual accountability	Includes explaining the dealings of her/his department, acknowledge that something is wrong, failures and mistakes, to resign if situation calls for it,

9.5.3 CONDUCT OF CABINET MEMBERS

CONCEPT	KEYPOINTS
	S96 deals with the ethical conduct of cabinet members and Deputy ministers. This provision requires cabinet members to conduct themselves according to the highest ethical standards both in their professional and individual capacities in order to protect the integrity of parliament.

9.6 CONTROL OVER THE EXECUTIVE

9.6.2 TYPES OF PARLIAMENTARY CONTROL OVER THE EXECUTIVE

CONCEPT	KEYPOINTS
Different quickie types	Question and answer during sessions, interpellations and short debates, parliament committees often investigate the executive, tabling in of subordinate legislation to parliament for approval, budget allocations to departments is done by parliament- at least its approval, removal or impeachment of president done by the NA, adoption of a motion of no confidence dissolving cabinet.

9.6.3 JUDICIAL CONTROL

CONCEPT	KEYPOINTS
	Since executive is subject to the constitution, the courts are an important player in determining that subjectivity; they can test this using the following criteria.
The Bill of Rights	The state administration may limit these rights only according to s36.
Fair and open hearing	The removal of ouster clauses, the courts disputes can be solved in a court of law.
Access to information	Meant to secure accountability and openness.
SOP doctrine	Has to be respected, and not compromise the courts or jurisdiction of other spheres of gvt.

9.6.4 ADMINISTRATIVE LAW

CONCEPT	KEYPOINTS
	The rules of administrative law constitute one of the most important checks and balances over the power of the executive. S 33 guarantees just administrative action.

9.6.5 CONTROL BY OTHER INSTITUTIONS

CONCEPT	KEYPOINTS
	Apart from control of parliament and the judiciary, the constitution empowers a number of institutions to investigate, criticize and report on the activities of the executive:
Public Protector	Has power to investigate gvt or state administration on conduct that is improper, it is an independent institution, reports to NA once a year.
Auditor General	Audits the accounts of all organs of state, is independent and submits reports to parliament.
Commissions of enquiry	President can appoint a commission to investigate any executive functionary and reports to parliament.
Special Investigating Units	Appointed by president, similar to commissions.
	The media also plays a role, and the general public through public debate and criticism through trade unions, lobby groups, churches etc.

Study Unit 10

JUDICIAL AUTHORITY

CONCEPT	KEYPOINTS
	Remember, separation of powers is an integral part of the 1996 constitution, even though there is no single provision to unequivocally mention this

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW
Section 165-Judicial authority	(1)The judicial authority of the Republic is vested in the courts.(2)The courts are independent and subject only to the constitution and the law, which they must apply impartially and without fear, favour or prejudice.(3)No person or organ of state may interfere with the functioning of the courts.(4)Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartially, dignity, accessibility and effectiveness of the courts.(5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies	The power and function and independence of the courts.	
166-Judicial system	Lists all the courts in their hierarchy.		
167(3)CC	The jurisdiction of the constitutional court, as the highest court of the land.		
167(4)	Exclusive competence of the constitutional court.(a) decide disputes between organs of state.(b)decide on the constitutionality of bills and legislation, amendments.		
167(50-Confirmation or order of invalidity	Confirms or invalidates the constitutional decisions of the lower courts before they can		

	be made an order of the court.		
167(6)	Direct access to constitutional court		
168(3)	Supreme court of appeal		
169	High Courts		
170	Magistrate courts and other courts		
Section 172(1)-Powers of courts in constitutional matters	(1)When deciding a constitutional matter within its power, a court:- (a) must declare that any law or conduct that is inconsistent is invalid to the extent of its inconsistency; (b) may make any order that is just and equitable, including:- (i) an order limiting the retrospective effect of the declaration of invalidity; and (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.		

Activity Answers

10.1 DEFINING JUDICIAL AUTHORITY

CONCEPT	KEYPOINTS
Definition	Judicial authority is vested in the courts, they perform an adjudicatory function. This is when a court or tribunal resolves legal disputes or controversies between subjects of the state, or between the state and its subject, 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.
<i>Ubi ius ibi remedium</i>	Where there is a right, there is a remedy. The adjudicatory function of the court would make no sense if a legal rule exists without remedy. The existence of such a rule would be pointless if the breach of the rule did not carry some sanction. Since the police, which form part of the greater executive enforces these rules, someone else has to adjudicate them, thus the judiciary.

10.2 THE JUDICIAL IN HISTORICAL CONTEXT

CONCEPT	KEYPOINTS
	Between 1910 and 1994, SA followed a constitutional system based on the principles and philosophy of parliamentary sovereignty, it is characterized by a system of gvt in which parliament is the sole bearer of legislative authority and no competing authority or body exists to impose legal limitations upon this competence.
Judiciary was subordinate	Judiciary seen as a subordinate to the law-making authority, and had little or no room to manoeuvre against apartheid ideologies.
Undemocratically elected parliament	Undemocratically elected parliament enacted laws that could not be tested by the courts.
Judiciary and the people	Judiciary was viewed with distrust since it was not independent, part of the same oppressive system.
	Despite numerous attempts by the judiciary to oppose the gvt, the Harris case, they were stifled, no bill of rights or constitution to hold them accountable
Limited to procedure	The judiciary could only test the whether the manner and form provisions or procedure for the enactment of an Act of parliament had been compiled with and not whether the Act was invalid or unconstitutional
	Demographically, the courts were staffed by white middle age males, could not have been good

10.3 THE ROLE OF THE JUDICIARY UNDER THE 1996 CONSTITUTION

CONCEPT	KEYPOINTS
	The 1996 constitution which heralded a new era of democratic government based on a constitution that is supreme and on the promotion of democratic objectives, specifically sought to address the shortcomings inherent in a system of governance premised on parliamentary sovereignty and to remove the constraints that were imposed on the judiciary prior to 1993.
	It has changed since 1994, the judiciary now plays a pivotal role in maintaining and upholding the constitution. It now has a number of functions:
	Seeks to preserve and foster basic human rights created under a constitutional state. The courts are now called upon to promote the values underlying an open and democratic society based on freedom and equality.
	Constitutional supremacy has now replaced parliamentary sovereignty, now the judiciary exercises the power to test that all laws passed by parliament and the provincial legislature conform to the procedural

	and substantive provisions of the Constitution.
	The judiciary also performs a watchdog function over the executive by ensuring they conform to the constitutions values and principles and norms.
Structure of Judiciary prior to 1993 Bottom to top.	Separate African courts, chiefs headman presiding over civil matters i.t.o customary law-Lower courts consisting of district and regional magistrate courts-provincial and local division high courts-Appellate Division
Structure of judiciary after 1993 Bottom to top	Other courts created by an act of parliament-Magistrate courts-High Courts-Supreme courts of Appeal-Constitutional Courts

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW
		Legal precedence on the courts creative function on law that is a character of the post 1996 constitution and legal system.	<i>Baloro & Others v Bophuthatswana & Others(1995)</i> The courts don't only interpret existing laws, but will engage in the more creative activity of generating new laws, particularly where the existing law is felt to be "unjust and ambiguous, inefficient or simply obsolete" owing to changing circumstances

10.4 ****NOTE STRUCTURE OF THE JUDICIAL SYSTEM- PRIOR TO 1993 AND AFTER****

10.5 JURISDICTION OF THE COURTS

CONCEPT	KEYPOINTS
Definition	The power or competence of a court to adjudicate on, determine or dispose of a dispute, the ability or authority of a court to hear a particular matter. This depends on factors like geographical delineation of magisterial districts, causes of action, the amount of the claim or some other grounds.
Constitutional court	Highest court of the land, only concerned with constitutional contraventions by either the state on individuals or by the state organs amongst themselves.
Supreme court of appeal	Allowed to hear Constitutional matters, except those matters that fall within the exclusive jurisdiction on the CC. it will be the last court of appeal on non-constitutional matters.
High Court	They have wide constitutional powers and may decide on constitutional matters except those that fall exclusively on the CC. Any other matter of any kind.

Magistrate Courts	It does not have constitutional jurisdiction, but the constitution allows parliament to confer such powers, they cannot enquire on anything the President does. They can hear any other kind of matter.

10.6 APPOINTMENT OF JUDGES

CONCEPT	KEYPOINTS
Judicial Services Commission	It advises government on matters relating to the judiciary, it was created by the 1993 constitution. It had to recommend on the appointment and removal of judges and terms of office. The involvement of the JSC in the appointment of the judges was intended to restrict the power of the executive to appoint whoever it wished and thus bolster judicial independence. Empowered by s 178. Judges are appointed by the President as head of the national executive after consultation with the JSC and leaders of the parties in the NA. The President is not bound by the recommendation of the JSC, he should just consult and consider them.
Note the following	The President makes these appointments of judges acting together of the cabinet.
Qualification & criteria	Candidate must be SA citizens, fit and proper and appointment must reflect the racial and gender composition of SA. Affirmative action appointments to balance out the demographics of the past.

10.7 JUDICIAL INDEPENDENCE

CONCEPT	KEYPOINTS
Internationally	The Universal declaration of the independence of justice, which follows the UN basic principles on the independence of judiciary. This allows the independence of the judiciary.
Meaning of judicial independence	<i>Trias politica</i> , one of the consequences of this doctrine is the independence of the judiciary. The 1996 constitution does not give a clear meaning "independence" as it pertains to the courts. The independence of the constitution is a vital ingredient to the constitutional state.
Functional independence	Functional independence is primarily an instance of the separation of powers doctrine. Functional independence refers to the way in which the courts operate within the framework of a constitutional state. The core principle central to the independence of the judiciary as the "complete liberty of individual judges to hear and determine cases before them independent of and free from external influences or

	influence of the gvt, pressure groups, individuals or even other judges.
Personal independence	Personal independence which is also known as institutional independence, is secured by making sure that judicial officers are satisfied with their conditions of service and will not, derogate from performing their core functions. These include, their security of tenure, conditions of service, manner of appointment assuring public signs of impartiality,
Impartiality of Judges	It refers to the individual judge's state of mind or attitude in relation to the issues in dispute and the parties involved. They must reflect the long term beliefs of the society, must avoid imposing their pvt creeds in society, must distinguish between their personal views and realities of present day society, must be open minded with regard to possibilities.
Accountability and ethics	There is judicial control on the judges to have them accountable. For e.g, the fact that their decisions can be taken for review or appeal encourages judges to apply their minds before making a decision. The involvement of the JSC, removal of office, public debate and criticism, civil liability if judge acts in mala fide.
The powers of the courts in constitutional matters	A competent court has to power to declare any law or conduct that is inconsistent with the constitution invalid to the extent of its inconsistency. On the following factors; the retrospectivity, the courts only declare the invalidity and not fix it, that for the legislature, they should interpret in a manner that does not conflict with the constitution, they may simply suspend the application allowing the legislature to fix it.

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW
Section 151-Status of municipalities	(1)The local sphere of gvt consists of municipalities which must be established for the whole of the territory of the republic(2) The executive and legislative authority of a municipality is vested in its municipal council.(3) The municipality has a right to govern, on its own initiative, the local gvt affairs subject to the national and provincial legislation, as provided for in the constitution. (4) The national or provincial government may not compromise or impede a municipality's right to		

	exercise its powers or perform its functions.		
Section 152-Objects of local government	(a) Democratic and accountable gvt (b) provision of service(c)social and economic development(d)safe and healthy environment(e)public participation.		
Section 153- Developmental duties of municipality	(a)structure and manage its administration and budgeting and planning process to give priority to the basic needs of the community and promote social and economic development(2)participate in national and provincial programmes.		
Section154- Municipalites in cooperative gvt	(1)national and provincial gvts by legislation must support and strengthen capacity of municipalities to manage their own affairs, perform functions and powers.(2)		
Section 155- Establishment of municipalities	Category A, B, C		
Section 156-Powers and functions of municipalities	Right to administer(a) Part B of schedule 4 and Part B of schedule 5(b) anything else set out in national or provincial legislation.(2)make and administer bylaws.(3) bylaw invalid if it conflicts with N or P legislation.(4) N and P with the agreement of M, can assign schedule 5 and 4 duties if its better implemented by M.		
Section 157- Composition of M	Elected members in accordance with N		

Council	legislation, proportional representation based on national voters role.		

BY NIGEL T. SITHOLE

071 039 7526