Advanced Constitutional Law and Fundamental Rights

PART 1 - CONSTITUTIONAL LAW

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STUDY UNIT 1 - CONSTITUTION, CONSTITUTIONALISM, AND DEMOCRACY SG 1 - 35

INTRODUCTION: SG 1

Constitutional law is the main branch of public law. Since it also deals with the relationship between state organs and individuals, constitutional law is related to and protects fundamental rights, which are generally entrenched in the constitution of a country. The protection and promotion of fundamental rights requires respect for constitutionalism.

1.1 CONSTITUTION SG 3

1.1.1 Definition - Constitutional Law

Constitutional law is generally defined as a set of binding rules relating to the distribution and exercise of state authority and to the relationship between the organs of state *inter se* on the one hand, and between the organs of state and individuals on the other. These rules are generally found in or constitute the constitution of a country.

The constitution is the primary source of constitutional law, the other sources being legislation, case law, international law and common law.

1.1.2 Classification of constitutions

- written, unwritten or customary constitutions
- supreme and non-supreme constitutions
- flexible and inflexible constitutions
- allochthonous and autochthonous constitutions
  - allochthonous - vested in constitution of the state but originated or imposed from other state/s
  - autochthonous - originated from state itself

Written: documents or instruments that contain constitutional rules.

Customary: unwritten form. e.g. - UK i.e. - country without a written constitution.

Supreme: constitution - considered to be the supreme law of the land. Any law or conduct inconsistent with it would be unconstitutional and invalid.

Non-supreme: has the force of ordinary law. It can be adopted, amended or repealed in the same way as ordinary legislation.

Flexible: are also non-supreme constitutions.

Inflexible: are supreme, and their amendment or repeal is subject to more stringent conditions than ordinary legislation.

Allochthonous: constitutions that are imposed by foreign powers

Autochthonous: are indigenous or home-grown constitutions.

Most constitutions in the world today are supreme, written and inflexible.

Origin of the concept ''constitution''

Uncertain, but it is generally accepted that the concept refers to the ***Greek*** *politeia* and **Latin** *constitution* and that English scholars were the first to use the word constitution in its modern sense. These concepts differed from our present-day understanding of a constitution.

Stourzh **(**1999:166) - the concept developed during the debate on the American Federal Constitution in 1787 to 1788.

McIlwain (1947:25), Sir James Whitelocke, an English lawyer, mentioned the word ''constitution'' when speaking of ''the natural frame and constitution of the policy of this Kingdom, which is ***jus publicum regni***. He held that this was the first modern use of the term ''constitution'' he has encountered, while also crediting Bolingbroke with the first use of the word ''unconstitutional''. SG 4

Nowadays, a constitution is generally defined as the supreme law of the land. Many African constitutions contain a supremacy clause.

Operation of a Constitution:

The constitution establishes and defines:

- the different organs of the state authority,
- their powers and the manner in which these powers should be exercised,
- the relations between the different bearers of authority, and
- between them and the people, as well as their
- rights and duties.

Nwabueze (1973:22) defined a constitution as *''a document having the force of law, by which a society organizes a government of itself, defines and limits its powers, and prescribes the relations of its various organs inter se and with the citizen''*.

1.2 CONSTITUTIONALISM SG 5

1.2.1 Definitions of constitutionalism

Defining constitutionalism is a controversial matter. Perspectives on constitutionalism are contradictory and confusing, as is illustrated in the literature. Constitutionalism is sometimes confused or identified with human rights, written constitutions, separation of powers and judicial review.

There are two main approaches to constitutionalism, namely, the traditional and the **modern** approaches.

1.2.1.1 Traditional approaches: **procedural** and **negative constitutionalism**

Traditional definitions of constitutionalism include:

- liberal
- procedural
- negative &
- formal constitutionalism.

According to *Ihonvbere* (2000:13) and *Shivji* (1991:28), the liberal concept of constitutionalism rests on two main pillars, namely:

- **limited government &**
- **individual rights**.

As *McIlwain* (1947:22) once put it, *"The most ancient, the most persistent, and the **most lasting of the essentials** of true constitutionalism still remains what it has been almost from the beginning, **the limitation of government by law.**"*

Andrews (1968:13) pointed out the following: "If one were to attempt a description of this complex concept in two words, we might call it ***'limited government'."***

Mojekwu (1979:184) also regarded constitutionalism as *"**a man-made device to limit the arbitrariness of governments"**.*

Zoethout and Boon (1996:1,11) took constitutionalism for: an expression of the ***conviction that no government should ever have unlimited power*** to do whatever it wants, since every political system is likely to relapse into arbitrary rule, unless precautions are taken.

Rosenbaum (1988:4) also stressed, *"Constitutionalism has evolved to mean the legal **limitations placed upon the rightful power of government in its relationship to citizens.***"

Nwabueze (1973:1) holds, ‘***‘There is something logically incoherent about the modern doctrine of constitutionalism, for it places a limit on supreme political authority without denying its existence.’’***

The problem has always been how to limit the arbitrariness of political power which is open to manipulation in a government. It is this limiting of the arbitrariness of political power that is expressed in the concept of constitutionalism. SG 6

Traditional definitions of constitutionalism are, therefore, grounded in the notion of the limitation of state power by means of law. The focus here is on the extent to which the constitution is meant to limit the damage a state can do. Constitutionalism as defined is a negative concept.

This is the logic of what *Ivison* (1999:83–89) called ‘‘Hobbesian Constitutionalism’’. Protection of individuals against the arbitrary exercise of power or despotic government is to be anchored in certain predetermined political norms, such as the fundamental principles of the rule of law. These are said to exist over and above the political community, and are not subject to the politics of bargaining and compromise. Negative constitutionalism is procedural and formal, and relates to the ‘’normative *Verfassung*’’ or politics exercised in terms of norms and the rule of law. Power is proscribed and procedures prescribed.

According to *Carpenter* (1997:948–949), constitutionalism is a doctrine that is prescriptive rather than descriptive: an ideal of how authority should be exercised, not how it is exercised in practice.

Constitutionalism has prescriptive, normative and descriptive dimensions. In so far as it restricts the state in respect of what it may do, constitutionalism tends to create a ‘‘minimal state’’, that is, a state that leaves greater room for individual freedom and activities.

The concept of a minimal state is in itself problematic, since what is being limited is not in fact the state, as understood in constitutional and international law, but the government, which is merely a component of statehood.

Born in the golden age of liberalism in the West, negative constitutionalism shares its ideology and is closely associated with it. Accordingly, it is generally labelled as liberal constitutionalism by both its protagonists and its opponents, and criticism against liberalism generally follows constitutionalism.

Constitutionalism was and still is perceived as a bourgeois concept designed to serve the dominant class, ‘ ‘an imperialist design imposed by the imperialist state

with the power of its monopolies'' (*Shivji* 1991:27–28). *Behaviourist and Marxist* scholars also alleged that this kind of constitutionalism was an instrument in the hands of conservative economic elites to prevent or impede social and economic change.

Constitutionalism was said to focus more on limitation of power, individual and negative rights and on a minimal state at the expense of collective rights, which require positive action by the government and more than a minimal state for their enforcement (*Sigmund* 1979:41).

Ivison (1999:83) argues that negative constitutionalism seems ''an incomplete formulation of what constitutionalism means. Constitutions are about preventing abuses of powers, but are also about more positive things too.'' On the other hand, scholars like *Zoethout and Boon* (1996:1,15) hold that because of its mainly procedural nature, traditional constitutionalism is unable to respond adequately to contemporary problems of the welfare society, since it is primarily aimed at protecting (negative) individual rights and freedoms.

Therefore, so the argument goes, we should redefine or reconceptualise the concept. Constitutionalism ought to transcend this negativism; not only should it provide for individual rights and freedoms, but it should also include (some) socio-economic and collective rights (ie the second- and third-generation rights). Hence the tendency to move away from traditional approaches to constitutionalism: from legal, procedural, formal and negative constitutionalism to modern approaches favouring political, substantive and positive constitutionalism.

1.2.1.2 Modern approaches: substantive and positive constitutionalism SG 7

Unlike traditional constitutionalism with its overemphasis on procedure and restraint, modern constitutionalism is said to be more concerned with values. It is value-laden, teleological or purposive constitutionalism. Modern constitutions are also value based.

The 1996 South African Constitution, for instance, provides that the Republic shall adhere to a number of core values, and these democratic values ''must'' be promoted in the interpretation of the Constitution in general and of the Bill of Rights in particular.

A powerful version of this kind of constitutionalism is what *Ivison* (1999:85) called ''*rights-based constitutionalism*''. Rights promoted by such constitutionalism are not only individual and first-generation rights, but also collective, second- and third generation rights.

Traditional and modern approaches and rules and values should not be mutually exclusive, but should reinforce each other. Formal, procedural and negative constitutionalism should not be emphasised at the expense of substantive and positive constitutionalism, and vice versa.

Today's constitutionalism includes procedure and substance, rules and values.

1.2.2 Components of constitutionalism

Rosenfeld (1994:28) considered constitutionalism ''a three-faceted concept'', consisting of three general features, namely:

- **limited government**
- **adherence to the rule of law and**
- **protection of human rights.**

A constitution, human rights and limitation or separation of powers are key elements of constitutionalism. These three constitutive elements are intertwined, and no single one would suffice on its own to define constitutionalism.

1.2.2.1 Constitution

There is a strong link, and a great deal of confusion, between constitutionalism *per se* and a working constitution. Written constitutions have come to be identified with constitutionalism. However, constitutions may operate with or without constitutionalism.

According to *Rosenfeld* (1994:14), ''*The relationship between constitution and constitutionalism is particularly important because constitutions are especially apt vehicles for the constitutionalization of the essential requisites of constitutionalism*.''

The emphasis placed by scholars such as *Okoth-Ogendo* (1991:3–25) on ''Constitutionalism without Constitution'', with reference to the British constitution, is unfortunate because we know that a constitution may be written or unwritten.

The majority of scholars agree that the United Kingdom has a constitution despite the fact that no single document bears that name.

Important constitutional matters, such as:

- *the duration of Parliament,*
- *succession to the throne,*
- *the franchise,*
- *assent to bills and*
- *the relationship between the Houses of Parliament*

are regulated by legislation, and the result is that British constitutional law is presently based only partly on unwritten rules.

States like Israel and New Zealand are also sometimes deemed not to have written constitutions, but their constitutional law is almost completely regulated by different laws, and it is incorrect to classify them as unconstitutional states, simply because they have unwritten constitutions or no constitutions at all.

In the case of written or even unwritten constitutions, three major tests must be used to determine whether the constitution or legal system complies with constitutionalism:

i. The first test, a crucial one, is *whether the constitution, if any, imposes limitations on the powers of the government*.

ii. The second test is that of legitimacy, not only external legitimacy, but also and mainly internal legitimacy. The constitution must be legitimate and emanate from the people. It must first serve the interests of the people and not those of the leaders who want to remain in power. It must express the will of the people and not that of the government. The people must be involved in the process of its drafting and adoption, and not taken by surprise by a document foreign to them, which they are merely requested to adopt by means of a ‘‘yes’’ vote.

iii. The third important test is the protection, promotion and enforcement of human and people’s’ rights (Nwabueze 1973:2, 24–27).

If a constitution or a legal system fails to pass the above tests it is said to exist without constitutionalism. Not all constitutions conform to the demands of constitutionalism.

In fact there are many countries that have written constitutions in the absence of constitutionalism. The constitutional and political state of affairs in several African states bears testimony to this sad reality, which Okoth-Ogendo (1991:3–25) referred to as an ‘‘African paradox’’. It is not a paradox, however. Nor is it African.

According to *Okoth-Ogendo* (1991:6), ‘‘*Primary elements of the paradox are the commitment to the idea of the Constitution, and rejection of the classical notion of constitutionalism*.’’

Shivji (1991b:254) also lamented the fact that although ‘‘*we have had great use, if not reverence, for the documents called constitutions, there has been little regard for constitutional principle or constitutionalism’’*.

Some constitutions manifest constitutionalism only in appearance, and nearly all perform functions not integrally related to constitutionalism. Under these conditions, despite the existence of a constitution, there is neither constitutionalism nor democracy.

Nevertheless, a constitution, whether written or unwritten, remains essential to constitutionalism, as it provides not only for the organisation and functioning of state powers, but also for their limitation.

1.2.2.2 Human rights

At least two LLB modules deal with human rights, namely, Fundamental Human Rights (FUR2601) and International Human Rights Law (LCP4807).

Human rights, also known as ‘‘fundamental rights’’, *are those rights without which there can be no human dignity*. They are to be *afforded* to every man or woman *solely by reason of their being human.* Human rights are *moral* and *individual* rights, but they can also be *collective* rights. SG 9

Human rights are usually categorised into three generations.

- First generation rights comprise: civil and political rights. These rights are said to require a minimal, passive and abstentionist state, and are usually easier to enforce.
- Second generation rights comprise: socio-economic & cultural rights. These rights require a positive and effective state as well as specific resources.
- Third generation rights comprise: group rights, such as the right to development, self-determination, peace, social identity and a clean environment - also referred to as ‘‘community rights’’. These rights require a positive and effective state as well as specific resources.

Such a classification of human rights is questionable, since it triggers the idea that some rights (those of the first generation, for instance) should be enforced before others. Yet the three generations of rights are intertwined. They should not be insulated from each other, but considered as a whole.

In ***Government of RSA and Others v Grootboom and Others*** 2000 (11) BCLR 1169, the court made a new contribution to the development of human rights jurisprudence, which has largely been dominated by civil and political or first-generation rights litigation.

In this case, the Constitutional Court was confronted with the very contentious issue of enforcement of socio-economic rights, which is particularly problematic in underdeveloped countries that lack the necessary resources.

In a unanimous decision, handed down by Judge Yacoob, it was noted that the Constitution obliges the state to act positively to ameliorate the plight of the hundreds of thousands of people living in deplorable conditions throughout the country.

The state must provide access to housing, healthcare, sufficient food and water, and social security to those unable to support themselves and their dependants.

The Court emphasised that all the rights in the Bill of Rights are interrelated, indivisible and mutually supportive. The realisation of socio-economic rights enables people to enjoy the other rights in the Bill of Rights, and is the key to the advancement of racial and gender equality and the creation of a society in which men and women are equally able to achieve their full potential.

Human dignity, freedom and equality are denied to those without food, clothing and shelter. The right of access to adequate housing can, therefore, not be seen in isolation. The state must also foster conditions that enable citizens to gain access to land on an equitable basis.

The state must give effect to these rights as far as its available resources permit and, in appropriate circumstances, the courts can and must enforce this obligation.

Nonetheless, however important these rights may be in a constitutional and democratic society, they are not absolute.

Democracy requires and is compatible with some restrictions on human rights. Limitations on and derogation of human rights are permissible in public international and domestic law.

Limitation of human rights:

Limitations on human rights must, however, comply with some basic principles.

Constitutionally tenable or justifiable limitations on rights can be effected in two ways, namely, by:

- a general limitation clause and/or
- internal limitations … also called internal modifiers or specific limitations, are those limitations entrenched in the same clauses in which rights are enshrined.

Suspension or derogation

A suspension or derogation of rights is different from their limitation. Suspension or derogation is possible only as a consequence of the declaration of a state of emergency.

Unlike limitation, suspension or derogation of rights is a temporary measure, which ends when the state of emergency is lifted. Any legislation enacted in the aftermath of a declaration of a state of emergency may derogate from the Bill of Rights only if it complies with the suspension clause. Some rights are even non derogable, whether entirely or only partially.

Human rights and constitutionalism are closely related.

Constitutionalism is basically about the limitation of governmental power, and perhaps the most important reason why the power should be limited is the protection of human rights. Human rights are both a means and an end to constitutionalism.

According to *Rosenfeld* ‘‘*Protection of human rights is considered the third general feature of modern constitutionalism*.’’

In *Sigmund's* words (1979:39), ‘‘*The guarantee of the protection of individual freedom is the overall purpose of constitutionalism*.’’

Nwabueze (1973:10) states that ‘‘*individual civil liberties are the very essence of constitutional government''*.

Ivison (1999:85) echoes this view when he notes that ‘‘*Constitutionalism is essentially about protecting individual legal rights*.’’

This basically liberal and Western conception of rights, which is founded on individual and civil rights, should be broadened to encompass collective rights, socioeconomic rights and environmental and development rights.

1.2.2.3 Limitation of powers

McIlwain (1947:21–22) and *Schochet* (1979:5) observe that **in all its successive phases constitutionalism has one essential quality**: it is **a legal limitation on government**.

They also hold that it is:

- the antithesis of arbitrary rule;
- its opposite is despotic government,
- the government of will instead of law.

It would therefore appear that there cannot be constitutionalism without limitation of powers. However, limitation does not necessarily mean separation of powers.

1.2.2.4 Separation of powers

Separation of powers is the most ancient and enduring element of constitutionalism.

According to *Vile* (1967:76), it was first found in its modern form in **John Locke's** writings, especially his *Second Treatise of Government*.

Locke's theory of government embodied the essential elements of the doctrine of separation of powers.

Charles Louis de Secondat, better known as the **Baron de Montesquieu**, was, however, the first to give it paramount political importance and remains the ‘‘oracle’’ who is always consulted and cited on this subject.

As *Vile* (1967:76–97) rightly noted, Montesquieu did not invent the doctrine of separation of powers, and much of what he had to say in his *De l'Esprit des Loix* (*The Spirit of the Laws*) was inspired by contemporary English writers and, particularly, by John Locke.

Montesquieu's contribution, however, surpassed that of all earlier writers. Montesquieu contributed new ideas to the doctrine. He emphasised certain elements in it that had not previously received much attention, particularly in relation to the judiciary, and he accorded the doctrine a more important position than most writers before him.

Montesquieu's view of the function of government was much closer to the modern concept than those of his predecessors. He emphasised the judicial function and its equality with other branches of government. He strongly advocated the independence of the judiciary, while providing a clearer view of the separation of the legislative and executive branches.

The doctrine of the separation of powers is based on the assumption that power corrupts and separation of powers is essential to liberty and democracy. SG 11

Montesquieu's thinking was underpinned by the idea that man, although a rational being, is led by his desires into immoderate acts, and constant experience shows us that every man invested with power is apt to abuse it, and carry his authority as far as it will go.

The end result of concentration or accumulation of all powers is despotic government, tyranny or the suppression of all forms of liberty.

Montesquieu's prescription for preventing the abuse of power was that everything be done to ensure that ''*le pouvoir arreˆte le pouvoir*'' or that power should check power.

To guarantee the protection of liberty and freedom against tyranny and dictatorship, Montesquieu thus recommended the separation of powers: all would be in vain if the same person, or the same body of officials, be it the nobility or the people, were to exercise these three powers being -

- that of making laws;
- that of executing public resolutions;
- that of judging crimes and disputes of individuals.

Separation of powers may be horizontal or vertical.

1.2.2.5 Horizontal separation of powers

Vile (1967:85–86) distinguishes between what he calls:

‘‘the pure doctrine of separation of powers’’ - *which in his view is a complete separation of powers*, and its modification….

essentially by the Fathers of the American Constitution, who *advocated a partial separation of powers* or the *modification of the ‘‘pure doctrine’’ by a system of checks and balances*.

Van der Vyver (1987:419–420; 1993:178–179) held that the notion of separation of powers eventually *developed into a norm comprising four basic precepts or principles*:

- **the principle of *trias politica***, which *requires a formal distinction between three independent branches of state authority*, namely…
  - *the legislative*
  - *executive and*
  - *judicial branches*
- **the principle of the *separation of personnel,*** according to which *the same people should not be allowed to serve more than one branch of government at the same time*
- **the principle of the *separation of functions*** *between the three branches of state authority to avoid one interfering with or assuming functions* vested by law in another branch or state organ
- **the principle of *checks and balances*** that requires that *each organ be entrusted with special powers designed to serve as checks on the exercise of functions by the others*, in order to create an equilibrium

According to the architects of the American constitution, the three principles were **‘‘parchment barriers’’** and as such insufficient:

‘‘*Unless these departments be so far connected and blended, as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained’’* (Vile 1967:159–160).

The principle of checks & balances

Checks and balances were, therefore, indispensable. This fourth principle represents the major American contribution to the theory of separation of powers. One of the checks and balances is judicial review by independent courts. SG 12

This principle deserves a brief comment, as it is arguably the most frequently discussed in the literature, especially by American scholars.

Judicial review:

According to Feliciano (1992:23), ''*Judicial review is essential for the maintenance and enforcement of the separation of powers and the balancing of power among the three departments of government*.''

Yet, it is also a limitation on the principle of the separation of powers in that by striking down laws or Acts of Parliament, the judiciary encroaches upon the functions of other branches of state authority, especially the function of the legislature. *Therein lies the paradox of judicial review*.

The people are sovereign not the state or its institutions

The conclusion reached was that the people, not the institutions of government, were sovereign. Each branch served the sovereign people and *no branch could rightly claim to be the people's sole representative*. Each branch, in its own way, was the people's agent, *the people's fiduciary* for certain purposes, whatever its manner of selection.

Conceptual confusion between judicial review & separation of powers:

The principle of checks and balances in general, and judicial review in particular, supplanted the three other principles of separation of powers. Worse still: in much of the literature, if judicial review is not confused with the separation of powers, of which it is but a component, it is considered to be synonymous with constitutionalism itself.

This conceptual confusion between judicial review and the separation of powers on one hand, and judicial review and constitutionalism on the other, is among the most regrettable in the literature and poses the problem of defining the concepts themselves. *Judicial review rightly lies at the heart of constitutionalism*.

1.2.2.6 Political regimes

A political regime must be distinguished from a government or a state. According to *Hyden* (1999:185), a regime is typically a more permanent form of political organisation than a specific government, but less so than a state. Governments change more often than regimes.

Sometimes they may change simultaneously, as for instance when the resignation or overthrow of a government also implies the end of the very basic rules that had previously guided political action.

In legal terms, a political regime is now considered to be a complete set of political institutions of a state, as they result not only from the constitutional rules to which they owe their existence, but also from their actual functioning as determined by various political, economic, social and cultural factors.

The term ‘‘political regime’’

The term ‘‘political regime’’ refers to the fundamental rules that organise and regulate political institutions and their functioning. It also relates to the political institutions themselves. In the latter sense, a political regime becomes a constellation with political institutions as its stars.

The concepts *‘‘political regime’’* and *‘‘political system’’*

The concepts ‘‘political regime’’ and ‘‘political system’’ are generally used interchangeably. *As used in discourse among political scientists, ‘‘political system’’ is broader than ‘‘political regime’’*. SG 13

Political regimes differ from one another, depending on the relationship between the main political organs of state authority, namely, the ‘‘government’’ in the sense of the cabinet and the legislature.

Components of a "political regime":

The major criterion seems to be the degree of separation of powers between the central organs of state authority, especially between the legislature and the executive, which has given rise to the primary division of political regimes into:

- *the **parliamentary** and*
- ***presidential mixed regimes.***

An intermediate type is the semi-presidential regime but this is closer to the parliamentary than to the presidential regime.

Parliamentary regimes

Whilst modern democracies in the world are governed by parliamentary regimes, the British or the Westminster system is generally regarded as the model of parliamentary government.

- The regime is essentially characterised, at least formally, by the pre-eminence of Parliament, however.
- Checks and balances in a parliamentary regime includes the accountability of the Cabinet to Parliament. Concurrently - the fact that Parliament could be dissolved are the key elements of the parliamentary regime.
- The parliamentary regime is also known as a regime of collaboration of powers, especially between the executive and the legislature.

The constituents of a parliamentary regime comprise:

- **A two headed system which includes:** - a head of state - being a president or a monarch which is also the head of the executive, and the second a prime minister or chancellor - heading the cabinet, which comprises ministers and deputy ministers.

  The head of state or is a different person from the prime minister or chancellor who leads

- **The head of state:**

  In a parliamentary regime the "head of state" is a figurehead. Theoretically he takes the most important political decisions. However - in fact the head of state only acts as a rubber stamp for decisions made by the cabinet. He or she is not politically responsible or accountable.

- **Accountability of the head of state:**

  As counterbalance the prime minister and his/her cabinet are accountable for their decisions.

  No presidential decision is constitutionally valid if it has not been endorsed or countersigned by a member of the cabinet. The prime-minister or another member of the cabinet who takes political responsibility for the implementation of decisions must countersign any decision made by the head of state.

- **The prime minister:**

  The prime minister is formally appointed and dismissed by the head of state. The latter will only appoint the political leader whose political party or coalition won elections in parliament.

  The head of state also appoints and dismisses other members of the cabinet and senior officials.

  As mentioned earlier, he/she generally endorses (actually signs) decisions made by the prime minister and the cabinet. [rubber stamp]

- **The Cabinet:**

  The cabinet is accountable to parliament or at least to its lower chamber, known as the national assembly or the Commons (in Britain).

  Members of the cabinet are also members of Parliament. The cabinet must enjoy the confidence of Parliament if it is to take office and continue to govern the country.

The cabinet may be removed from office by Parliament through a motion of no confidence.

Conversely, the head of state may dissolve Parliament or the national assembly in response to a proposal by the prime minister. A new election is then called and if a different majority or coalition that favours the cabinet is voted into Parliament, the cabinet will survive. Otherwise, the leader of the new majority or coalition will be appointed as the new prime minister. SG 14

Presidential regimes

Presidential regimes differ from parliamentary regimes in the following respects:

- The executive is not two-headed.

  The full executive authority is vested in the president, who appoints and may also dismiss ministers and deputy ministers.

- There is no need for presidential decisions to be countersigned by ministers to become valid.

- Ministers do not form a real collective cabinet; they are merely administrative officials who serve as collaborators, advisers or assistants to the president.

- The president is popularly elected and his/her election is independent from that of the members of the legislature.

- There is no prime minister, and the president, who is both the head of state and the head of government, is elected by universal franchise.

- Members of the executive are not members of Parliament, as there is a stricter separation of personnel and functions.

- The president and congress (Parliament) are independent of one another but there is a ‘‘marriage without divorce’’.

- The president and his/her secretaries are not accountable to congress and cannot be dismissed by it except in the very serious and rare case of impeachment.

- On the other hand, congress cannot be dissolved.

- Buchmann - A state under such a regime cannot be seen as a constitutional state.

The political regime of the United States of America is considered the model of the presidential regime.

It is characterised by a strict separation of powers and the predominance of the president, who is the very ‘‘*clé de voûte*’’ (the keystone) of state authority or the regime. Hence the name…. ‘‘presidential regime’’.

Many attempts to adopt the American model in the Third World and especially in Africa have failed so far. The presidential regime has been caricatured, and this has resulted in what has been called ‘‘presidentialism’’. The ‘‘presidentialistic regime’’ is a corrupt presidential regime characterised by the concentration of power in the hands of the president.

Buchmann maintains that there is no separation of powers but, in words, a real **hierarchisation of powers** where one institution, actually a man dominates all other institutions including parliament, which is left a very derisory role (Buchmann 1962:252–278). A state under such a regime cannot be seen as a constitutional state.

Mixed regimes

Some political regimes borrow from both parliamentary and presidential regimes. This may be illustrated by an investigation of the French regime during the Fifth Republic and also the South African regime under the 1996 Constitution.

In France, the executive authority consists of a president, directly elected by universal franchise, and a prime minister. The former is the head of state, while the latter leads the cabinet whose members are appointed by the president.

When the prime minister belongs to the same party or majority as the president, he or she is actually appointed by the latter and may also be dismissed by him. On the other hand, the president only appoints the leader of the majority in parliament as prime minister. SG 15

The president enjoys great powers, unknown in the classic parliamentary regime. Yet, his powers are not the same as those of the American president and his government remains accountable to the *Assemble´e Nationale* (national assembly), which may be dissolved. Since the advent of the system of *cohabitation* in the 1980s, France has known a president with no majority in the *Assemble´e Nationale*, who had to share powers with a cabinet led by the leader of his opposition in parliament.

The regime thus looks like a parliamentary regime without the head of state becoming a figurehead. This constitutional and political situation in France since the 1980s has troubled some French constitutional lawyers in their categorisation of the French regime.

According to scholars who looked at the powers of the president, the French regime was a *sui generis* presidential regime. To others, it remains a parliamentary system.

Despite important powers accruing to the president, the French regime borrows more from the parliamentary than the presidential regime. Accordingly, it would not be wrong to categorise it as a parliamentary regime, but a special one given the powers enjoyed the president.

The South African political regime under the 1996 Constitution comes closer to a mixed regime.

The elements SA borrows from the parliamentary regime are:

- the pre-eminence of Parliament
- the indirect election of the president in the national assembly
- ministerial countersigning of presidential decisions
- membership of the national assembly of the president
  - deputy president
  - ministers and deputy ministers
- accountability of members of the cabinet to Parliament, and
- the possibility that the national assembly can be dissolved.

The elements SA borrows from the presidential regime are:

From the presidential regime the South African regime has borrowed:

- the predominance of the president, who is an executive president and a *de facto* prime minister
- assisted by a deputy president, and
- the responsibility of members of the cabinet to the president, who appoints and may also dismiss them.

The elements SA borrows from the parliamentary regime are:

The South African political regime has borrowed extensively from parliamentarianism, and some of the characteristics of the president and national executive are germane to the presidential regime.

South Africa therefore governs under a hybrid political regime, but in essence another *sui generis* parliamentary regime.

1.2.2.7 Vertical separation of powers

Federalism is also a form of ‘‘separation of powers’’, albeit not in the sense in which the latter is generally understood.

Federalism is concerned with the ‘‘vertical’’ separation of powers between the central authority of the state and its provincial or regional units. The principle of federalism does, however, have its own origin and justification.

The first and most important constitutional application of federalism in the modern era is found in the United States of America. Federalism is linked to constitutionalism in the 10th Amendment to the American Constitution.

Federalism became the territorial version of the separation of powers and the bulwark of constitutional democracy. By contrast, the emphasis on the centralised rule of the majority during the French Revolution left no room for federalism. SG 16

Federalism is a political idea, doctrine or principle. It is a normative and philosophical concept based on the notion that the greatest human fulfilment is to be found through participation in a wider community that, at the same time, favours diversity and protects individuality.

The federal principle, therefore, expresses a philosophical and/or ideological idea that a political organisation should seek to achieve both political integration and political freedom by combining shared rule on some matters with self-rule on others, in other words, through cooperation and autonomy.

Federalism may be seen as the theory and practice of joining several entities into a larger political unity, while preserving the basic political integrity of each entity. It implies a way of constitutional and political thinking, in other words, a culture.

A cogent argument for federalism is that it tends to facilitate and foster democracy. Federalism also has to do with the protection of minorities and human rights. Federal solutions are the means to enhance democratic republicanism in complex societies.

They are often the best ways of resolving intractable ethnic conflicts, and protecting diversity through a combination of self-rule and shared rule within a framework of power sharing.

Federal government, therefore, has several advantages. The federal principle and separation in the strict sense are based on the same grounds: distribution of powers to protect human rights and prevent dictatorship, authoritarianism or despotism, but also to ensure and enhance good and democratic governance.

1.2.2.8 Models of federalism

As a political and legal philosophy, federalism adapts itself to all political contexts at both municipal and international levels, wherever and whenever two basic

prerequisites are fulfilled: the search for unity combined with genuine respect for autonomy and legitimate interests of the participant entities.

Divided and integrated federalism

Simeon (1998:42–71) has distinguished two models of federalism: a divided and an integrated one.

The divided model of federalism

The main features of the divided model of federalism are the following:

- The powers and responsibilities of the national and provincial levels of government are clearly separated

  (*area of exclusive competence for the federal government as well as for the provinces, with few concurrent or shared responsibilities*).

- The provinces are given independent powers of taxation.

- Mechanisms for cooperation between the federal government and provincial governments exist, but do not have any formal status or express constitutional or legal recognition.

- Provincial interests are not directly represented within the national government. It is left to provincial governments to negotiate and bargain with the federal government.

Canada is usually referred to as the prime example of the divided model of federalism. SG 17

The integrated model of federalism

The integrated model of federalism is designed to integrate and coordinate national and provincial politics at all levels.

The *German federation*, which is the prime example of the integrated model, has the following characteristics:

- There are few areas in which the national government enjoys exclusive power…. and….

- many areas in which the national government and provinces have concurrent or shared responsibilities.

- Revenues and powers of taxation are also shared.

- Several inter-governmental institutions are charged with cooperation between the various levels of government. These institutions are more structured than they are in Canada, and their decisions are formalised by treaties or agreements, which have the full force of law.

- The **Bundesrat**, the (German) second chamber of parliament, is made up of directly appointed ministers of the provincial governments, who are subject to recall.
- Through the Bundesrat the provinces can ensure that their specific interests and concerns are considered by the federal government.

Integrative and devolutionary federalism

Lenaerts (1990:206–207) states that the many faces of federalism can be propounded in two basic models, namely, *integrative federalism* and *devolutionary federalism*.

The integrative model of federalism

Integrative federalism refers to a constitutional order that strives for unity in diversity among previously independent states or confederally related component entities.

This model was followed in the USA and Switzerland.

The devolutionary model of federalism

Devolutionary federalism, on the other hand, refers to a constitutional order that redistributes the powers of a previously unitary state among its component entities.

Nigeria and Belgium followed this model.

As a rule of thumb, the accession to federation by means of a centrifugal process, that is, devolutionary federalism or top-down federalisation, is more difficult and takes longer than the traditional process whereby states come together to form a closer union by means of integrative federalism.

Territorial and personal federalism

Scholars like De Villiers (1993:377–382) and Devenish (1996:37) distinguish between **territorial** federalism and **personal**, **corporate** or **non-territorial** federalism, depending on whether the self-rule and shared rule are intended to benefit territorial entities or national groups, no matter where they are established in the country. SG 18

Territorial federalism is likely to be preferred to personal federalism, which is more complex and very often means racial, tribal or ethnic federalism.

This system (territorial federalism) appears to have been favoured by the Afrikaner and the Zulu peoples when they claimed their own states or ***self-determination*** in South Africa.

This dangerous variety of federalism is also the underlying principle on which the Belgian state is based.

Federalism and federation or confederation are usually confused or used interchangeably. *Chandler, Enslen and Renstrom* (1985:30), for instance, noted that ‘‘*the term federalism is usually reserved for federations at the national political level*’’.

And yet, despite their closeness, with the one nurturing the other, **federalism and federation are not synonymous**. Federation and confederation are the major practical embodiments of federalism.

Federalism as a political and ideological concept is wider than both of them, but **a federation or a confederation** without some matching kind of federalism is impossible.

On the other hand, **unitary systems can also have strong federalist features**. Federalism is opposed to unitarianism, which requires unity or centralisation of power. However, the contrast is not absolute, since unitarianism itself may go hand-in-hand with centralisation, decentralisation or devolution of power.

Non-territorial or personal federalism:

The modern trend is towards federalisation and devolution in unitary states. An extreme centralisation is hardly possible, and in our day every society is ‘‘federalist’’ to some extent.

Opponents of unitarianism and proponents of federalism argue that the first fosters authoritarianism or despotism, while the latter supports democracy and human rights.

However - while it is true that authoritarianism and despotism generally emerged in unitary states or quasi-federations, some unitary countries feature among the acclaimed models of constitutionalism and democracy.

On the other hand, champions of unitarianism (namely champions of a unitary state) and opponents of federation contend that the unitary state builds unity and controls the tribal and ethnic demons that are responsible for internal conflict and secession, which are favoured by federalism.

Forms of Government vs Forms of State

Horizontal Separation of Powers vs Vertical Separation of Powers

Unlike the horizontal separation of powers that defines forms of government, the federal principle refers to forms of state.

Forms of government have to do with the manner in which different state organs operate at the national level and how power is distributed among them.

Forms of state, on the other hand, refer to the way the power is distributed between the central government and the various territorial entities that comprise the state, and to the way these entities participate in the central government.

The embodiment of the ***federal principle in a constitutional design*** of a state mainly gives rise to two forms of state, namely:

- ***confederal states and***
- ***federal states***.

Confederal states

A confederal state or confederation is an alliance between a number of sovereign, independent states based on a treaty that serves to advance a number of common goals such as defence or economic cooperation.

The separate existence of the members as states under international law is in no way affected; a confederation is a constellation of states without legal personality in international law. SG 19

In this sense the designation of Switzerland as a ‘‘confederation’’ is inaccurate and more historical than real. It may be a confederation of tribes, ethnic groups or nationalities, but it is certainly not a confederal state as understood in international law. Switzerland is a federal state with cantons that function as autonomous entities.

The European Union, on the other hand, **has emerged as a true confederal state.**

Federal states and unitary states

Federal states should be distinguished from unitary states.

A unitary state is a state where state authority is organised in such a way that a state remains one state, with territorial entities united and placed under a single authority, which is the central or national government.

A unitary state is characterised by the existence of a single centre of political decision making in the country. This centre is empowered to legislate and to administer the country and the different entities (provinces or regions) without any meaningful participation by these entities.

A unitary state is one that is highly centralised, so that the central government is supreme, and any delegation of powers to provinces or regions merely effects a limited transfer of power.

The most important features of a **unitary form of state** include the following:

- Power is concentrated in the central or the national sphere of government.
- Greater emphasis is placed on centralisation of state activities than on devolution or decentralisation. In the case of devolution or decentralisation, the provinces or regions concerned enjoy only a limited degree of autonomy.
- The provinces or regions are subordinate to the central/national sphere of government.
- Provinces are not represented in the central or national government.
- Parliament is usually mono-cameral, and when it is bicameral, the second chamber does not necessarily represent the provinces.
- There is no real distribution of powers.

The main advantages of a unitary form of state:

- It is conducive to central planning.
- Policies are more harmonised.
- It is better suited to a society faced with crises such as dislocation, famine or economic crises.
- It aims at achieving greater homogeneity in a country, whether in the realm of political, economic or legal affairs.
- It is a less costly form of state, because there is no duplication of government at the different levels.
- The absence of duplication tends to produce a system of government that is administratively and economically efficient.
- It is a simple form of state.
- It leads to greater accountability, since the responsible authority is usually identified and compelled to account for failure in delivery.
- It tends to achieve national unity and reconciliation among the population.

The disadvantages of a unitary form of state are the following:

- It is centralised.
- It is less democratic and favours authoritarianism.
- It is not human-rights friendly, and tends to ignore minorities' rights.
- It tends to be corrupt and promotes bad governance.
- It does not favour development at the local level.

The Federal State:

A federal state is different from a unitary state in several respects. The following are **important features of a federal system of government**:

- State power (legislative and executive) and the sources of income are divided between two spheres of government.
- Parliament is generally bicameral, with one chamber representing the people (House of Representatives in the USA, *Bundestag* in Germany) and another representing the components of the federation (states, provinces, regions).
- The regions, states, provinces (*Länder* in German) are given wider powers than in a unitary system.
- Important issues such as foreign affairs, defence, taxation and customs and excise are normally regulated by the central sphere of government.
- Disputes between the spheres of government are usually resolved by an arbiter in the judiciary, the Constitutional Court (Germany) or the Supreme Court (USA).
- The federal constitution is supreme, but the regions, provinces and states may enact their own constitutions provided these are consistent with the federal constitution.
- The distribution of power between the federal (central/national) government and the regions, provinces or states is effected by the constitution. There are areas of exclusive competence for the federal government and the regions, provinces or states, but also areas of concurrent competence.
- Regions, provinces or states participate in the exercise of the federal legislative power through a second house of parliament (Senate, *Bundesrat*) and also in the adoption or amendment of the federal constitution.
- There is cooperation between the central and provincial or regional levels of the federation.

The following are some **advantages of a federal form of state** or government:

- It minimises tyranny by distributing power among the different government authorities and is, therefore, more democratic.
- It is considered the most efficient framework for a large country.
- It brings the government closer to the people, and makes it more accountable and more responsible.

- People's concerns, needs and interests are taken seriously.
- It allows for social and economic experimentation, which cannot always occur in a unitary state. The provinces, regions or states can serve as laboratories for experiments which, if successful, can be duplicated in the rest of the country.
- It is more appropriate for a plural or heterogeneous society characterised by cultural, linguistic, national or religious diversity. In larger and more complex African countries such as the Democratic Republic of Congo, Nigeria, South Africa and Sudan, it is seen as a mechanism that could allow each of the diverse elements in the population to enjoy a measure of autonomy.
- It is better able to protect human rights and minorities. SG 21

The following are some disadvantages of a federal state:

- It may reinforce ethnic and regional sentiments, which does not promote national unity and reconciliation.
- It leads to disparity in legislation, policies and development.
- It is costly, as it duplicates institutions at the different levels of government.

To determine whether a political system is a fully fledged federation, we need to look not solely at the constitutional structure, but also at the way in which the political system operates. It must be stressed that there is no single and pure model of a federation.

On the other hand, federal states do not necessarily go by that name. There are countries that bear the name of federal republics but do not meet all the requirements for a federation. In contrast, there are unitary states that are so decentralised that they come close to being federations. Some borderline situations exist as a result of the compromises reached among the draftsmen of their constitutions. That is the case with quasi-federal states or regionalised unitary states. South Africa under the 1996 Constitution is said to be such a state. The Constitution has strong federalist features without establishing a full-blown federal state.

1.3 CONSTITUTIONALISM AND RELATED CONCEPTS

1.3.1 Constitutionalism and the rule of law

The concept of the rule of law is not readily definable, although it is often used in everyday speech and in the press in particular. Scholars are divided on its meaning. This is particularly true in the South African context.

Carpenter (1997:959) holds the following:

In its original sense, as defined by *AV Dicey*, **the rule of law means three things**;

- first, that *no-one is punishable except for a distinct breach of the law*, *to which everyone is subject*;
- secondly, that *all are equal before the law*; and
- thirdly, that *the rights of the individual are not formally protected in a constitution*, but by the ordinary courts of the land.

According to *Davis, Chaskalson* and *De Waal* (1994:1), Dicey's concept of the rule of law comprised the three following fundamental tenets:

- The *regular law of the land is supreme* and, therefore, *individuals should not be subject to arbitrary power*.
- *State officials are subject to the jurisdiction of the ordinary courts* of the land in the same manner as individual citizens.
- *The Constitution is the product of the ordinary law of the land*, and the *courts should therefore determine the position of the executive and the bureaucracy* in terms of the principles of private law.

In its modern sense the doctrine of the rule of law - ***include the following principles:***

- the independence of the judiciary SG 22
- legal certainty
- control over the exercise of discretionary powers and over subordinate legislatures
- limitation of government powers through checks and balances
- minimum judicial procedural standards to ensure that no one can be found guilty unless she/he has been duly proved to be so
- equality before the law, which implies more than equality before the courts
- effective judicial remedies for the enforcement of fundamental rights

The rule of law is close to the French concept of the *e´tat de droit* [rule of law] to the German concept of the *Rechtsstaat*.

1.3.2 Constitutionalism and Rechtsstaat

In Conac's view, *e´tat de droit* [the rule of law] is synonymous with *Rechtsstaat* (Conac 1993:483). The latter was conceived in Germany (Prussia) at the end of the 19th century to counter the police state (*e´tat de police*), to limit administrative arbitrariness and discretionary power in order to enhance efficiency and protect citizens.

It implied intervention by the judiciary to ensure that executive authorities abide by the law. It was essentially an administrative *e´tat de droit* where administration was subject to law. Carpenter (1997:960) argues that the *Rechtsstaat* idea tallies to a large extent with the English law concept of constitutionalism, as it distinguishes between the state founded on law and the totalitarian state.

Scholars distinguish between the formal and the material *Rechtsstaat*.

1.3.2.1 The *formal* *Rechtsstaat*

The formal *Rechtsstaat* complies with criteria such as:

- the rule *nulla poena sine lege* [something that is not prohibited by law];
- the idea of a legislature that functions in accordance with certain predetermined rules;
- adherence to the doctrine of separation of powers, particularly in regard to functions, and the presence of checks and balances between the organs of government;
- adherence to certain rules in criminal proceedings;
- legal certainty;
- trust in or commitment to the legal order, and the recognition of the independence of the judiciary.

The list of criteria is not exhaustive, as the concept is dynamic, not static.

1.3.2.2 The *material* Rechtsstaat

The material *Rechtsstaat*, on the other hand, is concerned with legal values (eg *material or substantive justice rather than formal or legal certainty and fairness*) and complements the formal *Rechtsstaat*.

The material *Rechtsstaat* requires a system of judicial supremacy, *while the requirements of a formal Rechsstaat, such as those of the rule of law, may be met in a system of legislative or parliamentary supremacy*.

The distinction between the formal and the material *Rechtsstaat* is unknown in French literature. With regard to the *e´tat de droit*, the closest equivalent might be the distinction between a democratic and nondemocratic *e´tat de droit*.

In *Conac's* view (1993:485)

- democracy is the political transposition of the *e´tat de droit* and
- the the *e´tat de* droit the legal transposition of democracy.
- Thus an *e´tat de droit* is necessarily a democratic state. SG 23

According to *Badinter* (1993:9), this adjective is important. What is required by constitutionalism and democracy, therefore, is not merely an *e´tat de droit*, but a constitutional and democratic one.

The Afrikaans *Regstaat* is also directly derived from the German *Rechtsstaat*, as is the French *e´tat de droit*.

To sum up:

The concepts of *e´tat de droit, Rechtsstaat, Regstaat*, rule of law, and constitutionalism are historically, theoretically and philosophically different. Nevertheless, because of the awkwardness of expressions such as ‘‘legal state’’ or ‘‘state law’’, *e´tat de droit* and *Rechtsstaat* are generally called ‘‘rule of law’’.

Rule of law is close to and even implicit in constitutionalism. They complement and enrich each other.

On the other hand, **the rule of law, *e´tat de droit*, *Rechtsstaat*, and *Regstaat* imply a government subject to the law**. They are all interrelated and supportive of constitutionalism and democracy.

1.4 DEMOCRACY

Democracy is undoubtedly the most widely discussed and frequently contested notion of political theory.

Nwabueze (1973:1) pointed out that ‘‘*no word is more susceptible to a variety of tendentious interpretations than democracy*’’.

Democracy has acquired different, even contradictory meanings. It has suffered as much from its loyal partisans as from its opponents. Even its fierce enemies, dictators and authoritarian leaders claim to be democrats and proclaim their faith in ‘‘democracy’’.

Democracy is certainly the most popular concept in both political and social science discourse. Its popularity results from the fact that **over the years, democracy has become a very value-laden term**.

Scholars of repute have already wasted too much ink on the definition of democracy. We do not wish to enter this debate at any length, except to highlight the main conceptions of democracy, its basic requirements and its unfinished history.

1.4.1 Defining democracy: conflicting conceptions and the weight of ideology

Defining democracy is a challenge. Many writers have spent their scholarly lifetimes teasing out the subtleties and nuances associated with democracy. Despite all these endeavours there are still no universally accepted definitions and the concept is still highly contested in analytical and ideological discourse.

Depending on the scope of democracy, **two major conceptions of democracy may be identified, namely**:

- **the minimalist and**
- **the maximalist conceptions.**

These conceptions have been informed by the two dominant ideologies in the world of today, namely:

- **liberalism/capitalism and**
- **socialism/communism.**

Minimalist and maximalist conceptions of democracy are generally opposed in scientific discourse.

Maximalist conceptions: relate to democratic values or principles, while….

Minimalist conceptions: refer to the institutions in which those values are embodied.

The clue to understanding democracy is based on this vital distinction.

1.4.1.1 Minimalist conceptions and liberalism

There are several minimalist conceptions of democracy with the common ground of being based on institutions of government and those other institutions directly or indirectly related to government, particularly political parties and pressure groups, elections and rule of law.

Minimalist conceptions are basically procedural, formal and institutional. Procedural or institutional democracy may be linked to procedural or formal constitutionalism, as we saw earlier.

Democracy is defined as a specific political machinery made up of institutions, processes and roles.

The notion of procedural or institutional democracy is similar to that found in ***Robert Dahl's*** **concept of polyarchy** (Dahl 1971:220–224).

Dahl argues that polyarchy in a political order is characterised by seven institutions, all of which must be present. *These are*:

- elected officials
- free and fair elections
- inclusive suffrage
- right to run for office
- freedom of expression
- alternative info &
- associational autonomy.

Polyarchy is distinguished by two broad characteristics, namely, that:

- ''citizenship is extended to a relatively high proportion of adults, and
- the rights of citizenship include the opportunity to oppose and vote out the highest officials in government''.

According to *Sorensen* (1996:42), **Dahl's notion of polyarchy has three elements**:

- competition for government power
- political participation in the selection of leaders and
- policies, and civil and political rights.

Many scholars operate within a minimalist definition of democracy, in that they stress the importance only of the institutional mechanisms for acquiring power in a democratic manner.

Hyden (1999:183) criticised this approach, *holding that it fails to recognise such other important principles as the accountability of rulers and of other institutions that are crucial to sustaining a democratic system*.

According to minimalistic thinkers, democracy is synonymous with competitive and multiparty democracy. It is representative democracy, also labelled Western or liberal democracy.

Western or liberal democracy - was defined by *Sandbrook* (96:137–138) as ''*a political system characterized by regular and free elections in which politicians organized into political parties compete to form the government, by the right of virtually all adult citizens to vote, and by guarantees of a range of familiar political and civil rights*''.

However, *Wiseman* (1990:6) contests the label of ''Western'' democracy given to competitive and representative democracy, allegedly because liberalism emanated from the West, as did ''Marxist'' democracy.

Criticism of minimalist democracy came mainly from Marxist and socialist scholars. *The Marxist argument is that liberal democracy is merely a mask for bourgeois democracy*. ***Amin*** (1996:70) holds that ''***Western democracy has no social dimension''***. According to him, the Western or liberal bourgeois democracy, which is confined to the political domain, ***ignores the masses to serve the minority***, such as:

- *it elevates individual and political rights …*
- *over collective and socio-economic rights, and*
- *elevates the rights of the minority (bourgeois) over those of the people (Amin 1996:64).*

It is a formal democracy to which *Shivji* (1991b:254–255) preferred a substantive or, specifically, a popular democracy. SG 25

Shivji (1992:2) *regretted that democracy was frequently, if unconsciously, conflated with its liberal form, a parliamentary or multiparty system, that is to say with constitutionalism and individual rights and freedoms* etc. *rather than*

interrogated as a form of struggle and the mode of politics of the vast majority of the working people.

Ake (1996:132) **regarded liberal democracy as an ''impoverished'' democracy**.

Glaser (1996:270) says that for some socialists, a defence of civil liberties and political pluralism or, at any rate, their elevation to pride of place alongside other democratic principles, is irretrievably associated with individualism, formalism and reformism.

Criticism of liberal democracy also came from Western scholars. The French scholar ***Duverger*** **labelled it** ''*de´mocratie sans le peuple*'' (***democracy without the people***).

Duverger held that far from being the government of the people, ***democracy in the West had turned out to be a partycracy*** and a *plutocracy defined as the government of the majority party or the rich* and *some professional political families*. The people only play a part during elections (Duverger 1976).

Ronen (1986:192) also regretted that definitions of democracy have tended to emphasise representation and the process of choice and accountability, which include political parties, elections, public opinion, and so forth.

Amin (1996:70) expresses the following opinion:

To stop at Western democratic forms without taking into consideration the social transformations demanded by the anti-capitalist revolt of the periphery means holding on to a caricature of bourgeois democracy and thus ensuring alienation from the people and external vulnerability. For our democracy to take root, it must, from the start, take a position that goes beyond capitalism. In this, as in somany other domains, the law of unequal development operates.

One problem with the critics of minimalist conceptions, particularly liberal democracy, is that despite criticism, scholars do not believe it can be achieved in Africa. *Shivji* (1992:44), for instance, considered democracy an essentially bourgeois programme, with no bourgeoisie to support it in Africa. In the same breath, *Ake* (1996:137) contended that *''most of Africa is still far from liberal democracy and further still from the participative social democracy that our paradigm envisages*''.

1.4.1.2 Maximalist conceptions and socialism

Maximalist conceptions are built on criticism of liberal and Western democracy.

Whereas minimalist scholars define democracy as a process and a set of institutions, and focus on political democracy, **maximalist concepts concentrate on the substance and values of democracy**, the most prominent among them being social equality, and on socio-economic rights.

The maximalists regard democracy as essentially socio-economic and popular or socialist democracy.

Compared with minimalist conceptions emphasising individual and political rights, **maximalist views broadly define democracy as implying collective and socio-economic rights**. To liberal and bourgeois or elite-driven democracy, they oppose social and economic or popular democracy or what *Nyang'oro* once called **''Jacobin democracy''** or ***''people-driven democracy''***.

Unsurprisingly, most champions of maximalist conceptions recruit adherents from among scholars from socialist or Marxist persuasions, or from the so-called ''Left''. **Maximalist scholars advocate a social democracy**, which emphasises concrete political, social and economic rights, as **opposed to a liberal democracy**, which emphasises abstract political rights: ∴ **a democracy that puts as much emphasis on collective rights as it does on individual rights**. This should be a popular, participative and social democracy. SG 26

Glaser (1996:251) *criticised the maximalist conceptions for their emphasis on social equality, substantive democracy and collective rights, to the detriment of formal, legal equality, formal democracy and individual rights*. According to him, the central deficiency in the democratic discourses of the South African Left is the low status accorded to political pluralism and civil liberties *Glaser* (1996:248–249).

Nevertheless, civil liberties and political pluralism are indispensable to any socialist order claiming to be democratic, and should not be judged or jettisoned on the basis of instrumental criteria.

Clapham and Wiseman (1995:220) *suggest that a realistic notion of democracy is to be found much closer to the minimalist end of the spectrum than to the more ambitious maximalist end.*

Minimalists should learn from maximalists the values of social equality, collective and socioeconomic rights. On the other hand, maximalist conceptions should be enriched by principles, institutions, rules, individual and civil and political rights.

All things considered, the different conceptions of democracy revolve around democracy as defined by **US President Abraham Lincoln** in his famous speech of **19 November 1863**, in which he referred to ***''the government of the people, by the people and for the people''***.

1.4.2 Components of democracy

How one defines the elements of or requirements for democracy depends on whether one is maximalist or minimalist, but in the end they are all intermingled and they interrelate. Some of them relate to the establishment and others to the consolidation of democracy. However, it is hardly possible to produce an exhaustive list. It is worth revisiting some elements or requirements that are generally referred to in the literature on constitutionalism and democracy, and in the political discourse, especially that of the West.

The focus is on elections and on political pluralism or multi-partyism. The most debated requirements for democracy, particularly favoured by minimalist and liberal scholars, are elections and multi-partyism, which are generally confused with democracy.

1.4.2.1 Democracy and elections

Elections and democracy have become virtually synonymous in Western political thought and analysis. *Dahl* stated that the consolidation of democracy involves political participation and competition, which implies elections and pluralism (Bratton & Posner 1999:378).

More recently, **in the rush to globalise democracy** in the aftermath of the Cold War, *democracy was reduced to the crude simplicity of multiparty elections*, to the *benefit of some of the world's most notorious autocrats*, who were able to parade *democratic credentials* without reforming their repressive regimes. SG 27

In the liberal conception, elections are the defining institution of democracy. *Huntington* applied the **''*two-turnover test*''** according to which consolidation of democracy occurs [.in the process and outcome of elections]…. whenever the winners of founding elections are defeated in a subsequent election, and the new winners themselves accept an electoral turnover (Bratton & Posner 1999:378).

Terry (Bratton & Posner 1999:378) rightly criticised such assessments of democratic building or consolidation based only on elections or what he labelled **''*the fallacy of electoralism*''.**

Nzongola-Ntalaja (1997:19) argues that it would be too simplistic to identify democracy with the holding of elections. According to him, the question of democracy goes beyond elections; it concerns the realisation of democratic principles of governance and the balance of social forces in the political community.

Ake made the same point by referring to the **one-party system**, with people ***''voting without choosing''***. (1996:137)

Mkandawire captured that idea well in the expression ***''choiceless democracies''***. (1999:119–135)

Young *maintained that the need to satisfy foreign donors was one of the major inducements for African authoritarian regimes to open up their systems*. Moreover, the most tangible demonstration that such a change had been initiated was the legalisation of political parties and the holding of competitive elections (Joseph 1999:9–10).

In Africa, numerous elections, albeit hardly free and fair, have been held regularly since independence without countries establishing and consolidating democracy. The phenomenon here is one of elections without democracy. ***Electoral democracies are merely cosmetic democracies.***

If nothing else, convening scheduled multiparty elections serves the minimal function of marking democracy's survival. In these conditions, are elections unnecessary? *While seeking to avoid the* ***electoral fallacy***, *we should not embrace its antithesis*, namely, the *"anti-electoralist fallacy"*, *by assuming that elections are unimportant for democratisation*.

In the modern era you can have elections without democracy, but you cannot have democracy without elections. As *Bratton and Posner* (1999:379) wrote, ''*The regularity, openness, and acceptability of elections signal whether basic constitutional and attitudinal foundations are being laid for sustainable democracy*.''

Although elections and democracy are not synonymous, elections nonetheless remain fundamental, not only for the installation of democratic government, but for broader democratic consolidation.

1.4.2.2 Democracy and multi-partyism

According to liberal theory, there is no democracy without political pluralism, understood as multi-partyism. *Political parties have been identified as crucial to the process of democratic transition and consolidation*. However, like elections, **multi-partyism is not democracy.**

On the other hand, political parties are recent, and as demonstrated in precolonial Africa, it is possible to have democracy, or some measure of it, without multi-partyism. Where it exists, multi-partyism is not a guarantee of democracy. Authoritarianism may well tie the knot with integral multi-partyism. SG 28

1.4.2.3 Democracy and constitutionalism: the counter-majoritarian dilemma

The relationship between constitutionalism and democracy has been the subject of hot debate in legal and political sciences. *Sometimes constitutionalism and democracy are considered mutually dependent and reinforcing, and at other times they are seen as antagonistic, especially with regard to the* ***"counter-majoritarian dilemma".***

Marriage between constitutionalism and democracy

Democracy may not be the essence of constitutionalism, and a system may be constitutional without being democratic.

Constitutionalism is nevertheless considered a step towards democratisation and an issue that insinuates itself into the broad debate on democracy.

True and sustainable democracy is impossible without constitutionalism.

- without constitutional restraints, democracy becomes weaker and is doomed to collapse.
- constitutionalism is a prerequisite for democratic survival.

Constitutionalism and democracy are, therefore, interrelated and interdependent. *However, they have also come to be regarded as incompatible or contradictory phenomena, as captured in the counter-majoritarian dilemma or difficulty*

The counter-majoritarian dilemma

One of the major discussions about the relationship between constitutionalism and democracy concerns the **counter-majoritarian dilemma, which is the discord between majoritarian politics and constitutionally anchored restraints**.

The counter-majoritarian dilemma embodies many different aspects, some of which need to be revisited briefly:

- First, why should people bind themselves to a constitution that has been entrenched in order to preclude easy alteration?
- Secondly, why should a democratic government be limited at all, and how can the constitutional pre-commitment be legitimate?

In other words, how can we justify a system that thwarts the will of the majority in democracy?

According to *Davis, Chaskalson* and *De Waal* (1994:5–8), constitutional scholars,

particularly in the USA, have long struggled with the ‘‘counter-majoritarian difficulty’’, and despite many attempts at resolving it, the debate goes on.

Constitutionalism & Democracy in juxta-position…

According to *Elster* (1988:7), **constitutionalism is fighting a war on two fronts**:

- **against the executive and**
- **against the legislative branches of government.**

NB: Basically, the debate on the counter-majoritarian dilemma revolves around the **legitimacy of judicial review**:

- Is the fact that judicial review allows unelected and allegedly unaccountable judges to strike down legislation enacted by elected and legitimate people's representatives in parliament compatible with popular sovereignty and democracy? SG 29
- Should appointed judges have a right to nullify the decisions of democratically elected officials?

Constitutionalists perceive constitutionalism as a useful restriction on democracy, but democrats see it as an unnecessary nuisance.

Constitutionalism has been described as being **in essence antidemocratic**, because it implies restrictions on majority decisions.

Some scholars come close to suggesting that constitutionalism and democracy cannot be reconciled, and ''**constitutional democracy**'' is a marriage of opposites, an **oxymoron**.

For a large number of serious thinkers, constitutional democracy remains a **paradox**, if not a contradiction in terms. *The relationship between constitutionalism and democracy is said to be problematic, if not downright contradictory*.

Those who view constitutionalism and democracy as irremediably opposed or an oxymoron are idealists who certainly believe in the perfection of democratic government in the world.

Alternative view… mutually complimentary concepts

However, as *Sejersted* (1988:131) asks, **is there really a contradiction between constitutionalism and democracy?**

A number of political thinkers and scholars hold that constitutionalism and democracy are **not fundamentally antagonistic**, **but mutually supportive** or complementary. In other words, they are reconcilable.

In the **USA**, after *Marbury v Madison* 1803 where John Marshall, the Chief Justice, asserted that the power of judicial review, the American people still retain confidence in the judicial system and the power of the judiciary to be the watchdog of democracy.

Even in **Britain** where the system of parliamentary sovereignty still prevails, there is no contradiction between democracy and the rule of law.

Constitutionalism and democracy have rightly been reconciled in Africa, as judicial review has been entrenched in many African constitutions.

Therefore, while the debate on the counter-majoritarian dilemma may have been of importance in American constitutional law, it has come to be moot or academic in African comparative constitutional law.

Constitutionalism entails the limitation of the powers not only of the executive, legislative and judicial branches of government, and of administrative officers, but **also of the parliamentary majority**. An absolute democracy would be a facade for tyranny by the majority.

It is not only the judiciary that could endanger democracy and bring about authoritarianism or totalitarianism; a passionate majority could do the same thing.

As *Jefferson* emphasised in the nineteenth century American case, ***''elective despotism''*** *cannot be the government the people fought for; this applies equally to the African peoples who embarked on the struggle for constitutionalism and democracy* (Levi 1978:375).

On the other hand, constitutionalism is better served with democracy and democracy with constitutionalism, within the framework of a constitutional democracy or democratic constitutionalism. SG 30

Tension between constitutionalism and democracy: which should prevail?

The problem that may arise, especially in constitutional democracy or democratic constitutionalism, is **which should prevail in the event of tension**: constitutionalism or democracy?

Despite criticism against it, constitutionalism, at least as narrowly understood to refer to the power of the judiciary, has prevailed over majority rule without democracy being the loser.

The settlement of the electoral dispute during the US presidential election in 2000 is a case in point. In the USA, the general rule is that the presidential candidate who wins the popular vote gets at least 270 of the 538 electoral votes and wins the presidency.

However, the results of the November 2000 presidential election gave rise to an unusual situation which the country had not known for 125 years. *In Florida the margin between* Vice-President Albert Gore and Governor George W Bush, the republican and democratic candidates respectively, *was less than one percent of the ballots cast, and required manual recounting in terms of the electoral law of the State of Florida.*

The recounting of votes in constituencies where the Democrats had a strong following was very likely to give their candidate the lead by helping him win the

electoral votes for Florida that he required to become the next US President.

Accordingly, Vice-President Al Gore launched an application for manual recounting before the Supreme Court of Florida.

On 8 December 2000, the court ordered that the Circuit Court of Leon County tabulate by hand 9 000 ballots in Miami-Dade County. The Court also ordered the inclusion in the certified vote totals of 215 uncertified votes in Palm-Beach County and 168 votes identified in Miami-Dade County for Vice-President Albert Gore and Senator Joseph Lieberman, democratic candidates for the offices of President and Vice-President of the USA.

The court ruled that relief would require manual recounts in all Florida counties where under-votes existed. The court directed that the standard to be employed in the manual recounts was the standard established by the legislature in the election code of Florida. Governor Bush opposed. The case was urgently referred to the US Supreme Court, which handed down its judgment on 12 December 2000, the day set as the deadline for the certification of the results in Florida. In a five-to-four ruling, the US Supreme Court reversed the judgment of the Supreme Court of Florida. It held that the Florida statutory standard for the manual examination of ballots violated equal protection rights, and ultimately mandated that any manual recount be concluded by 12 December 2000.

The Court ruled that considering the time when the US Supreme Court opinion would be released, the deadline could not possibly be met. It also declined to grant relief to the appellants, namely, democratic candidates Albert Gore and Joseph Lieberman, and decided to leave the issue of the development of a specific, uniform standard throughout the State of Florida to the competence of the legislature of this State.

As the guardian and watchdog of American constitutionalism and democracy, the US Supreme Court enjoys such prestige that Vice-President Albert Gore agreed to abide by its ruling. So did the Democratic Party and the American people. *This case contributed to the downplaying of the traditional debate on the counter-majoritarian dilemma in the very country where it originated and developed to such a degree*.

STUDY UNIT 2

CONSTITUTION, CONSTITUTIONALISM, AND DEMOCRAC IN SOUTH AFRICA SG 39 - 65

2.1 INTRODUCTION: SG 39

The apartheid system in South Africa was a total negation of constitutionalism and democracy, as the black people, who constitute the overwhelming majority of the population, were denied the right to enjoy their fundamental rights on the same level as the white people. This negation can be laid at the door of the system of parliamentary sovereignty which applied in South Africa prior to the new constitutional dispensation in 1994.

In terms of the system of parliamentary sovereignty, Parliament was the supreme government institution and had absolute sovereignty. Its decisions were passed into law and had to be obeyed by everyone. The only requirement was that in making law or taking decisions, Parliament had to follow correct procedures. Laws made by Parliament were not subject to judicial review except on procedural irregularities. *The judiciary therefore did not have the authority to question or test the fairness or validity of parliamentary law or conduct*.

This state of affairs resulted in the institutionalised and systematic violation of the basic human rights of the (mainly black) majority, who did not have any say in the running of their own country. This was facilitated through discriminatory laws which *deprived them of their basic human rights, including their freedom, human dignity and equality*.

The most that could be done by the judiciary was to test whether, in passing laws, performing its function or exercising its powers, Parliament had complied with legal procedures. As a result of this minimal or subservient role, the judiciary suffered severe legitimacy crises.

The apartheid system ultimately came to an end with the adoption of the 1993 Constitution. The 1993 Constitution provided for a transition from the apartheid system to a constitutional and democratic dispensation. In essence, **the system of parliamentary sovereignty was replaced with constitutional supremacy.**

The 1993 Constitution came into force in 1994. It was later replaced by the 1996 Constitution, which affords greater weight to constitutionalism and democracy than any other constitution in the history of the country. The historical context within which the 1996 Constitution was developed is of critical importance for constitutional interpretation. The next SU will deal at length with the issue of constitutional interpretation.

It should be noted, however, that since this module is at an advanced level (fourth year LLB level), a comprehensive account of the historical development of South Africa's Constitution is beyond the scope of this SU. This aspect was covered comprehensively in the compulsory LLB module Constitutional law (CSL2601), which is a prerequisite for registering this module. However, should you need to refresh your memory on this aspect, you may consult either of two recommended sources, namely De Villiers B (ed) *Birth of a Constitution* (Juta 1994), chapters 1, 2 and 5, or a seminal article by Corder H ''Towards the South African Constitution'' in *The Modern Law Review* (1994) 57 (4) 491–533. In this module, we merely provide a brief historical background to the development of the 1996 Constitution.

2.2 BIRTH OF THE CONSTITUTION

The apartheid state

Prior to the current constitutional and political order, South Africa was an undemocratic and illegitimate state ruled by a privileged white minority. It was based on the apartheid system which denied the black people, who constitute the overwhelming majority of the South African population even to this day, their basic human rights. SG 40

The era of The history of apartheid and its enforcement by law in South Africa is well documented and it is not our intention to delve into it here. Suffice it to say that the apartheid regime, which was based on racial discrimination and massive human rights violations, was opposed in South Africa mainly by the black majority through various liberation movements.

The era of resistance & liberation

Since the apartheid regime often resorted to physical violence, including detention without trial and shooting, the liberation movements, which had initially protested peacefully, ultimately resorted to an armed struggle in an attempt to bring apartheid to an end. These movements were, however, labelled terrorists and banned from the country. Many of their leaders were arrested while others became political refugees in other countries.

The apartheid system was opposed not only in this country but also by the international community. While South Africa was becoming ungovernable, it also became isolated from the international community through sanctions. As a result, the apartheid government ultimately yielded to the pressure and started to engage the liberation movements in political and constitutional negotiations to end the violence and assure a better future for their people (Bouckaert 241).

The unbanning of Liberation movements & freedom of political prisoners: 2 February '90

It was therefore mainly due to international and domestic political and socioeconomic pressure that former President FW **de Klerk**, at the opening of Parliament on **2 February 1990**, in what has been called a ''historic speech'', announced the **unbanning of** liberation movements and their exiled members and the release of political prisoners and detainees, including the world-famous Nelson Mandela. (Corder 1994:494).

This culminated in various meetings between the apartheid government and the liberation movements to negotiate a way forward.

However, even while negotiations were continuing between the apartheid government and the unbanned liberation movements, political violence was escalating, mostly in black townships, one of the most violent incidents being the Sharpeville massacre.

Convention for a Democratic South Africa 1991/2

As a result of the socio-political instability - a multi-party conference was called in order to facilitate the negotiation of a new constitution.

Negotiations continued between the then illegitimate government and the major liberation movements, which ultimately culminated in a multi-party conference through the formation of the **Convention for a Democratic South Africa** (CODESA) **towards the end of 1991.**

As expected, the liberation movements and the government held different political views. The liberation movements insisted that in order to enjoy any legitimacy, a new constitution had to be adopted by a legitimate government that had been elected democratically. Neither the then government nor the liberation movements could claim to be legitimate as none of them had been elected freely and fairly by the majority of the population. However, the government feared that a democratically adopted constitution would not adequately address the fears and anxieties of the whites and other minorities.

Ultimately, the negotiating parties reached a compromise which culminated in a two-stage process for the adoption of a constitution.

The 1st stage - adoption Interim Constitution & formation of the NA

The first stage involved the adoption of an interim Constitution (*the Constitution of the Republic of South Africa Act 200 of 1993*). In terms of this Constitution, an interim government (the **Government of National Unity**) was established.

In terms of the interim Constitution, **a Constitutional Assembly had to be elected**.

Thirty-four Constitutional principles - a solemn pact

The mandate of the Constitutional Assembly was to **draft and adopt a ‘‘final’’ Constitution**. In drafting and adopting the final Constitution, the Constitutional Assembly had to work **within the framework of the Constitutional Principles** (CPs) as contained in **Schedule 4** of the interim Constitution and the **Constitutional Court had to certify** *that the ‘‘final’’ Constitution complied with these principles.* SG 41

The CPs were basically a list of **34 democratic principles or guidelines**, which were adopted by the parties negotiating the transition to a new constitutional government. These guidelines **were contained in Schedule 4 of the interim Constitution** and regarded as a *‘‘solemn pact’’*.

This meant that they were morally and legally binding on the negotiating parties. Examples of the CPs included:

(CP I) the establishment of one sovereign state, a common South African citizenship, and a democratic system of government committed to achieving equality between men and women of all races

(CP II) the provision of entrenched and justiciable, universally accepted fundamental rights, taking into consideration the

(CP III) fundamental rights protected under the interim Constitution the prohibition of racial, gender and all other forms of discrimination and the promotion of racial and gender equality and national unity;

(CP IV) constitutionalism;

(CP VI) the separation of powers

(CP VII) an independent judiciary;

(CP VIII) with the power to safeguard and enforce the Constitution and all fundamental rights; representative government embracing a multiparty democracy, regular elections, universal adult suffrage, a common voters roll, and in general, proportional representation (De Villiers 1994:34–49).

The Constitutional Court was responsible for determining whether the final constitution complied with these CPs.

The 2nd phase - elections CA & Senate (Parliament)

Since the will of the people had not been tested through elections, the legitimacy of the interim Constitution was in doubt. Therefore, a mechanism had to be devised for the creation of a new Constitution that would be legitimate and fully democratic.

The second stage of the transition began with the holding of elections for a National Assembly (NA) **and Senate** (which together constituted Parliament) **on 27 April 1994.** The ‘‘final’’ Constitution was to be drafted and adopted by a joint sitting of the NA and the Senate, which collectively made up the Constitutional Assembly (CA).

This CA had to pass a new constitutional text within two years of the date of the first session of the NA under the interim Constitution. The constitutional text was adopted by the CA on **8 May 1996** and submitted to the Constitutional Court for certification.

The *First Certification* case

However, the constitutional text had to be amended when the Constitutional Court, in the *First Certification* case (*Ex parte Chairperson of the Constitutional Assembly in Re: Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) (par 44–83), found that some of its provisions did not comply with the CPs.

The Constitutional Court found that, although the basic structure of the constitutional text was in accordance with the CPs, certain individual provisions of this text were in conflict with some CPs.

Conflicts of the final constitution with the CP's

These included, but were not limited to:

Section 241(1) of the constitutional text, which provided that the provisions of the Labour Relations Act (LRA) should remain valid until they are amended, despite the provisions of the Constitution. The Court found that this section was in conflict with CP IV, *which provided that the Constitution was supreme because it immunises the LRA from constitutional review until amended*.

Schedule 6 s22(1)(b): The same applied to this schedule the constitutional text in respect of the Promotion of National Unity and Reconciliation Act 34 of 1995.

Section 74: Furthermore, the Court found that the provisions of the constitutional text regarding the amendment of the Constitution (s 74) did not comply with the CPs. Section 74 of the constitutional text was found to provide for ‘‘special majorities’’, but not for ‘‘special procedures’’ for the amendment of the Constitution, in conflict with CP XV, which required ‘‘special procedures involving specified majorities’’.

Protection of the BoR: Moreover, it was found out that for the fact that the Bill of Rights was not given more stringent protection than the rest of the Constitution, it was not in accordance with CP II.

Local government: The provisions for local government were held to be inadequate, because they did not provide for the ‘‘framework for the structures’’ of this level of government as required by CP XXIV, or for financial powers and functions as provided for in CP XXV, or for the formal legislative procedures as set out in CP X. SG 42

Provincial government that the powers and functions of the provinces, as set out in the draft text, did not match the requirement of the CP that these powers and functions should not be ‘‘substantially inferior to’’ their powers and functions under the interim Constitution.

The constitutional text was therefore referred back to the CA for rectification. It was then amended and resubmitted to the Constitutional Court.

The 2nd Certification Case 4 February 1997 - an historic order…!

The *Second Certification* case (*Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (1) BCLR (CC)), on 4 February 1997, certified the revised constitution - as complying with all the CPs. The Court's ''historic order'' (par 16E-H) of the *Second Certification* case, reads as follows:

[W]e certify that all the provisions of the amended constitutional text, the Constitution of the Republic of South Africa, 1996, passed by the Constitutional Assembly on 11 October 1996, comply with the Constitutional Principles contained in schedule 4 of the Constitution of the Republic of South Africa, 1993.

2.3 THE 1996 CONSTITUTION

The Constitution - not an ordinary act of Parliament:

The 1996 Constitution was officially referred to or numbered as ''Act 108 of 1996''. We agree with Van Wyk (Wyk D *'' 'n paar opmerkings en vrae oor die nuwe grondwet''* (1997) (60) *THRHR* 377–378) that this is incorrect and irregular, as the Constitution is not an ordinary Act of Parliament and cannot be numbered in accordance with this sequence. The reason is quite simple.

The 1996 Constitution is not an Act of Parliament. It was drafted and adopted by a Constitutional Assembly. This is a special body separate from Parliament consisting of the National Assembly and Senate sitting jointly for this purpose. The 1996 Constitution was drafted and adopted within the framework of the 34 CPs in schedule 4 of the interim Constitution.

In **drafting and adopting** the Constitution, the Constitutional Assembly **followed its own procedure**, which differed from normal parliamentary procedures. This Assembly had its own chairperson, all was wholly made up of members of Parliament sitting jointly and had its own administration.

The Constitution also had to be certified by the Constitutional Court, which is something that is not done for ordinary Acts of Parliament. It is **therefore** referred to as the ''Constitution'', ''the 1996 Constitution'' or the ''**Constitution, 1996''**.

2.3.1 Context of the Constitution

You should know the **preamble** and **sections 1 and 2** of the Constitution. Together with **section 39**, these provisions provide a proper context for the interpretation of the Constitution.

Preamble of the Constitution

We, the people of South Africa,

* Recognise the injustices of our past;
* Honour those who suffered for justice and freedom in our land;

* Respect those who have worked to build and develop our country; and
* Believe that South Africa belongs to all who live in it, united in our diversity.

We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to-

* Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
* Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
* Improve the quality of life of all citizens and free the potential of each person; and
* Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

May God protect our people. *Nkosi Sikelel' iAfrika.*
Morena boloka setjhaba sa heso. *God seën Suid-Afrika.*
God bless South Africa. *Mudzimu fhatutshedza Afurika.*
Hosi katekisa Afrika.

FOUNDING PROVISIONS
(ss 1-6)

1 Republic of South Africa

The Republic of South Africa 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 and non-sexism.
(c) Supremacy of the constitution and the rule of law.
(d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

2 Supremacy of 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.

39 Interpretation of Bill of Rights

(1) When interpreting the Bill of Rights, a court, tribunal or forum-
  (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
  (b) must consider international law; and
  (c) may consider foreign law.
(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.
(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

The preamble of the Constitution 1996

The preamble contains the foundational values upon which the Constitution is based. These include freedom, equality, social justice, democracy, protection of human rights, and supremacy of the Constitution.

The introductory phrasing of the preamble differs from that of preambles in ordinary Acts of Parliament. The latter start with the phrase ‘‘Be it therefore enacted by the Parliament of the Republic of South Africa’’. The Constitution does not contain such a phrase and this is because it is not an Act of Parliament.

It could therefore be argued that the preamble to the Constitution does not have the same limited interpretational role as an ordinary preamble in that it is invoked only in the case of uncertainty.

Rather, the preamble should be seen as an integral part of the interpretation process. The reason is that the Constitution contains so many other value-laden provisions that it becomes artificial to separate the preamble, and to invoke it only in the case of uncertainty. SG 43

Section 1 is also a value-based provision.

It provides that South Africa is one sovereign, democratic state, founded on certain values, including the rule of law, accountability, responsiveness and openness. *This is the context within which the 1996 Constitution should be interpreted, namely within a value-based contextual framework*.

Section 2: The Constitution is the Supreme Law

Section 2 of the Constitution provides that the Constitution is the supreme law of the land, and any law or conduct inconsistent with it is invalid.

This is a paradigm shift from the notion of parliamentary sovereignty that applied prior to the 1993 Constitution to constitutional supremacy under the current constitutional dispensation.

Section 2 further creates a duty, namely that all **obligations imposed** by the Constitution must be fulfilled. This is repeated in section 237 of the Constitution, which makes provision for constitutional obligations to be performed with diligence and without delay. You should also take note of sections 39(1) [see above] and 239, which relate to constitutional interpretation.

239 Definitions

In the Constitution, unless the context indicates otherwise-

'national legislation' includes -

(a) subordinate legislation made in terms of an Act of Parliament; and

(b) legislation that was in force when the Constitution took effect and that is administered by the national government;

'organ of state' means -

(a) any department of state or administration in the national, provincial or local sphere of government; or

(b) any other functionary or institution-

(i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer;

'provincial legislation' includes-

(a) subordinate legislation made in terms of a provincial Act; and

(b) legislation that was in force when the Constitution took effect and that is administered by a provincial government.

Section 39 is an interpretive clause aimed at providing guidance on the interpretation of the Bill of Rights. It requires that, in the interpretation of constitutional provisions relating to fundamental rights, values such as constitutionalism and the rule of law, which underlie an open and democratic society, must be promoted.

Section 239 (definitions) is crucial for the interpretation of the Constitution as a whole. Both sections will be fully explored in the next SU, which deals with constitutional interpretation.

2.3.2 Constitutionalism and the 1996 Constitution

Constitutionalism, democracy and the rule of law have been discussed in SU 1 (see also Boulle, Harris & Hoexter 1989:20–55).

Constitutionalism is entrenched in the Constitution (section 1) as one of the values underlying an open and democratic society. The preamble to the 1996 Constitution recognises the need to:

* *develop a society based on democratic values, social justice and fundamental human rights;*
* *lay the foundation for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law; and*
* *build a united democratic South Africa able to take its rightful place as a sovereign state in the family of nations*.

The preamble to the interim Constitution referred to *"the need to create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state"* and the expression *"sovereign and democratic constitutional state"* has become firmly established by the Constitutional Court as part and parcel of our new constitutional vocabulary.

Study in this regard *S v Makwanyane* 1995 6 BCLR 665 (CC); 1995 (3) SA 391 (CC) paras 156, 220 and 301.

Furthermore, the view that constitutional values, such as constitutionalism or a constitutional state, should be considered in interpreting the Constitution, *as provided for in section 39(1), has been confirmed by the Constitutional Court*.

Read in this regard *S v Zuma* 1995 4 BCLR 401 (CC) paras 17 and 18;

Makwanyane para 19; and

Soobramoney v Minister of Health, KwaZulu-Natal 1997 12 BCLR 1696 (CC) at para 52.

Lastly, our courts, and in particular the Constitutional Court, accept our current system as a ***"constitutional democracy"***. SG 44

This has been confirmed by the Constitutional Court in the cases:

First Certification at para 34 and
Pharmaceutical Manufacturers Association of SA; in Ex parte application of the President of RSA 2000 3 BCLR 241 (CC); 2000 (2) SA 674 (CC) at (paras 84–85).

The concept of "constitutionalism" relates to concept of the rule of law.

The rule of law is one of the values on which our constitutional order is based. This is clear from section 1(d) of the 1996 Constitution.

The rule of law simply means government in accordance with the law. Implicit in this is that South Africa is a constitutional state or that constitutionalism reigns in South Africa. It should be noted that, although the interim Constitution expressly recognised both ***"the rule of law"*** and ***"a constitutional state"*** as values underlying democracy, the 1996 Constitution only recognises the ***"rule of law"***.

However, it is generally accepted that the drafters of the 1996 Constitution had a much broader concept of the rule of law in mind. In other words, every exercise of state authority is subject to and circumscribed by the Constitution.

The fact that

- *the Constitution is supreme (as provided in s 2 of the Constitution),*
- *contains a justiciable Bill of Rights (Ch 2 of the Constitution), and*
- *requires judges to have regard to constitutional values (ss 1, 36 and 39 of the Constitution),*

is a clear indication that reference to the rule of law is meant to be understood in the broadest possible sense, as a system of government in which the law reigns supreme (Davis et al 1994:11).

Modern constitutionalism is, therefore, concerned with values.

It is value-laden or purposive constitutionalism. This has been confirmed by the Constitutional Court in *Makwanyane* (para 266), where a wider meaning of constitutionalism was required, adherence to or respect for the African value of *ubuntu* was required and government's respect for and protection of fundamental human rights was required.

The doctrine of constitutionalism - the limitation of State power:

The essence of the doctrine of constitutionalism, according to *Boulle, Harris* and *Hoexter* (1989:20–55), is that state power should be defined and limited by law in order to protect the interests of society.

The doctrine upholds the notion of limited government, as opposed to arbitrary rule.

The principle of limitation applies as follows:

(1) It restricts the range of things which a government can do.

(2) It prescribes the procedures the government must follow in doing those things within its competence.

Constitutional prescription or Constitutional description

Further, *Boulle et al* suggest that ***constitutionalism is a prescriptive, and not a descriptive, doctrine.*** It indicates how state power should be exercised, and how it is exercised in practice.

However, **in our view**, constitutionalism under our new ***constitutional dispensation has acquired both prescriptive and descriptive dimensions***, and the courts have a duty to ensure that constitutionalism is practised in South Africa.

The normative essence of Constitutionalism

It is also generally accepted that constitutionalism is normative in nature – that is, ***it denotes which set of values should be upheld in the governing process***. This is also in accordance with the German principle of material ***Rechtsstaat.***

The concept of *Rechtsstaat* is of German origin and we will not concern ourselves, in this module, with its historical development.

Should you be interested in that, consult *Blaauw L*. *"the Rechtsstaat idea compared with the rule of law as a paradigm for protecting rights"* 107 (1990) *SALJ* 76–96 and *De Waal J* ''A comparative analysis of the provisions of German origin in the interim Bill of Rights'' (1995) 11 (1) *SAJHR* 4–9.

Suffice it to say that the status of the ***Rechtsstaat*** idea in German law is that of an ***''objective normative legal principle''.*** SG 45

2.3.3 Democracy and the 1996 Constitution

Constitutionalism is an important feature of any democratic state.

Democracy is the core value on which South Africa is now founded. The words ''democracy'' and ''democratic'' feature very prominently in the Constitution (see in this regard the Preamble and ss 1, 7(1), 36(1), 39(1), 57(2)*(b)*, 61(3), 70(1*(b)*, 70(2)*(b)(c)*, 116(1)*(b)*, 160(8)(*b*), 181(1), and 195(1) of the Constitution). Section 7 (1) of the Constitution provides that the Bill of Rights is a cornerstone of democracy in this country.

7 Rights

(1) This Bill of Rights is a cornerstone of democracy in South Africa. 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 fulfil the rights in the Bill of Rights.

(3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.

36 Limitation of rights

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

57 Internal arrangements, proceedings and procedures of National Assembly

57(2)(b)

(2) The rules and orders of the National Assembly must provide for-

(b) the participation in the proceedings of the Assembly and its committees of minority parties represented in the Assembly, in a manner consistent with democracy;

61 Allocation of delegates

(3) The national legislation envisaged in subsection (2) (a) must ensure the participation of minority parties in both the permanent and special delegates' components of the delegation in a manner consistent with democracy.

70 Internal arrangements, proceedings and procedures of National Council

70(1(b), 70(2)(b)(c),

(1) The National Council of Provinces 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.

(2) The rules and orders of the National Council of Provinces must provide for-

(a) the establishment, composition, powers, functions, procedures and duration of its committees;

(b) the participation of all the provinces in its proceedings in a manner consistent with democracy; and

(c) the participation in the proceedings of the Council and its committees of minority parties represented in the Council, in a manner consistent with democracy, whenever a matter is to be decided in accordance with s75.

116 Internal arrangements, proceedings & procedures of provincial Legislatures

(1) A provincial legislature may-

(b) make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement.

(2) The rules and orders of a provincial legislature must provide for-

(b) the participation in the proceedings of the legislature and its committees of minority parties represented in the legislature, in a manner consistent with democracy;

CHAPTER 9
STATE INSTITUTIONS SUPPORTING CONSTITUTIONAL DEMOCRACY

181 Establishment and governing principles

(1) The following state institutions strengthen constitutional democracy in the Republic:

(a) The Public Protector.

(b) The South African Human Rights Commission.

(c) The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.

(d) The Commission for Gender Equality.

(e) The Auditor-General.

(f) The Electoral Commission.

CHAPTER 10
PUBLIC ADMINISTRATION (ss 195-197)

195 Basic values and principles governing public administration

(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

(a) A high standard of professional ethics must be promoted and maintained.

(b) Efficient, economic and effective use of resources must be promoted.

(c) Public administration must be development-oriented.

(d) Services must be provided impartially, fairly, equitably and without bias.

(e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.

(f) Public administration must be accountable.

(g) Transparency must be fostered by providing the public with timely, accessible and accurate information.

(h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.

(i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.

Democracy and the Constitution:

However, the concept of democracy is not defined in the Constitution. *In the South African context, "democracy" implies that every adult South African citizen is entitled to cast his or her vote for a representative of his or her choice in free and fair elections, and to express his or her will in Parliament, a provincial legislature or a municipal council.*

According to *Currie and De Waal* (2001:82), **this is representative democracy**. There are various important constitutional provisions which give effect to the basic idea of representative democracy.

The most important provision or the "central pillar" of representative democracy is section 19 of the Constitution, which deals with political rights.

Representative democracy is also a form of participatory democracy.

Participatory democracy *means that individuals or institutions must be given the opportunity to take part in the making of decisions that affect them*.

Section 17 of the Constitution recognises the importance of direct democracy by safeguarding the right to assembly, demonstration, picket and petition.

Section 84(2) further makes provision for national referendums to be called by the president, and there are similar provisions relating to provincial premiers.

Limitation of the Legislature:

Legislative bodies, once elected, are not at liberty to make whatever laws they wish. They are bound by the values that are embodied in the Constitution. Constitutional democracy therefore reigns in South Africa.

The Constitution as the Supreme Law:

As far as the status of the Constitution is concerned, section 2 provides: *This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled*.

The idea of a supreme constitution and the rule of law are crucial elements of constitutionalism and democracy.

You should remember, however, what we stated in SU 1: constitutionalism, democracy and the rule of law usually require the existence of a supreme constitution, but as the British case has shown, they can exist in the absence of a written and supreme constitution.

In view of the above, we may say that the 1996 Constitution guarantees and aims to protect and promote not only constitutionalism and democracy, but also the rule of law.

2.4 SEPARATION OF POWERS UNDER THE 1996 CONSTITUTION SG 46

As pointed out earlier, separation of powers is one of the components or ‘‘essential principles’’ of constitutionalism and democracy. According to *Rautenbach* and *Malherbe* (2003:10), it is an integral part of the theory and philosophy of constitutionalism or limited government.

It is also worth noting that **there is no express mention of the doctrine of separation of powers in the Constitution**.

The Constitutional Court in *South African Association of Personal Injury Lawyers v Heath* 2000 (1) BCLR 77 (CC) paras 18–22 held that *‘‘there can be no doubt that our Constitution provides for such a separation [of powers], and that laws inconsistent with what the constitution requires in that regard, are invalid’’.*

The Court further held that *‘‘the separation of powers is an unexpressed provision that is ‘implied’ in or ‘implicit’ to the Constitution. Its presence is based on inferences drawn from the structure and provision of the Constitution, rather than on an express entrenchment of the principle.’’*

There are two ways in which state authority or power may be distributed, to wit:

- ***horizontal and***
- ***vertical separation of powers.***

First we discuss the horizontal separation of powers, with which you should be very familiar by now, before discussing the second method of separation of powers, namely, vertical separation of powers.

2.4. Horizontal separation of powers and form of government

2.4.1.1 Horizontal separation of powers

It can be deduced from the structure of the Constitution that the doctrine of separation of powers is firmly entrenched with the object of ensuring the proper regulation of state authority.

In terms of the Constitution:

- *the legislative authority in the national sphere of government is vested in Parliament (Chapter 4),*
- *the executive authority is vested in the president (Chapter 5),*
- *the judicial authority is vested in the courts (Chapter 8).*

The legislature

As indicated above, the **legislative authority** in the *national sphere* of government is **vested** in parliament. In the *provincial sphere* it is vested in provincial legislatures, and in the *local sphere* of government it is vested in the municipal councils.

The current South African Parliament is bicameral. In other words, it consists of two houses, namely, the National Assembly and the National Council of Provinces.

The National Assembly (NA) is elected to represent the people and to ensure government by the people.

The National Council of Provinces (NCOP) represents the provinces and ensures that provincial interests are taken into account in the national sphere of government.

According to *Currie and De Waal* (2001:133), ***the idea behind bicameralism*** is that the two houses of parliament, representing different interests, will act as a check on one another, i.e. exercise a certain measure of control or restraint over one another. [**checks & balances]** SG 47

The executive

Under section 85 of the Constitution the executive authority of the state in the national sphere of government is vested in the president, acting in conjunction with the cabinet.

In terms of section 85(2) (d), the cabinet has the constitutional authority to prepare and initiate legislation. Section 73(2) gives a cabinet member the authority to introduce a Bill in the National Assembly.

The question whether a court of law may intervene in the legislative process at the stage where the executive is still initiating and preparing legislation *was considered by the Constitutional Court in* ***Glenister*****.**

This question was formulated as follows by Langa CJ: *"... [T]he sole question in this case is whether it can ever be appropriate for this court to intervene when draft legislation is being considered by Parliament, to set aside the decision of the executive to initiate the legislative process"* ... at para 36.

As the court indicated, this question must be guided by the principle of separation of powers.

The judiciary

In terms of section 165 of the Constitution, judicial authority is vested in the courts, which are independent and subject only to the Constitution and to the law, which they must apply impartially and without fear, favour or prejudice. The issue of judicial independence, as envisaged in section 165, is one of the main pillars of the doctrine of separation of powers.

The judiciary serves as an important check on the other branches of government and should, therefore, be independent and beyond reproach. For a proper understanding of the independence of the judiciary within the context of the doctrine of separation of powers between the legislature and the courts, please study the prescribed case: *Doctors for Life International v The Speaker of the National Assembly and Others*

Doctors for Life (in particular paras 37–38), where it was stated that:

"[t]he constitutional principle of separation of powers requires that other branches of government refrain from interfering in parliamentary proceedings.

This principle is not simply an abstract notion; it is reflected in the very structure of our government. The structure of the provisions entrusting and separating powers between the legislative, executive and judicial branches reflects the concept of separation of powers. SG 48

The principle "has important consequences for the way in which and the institutions by which power can be exercised". Courts must be conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government.

They too must observe the constitutional limits of their authority. This means that the Judiciary should not interfere in the process of other branches of government unless to do so is mandated by the constitution.

But under our constitutional democracy, the Constitution is the supreme law. It is binding on all branches of government and no less on Parliament.

When it exercises its legislative authority, Parliament "must act in accordance with, and within the limits of the Constitution", and the supremacy of the Constitution requires that "the obligations imposed by it must be fulfilled".

Courts are required by the Constitution "to ensure that all branches of government act within the law," and fulfil their constitutional obligations. This Court "has been given the responsibility of being the ultimate guardian of the Constitution and its values".

Section 167(4), in particular, entrusts this Court with the power to ensure that Parliament fulfils its constitutional obligations.

This section gives meaning to the supremacy clause, which requires that "obligations imposed by [the Constitution] must be fulfilled". It would therefore require clear language of the Constitution to deprive this Court of its jurisdiction to enforce the Constitution.

In ***De Lange*** *v Smuts NO* 1998 (3) SA 785 (CC), Ackerman J reiterated that **there is no universal model of separation of powers**, **and that it is not absolute.** An absolute separation of powers would lead to inefficiency and inflexibility.

Ackermann J conceded that: *"…. over time our courts will develop a distinctively South African model of separation of powers, one that fits the particular system of government provided for in the Constitution and that reflects a delicate balancing, informed both by South Africa's history and its new dispensation, between the need, on the one hand, to control government by separating powers and enforcing checks and balances and, on the other hand, to avoid diffusing power so completely that the government is unable to take timely measures in the public interests"* (De Lange & Smuts para 60).

On several subsequent occasions the Constitutional Court has adopted a rather strict approach to the doctrine of separation of powers. For instance…

In ***Executive Council*** *of the Western Cape Legislature v President of the Republic of South Africa* 1995 10 BCLR 1253 (CC), 1996 4 SA 744 (CC) paras 106 to 113, it was decided that it was inconsistent with the doctrine of separation of powers for Parliament to delegate its power to amend the laws to the president as head of the executive.

In ***Bernstein*** *v Bernstein NO* 1996 4 BCLR 449 (CC) para 105 it was stated that "*the right of access to the courts was inter alia, aimed at protecting the independence of the courts and thus separation of powers*".

In *Heath,* par 38, 45, and 46 it was held that the Special Investigating Unit performs executive functions that are inconsistent with the judicial functions of a judge, and that the provision in section 3(1) of the relevant Act, which required the president to appoint a judge as head of the unit was unconstitutional.

In *S v Dodo* 2001 5 BCLR 423 (CC), 2001 3 SA 382 (CC) paras 22–25, it was held that, although sentencing is a judicial function, a law *prescribing a mandatory minimum sentence was not inconsistent with the separation of powers, as the legislature also has a responsibility in respect of sentencing*. SG 49

As indicated in *S v Dodo* (para 17), and in *Glenister v President of the Republic of South Africa and Others* (CCT 41/08) [2008] ZACC 19 (paras 32–36), **the starting point for an understanding of separation of powers upon which our Constitution is based must be the text of the Constitution**.

This can be traced back to the *First Certification* judgment *(Ex parte Certification of the Constitution of the Republic of South Africa,* 1996 (4) SA 744 (CC), in which the Constitutional Court held that the text of the Constitution did comply with Constitutional Principle VI.

The court rejected the argument that the new constitutional text did not comply with Constitutional Principle VI, because unlike in the US and France, cabinet ministers remained Members of Parliament.

This principle proclaimed that ‘‘*[t]here shall be a separation of powers between the legislature, the executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness’’*.

The Constitutional Court approached this issue with flexibility and found that there is no universal model for separation of powers, and that the separation of powers is not absolute anywhere, as each state follows its own model. It was held that the overlap between the legislature and the executive in the South African Constitution strengthens the accountability of the executive to the legislature and does not infringe the doctrine of separation of powers.

As a matter of fact, the Constitution reflects a balance between an overconcentration of power and the need for effective government. The Constitutional Principles only require that there should be separation of powers in the Constitution. They do not prescribe what form this should take. The form it took in the Constitution is not inconsistent with the Constitutional Principles.

The court also followed a functional approach to separation of powers and indicated (at paras 106–113) that the inclusion of socio-economic rights in the Bill of Rights did not confer a task on the courts so different from their ordinary function that it was inconsistent with separation of powers.

Furthermore, despite separation of powers in South Africa, a large degree of interdependence still exists. In other words, **there are important checks and balances in the Constitution.**

- For instance, the president is elected by Parliament and Parliament also has the power to remove him or her from office on account of misconduct, inability or a serious violation of the Constitution or the law;
- the president's term of office is dependent on that of Parliament; the president must resign if Parliament adopts a motion of no-confidence in the cabinet;
- after his or her election, the president may not remain a Member of Parliament, but in general, other cabinet ministers must be Members of Parliament (only two cabinet ministers need not be Members of Parliament);
- bills adopted by Parliament must be assented to by the president;
- judges are appointed by the executive authority, although the legislative and judicial authorities are indirectly involved in the matter (please study section 178 of the Constitution on the involvement of Parliament in the appointment of judges).

Despite the constitutional guarantee of judicial independence, the South African judiciary is currently facing serious challenges. The judiciary recently came under attack from many quarters, including the ruling party.

Key political figures have recently claimed that some prominent judges were ***"old, white Rhodesians with a tainted history"***; and that ***"judges are counter-revolutionaries"*** and so on, as reported in the *Mail & Guardian Online.*

However, the judgment of the Supreme Court of Appeal in *National Director of Public Prosecutions v Zuma* 2009 (4) BCLR 393 (SCA) has restored the essence of the independence of the judiciary after its image and integrity had been seriously compromised by the Nicholson judgment (the judgment of the KwaZulu-Natal High Court, Pietermaritzburg in *Zuma v National Director of Public Prosecutions* 2009 (1) BCLR 62 (N) (also available at *www.saflii.org.za*), in the matter between the NPA and Mr Zuma. SG 50

The SCA established that the court *a quo* failed to distinguish between facts and political conspiracy theories to the extent of moving beyond what the court was required to deal with. At para 15, the court held that:

"*[I]t is crucial to provide an exposition of the functions of a judicial officer because, for reasons that are impossible to fathom, the court below failed to adhere to some basic tenets, in particular that in exercising the judicial function judges are themselves constrained by the law.*

The underlying theme of the court's judgment was that the judiciary is independent; that judges are no respecters of persons; and that they stand between the subject and any attempted encroachments on liberties by the executive (para 161–162).

***This commendable approach was unfortunately subverted by**:*

- *a failure to confine the judgment to the issues before the court;*
- *by deciding matters that were not germane or relevant;*
- *by creating new factual issues;*
- *by making gratuitous findings against persons who were not called upon to defend themselves;*
- *by failing to distinguish between allegation, fact and suspicion; and*
- *by transgressing the proper boundaries between judicial, executive and legislative functions*".

At para 19, the court continued as follows:

"*[T]he independence of the judiciary depends on the judiciary's respect for the limits of its powers. Even if, in the words of the learned judge, the judiciary forms a 'secular priesthood' (para 161) this does not mean that it is entitled to pontificate or be judgmental especially about those who have not been called upon to defend themselves – as said, its function is to adjudicate the issues between the parties to the litigation and not extraneous issues*".

However, the integrity of the judiciary itself is subject to further compromise, as the ruling party (ANC) has initiated a process that will look at the NPA itself and how its powers can be curtailed.

The Constitution requires the courts to remain above party politics and apply the law without fear or favour, regardless of status and membership of a particular group. **Judicial review should not be seen as an attack on the integrity of any person, but as a tool to affirm the foundational values and principles entrenched in the Constitution.**

2.4.1.2 Form of government: parliamentary or presidential government? SG 51

Horizontal separation of powers and the different systems or forms of government to which it gives rise were discussed in SU 1. The application of this principle in South Africa led to the adoption of a system of government with both parliamentary and presidential features, but which remains essentially a parliamentary system, as the parliamentary features prevail over the presidential ones.

Parliamentary features

The following parliamentary features can be identified in the SA system:

- Whereas in the USA the president is elected by popular vote, in South Africa the president is elected by the National Assembly (NA) from among its members at its first sitting or whenever there is a vacancy for the position of president, and not directly by the electorate (section 81 of the 1996 Constitution).
- Unlike in the US, where the President and his cabinet are accountable to the electorate, members of the cabinet, including the president, are individually and collectively accountable to the NA for the exercise of their powers and performance of their duties (section 92 of the 1996 Constitution).
- In South Africa, since the president is elected by the NA from among its members, he or she must resign if the NA adopts a motion of no confidence in him or her (section 102 of the 1996 Constitution). This is different from the position in the US where the president is elected by popular vote and therefore cannot be forced to resign by the legislature.
- In South Africa, the NA may be dissolved by the president (section 50 of the 1996 Constitution).
- With the exception of two ministers at most, cabinet members must be selected from the NA and must therefore be members of the NA (section 91 of the 1996 Constitution).

Presidential features

The following presidential features can also be identified in South Africa:

- Unlike in the Westminster system, where the head of state and head of government are separate and distinct (Rautenbach & Malherbe 2003:180), in South Africa the president performs dual functions as head of state and head of government/the executive (s 83). This is similar to the position in the United States of America.
- In South Africa, the NA may remove the president from office by passing a resolution with a supporting vote of at least two-thirds of its members (s 89). This differs from the position in the US, where the President cannot be forced to resign for political reasons, for example, after the passing of a motion of no-confidence in him, because the US president is not elected by the legislature (Rautenbach & Malherbe 2003:180). SG 52

- In South Africa, once elected, the president ceases to be a Member of Parliament (s 87). In the US, the President is not elected from the legislature, and neither the President nor his cabinet are members of the legislature.
- In the US the President may veto a law. In South Africa, although the President may not veto legislation, he may refer a Bill back to the NA when he has reservations about its constitutionality (s 79).

It is clear from the above that, under the new constitutional dispensation, South Africa has adopted neither a pure Westminster parliamentary system of government, nor a pure US presidential system of government. Rather, it has adopted a hybrid form of government characterised by both parliamentary and presidential features.

The form of government under the 1996 Constitution

As we have said, the South African system of government combines parliamentary and presidential features.

2.4.2 Vertical separation of powers and the form of state under the 1996 Constitution

2.4.2.1 Cooperative government

Vertical, territorial or spatial separation of powers was defined in SU 1, where we discussed the distribution of power among the different levels of state authority.

Federalism is based on a vertical separation of powers.

The distribution of power is based on the Constitution, which is the supreme law. The **Constitution establishes** areas of **exclusive competences** and those of **concurrent competences** (of the central/national and state/provincial/regional governments).

Chapter 3 of the 1996 South African Constitution is entitled ‘‘Co-operative Government’’. There are three spheres of government:

➢ **National** ➢ **Provincial** ➢ **Local** SG 53

These three spheres of government are also

➢ **distinctive** ➢ **interdependent, &** ➢ **interrelated.**

According to Currie and De Waal (2001:119), chapter 3 is aimed at promoting a cooperative form of federalism, as opposed to competitive federalism, which is characterised by the division of government activities between the central and regional governments.

In a co-operative form of federalism, on the other hand, different spheres of government share the same responsibilities.

The constitution usually allocates legislative and executive powers to the central and regional government. The different spheres then interact with each other in a spirit of cooperation rather than a spirit of competition.

Section 41 of the Constitution reinforces this cooperative model of federalism by making provision for certain principles of cooperative government and inter-governmental relations that need to be observed and adhered to by all spheres of government.

These principles also reinforce the distinctiveness, interrelatedness and interdependence of this type of cooperative government.

To achieve this distinctiveness, section 41(1)(e) for example requires all spheres of government to respect the constitutional status, institutions, powers and functions of government in the other spheres.

Section 41(1)(f) **constrains the spheres** of government to exercise only those powers that have been conferred upon them by the Constitution.

Section 41(1)(g) obliges all spheres of government to **respect the functional and institutional integrity** of the other spheres of government.

These provisions affirm the cooperative system of governance as regards the distribution of powers among the different spheres of government. They provide for areas of exclusive competence of the provincial sphere of government (Schedule 5) and areas of concurrent competence of both the national and the provincial spheres of government (Schedule 4).

2.4.2.2 The judiciary and cooperative governance

The issue of cooperative governance was recognised and acknowledged by the Constitutional Court even prior to the coming into effect of the 1996 Constitution. In *Certification of the Constitution of the Republic of South Africa,* 1996 (10) BCLR 1253 (CC) (paras 87–292), the Constitutional Court had to decide whether Chapter 3 of the constitutional text, and in particular the requirement that the different spheres of government should avoid legal proceedings against each other, violated Constitutional Principle XX, which provides for the recognition of provincial autonomy.

The Court emphasised that the Constituent Assembly was free to select a model of cooperative government rather than one of competitive or divided federalism.

The Constitution also established the *Constitutional Court as the highest court* in all constitutional matters and the final referee in the event of conflict of competence between the different spheres of government.

The significance of the Constitutional Court as the final arbiter in the resolution of disputes between the spheres of government in order to affirm the principles of co-operative governance was confirmed in *Premier of the Province of the Western Cape v President of the Republic of South Africa* (1999 (4) BCLR 382 (CC), in which Chaskalson P held that: SG 54

*[t]he principle of cooperative government is established in section 40 where all spheres of government are described as being **"distinctive, inter-dependent and interrelated"**. This is consistent with the way powers have been allocated between different spheres of government.*

***Distinctiveness** lies in the provision made for elected governments at national, provincial and local levels.*

***The interdependence and interrelatedness** flow from the founding provision that South Africa is "one sovereign, democratic state", and a constitutional structure which makes provision for framework provisions to be set by the national sphere of government.*

***These provisions vest concurrent legislative competence** in respect of important matters in the national and provincial spheres of government, and contemplate that all provincial executives will have responsibility for implementing certain national laws as well as provincial laws (at para 50).*

Coordination of the legislative and executive activities of the different spheres of government is crucial to the cooperative form of government. Cooperation is of particular importance when it comes to concurrent lawmaking and implementation. Conflict between laws in respect of concurrent matters must be avoided, and the responsible organ for the execution of laws must be clearly identified.

Chaskalson CJ in the *Premier of the Province of the Western Cape* judgment further held that:

"*[c]o-operation is of particular importance in the field of concurrent legislative making and implementation of laws. It is desirable, wherever possible, to avoid conflicting legislative provisions, to determine the administrations which will implement laws that are made therefore in the budgets of the different governments* ". (at para 55).

This judgment endorsed the vertical separation of powers between the three spheres of government, namely, the national, provincial and local spheres.

2.4.2.3 Form of state: unitary or federal?

Vertical separation of powers and the different forms of state were discussed in SU 1. Despite the fact that it has some federal features, some scholars (see Elazar 1994:35; Watts 1994:86) considered South Africa a quasi-federal or regional state as certain strong features of a federal state are present here. However, on closer examination, South Africa is found to be a unitary state, but a largely decentralised one.

Federal features

The following are some of the federal features of the South African state:

- The Constitution distributes the competences between the national and the provincial spheres of government, some being exclusive and others concurrent.
- Provision is made for processes to facilitate intergovernmental relations in those areas where responsibilities are shared or overlap.
- The Constitution is the supreme law of the Republic, and the Constitutional Court
- is the final judge of the conflicts of competences between the different spheres of government.
- Each sphere of government has its own executive and legislative authority.
- Parliament is bicameral: the NA is elected to represent the people, while the National Council of Provinces represents the provinces.
- The Provinces are entitled to adopt their own constitutions. SG 55

Unitary features

South Africa has the following unitary features:

- Strong, centralised power is vested in the national sphere of government.
- There is greater emphasis on central or unitary control of state activities.
- The provinces are subordinate to the national government in many respects.
- National legislation prevails over provincial legislation in many areas.
- Despite constitutional provisions, only two provinces have their own constitutions.
- There is limited distribution of state authority between the national and the other spheres of government; the national or central government remains the highest and strongest authority in South Africa.
- Provinces have limited resources.

According to *Simeon* (1998:59), despite his reluctance to use the term, South Africa has opted for a federal model. He indicates that, in general, South Africa leans strongly towards a shared model, which is much closer to the German than the Canadian example.

The interim Constitution was, as its preamble stated, a solemn pact among equals. The German model of cooperative, collaborative governance was asserted from the outset in chapter 3 of the interim Constitution as it is in chapter 2 of the 1996 Constitution.

Cooperation, collaboration and coordination between different spheres of government are the essence of any constitutional federal bargain. The supremacy of the Constitution, which immediately precedes the establishment of citizenship, clearly makes the Constitution rather than national government the supreme authority in the country, as in other democratic polities, particularly federal ones.

The form of state under the 1996 Constitution

The 1996 Constitution established a cooperative system of government. Chapter 3 of the Constitution is dedicated to the concept of cooperative government. According to Currie and De Waal (2001:119), this chapter is aimed at promoting a cooperative form of federalism, as opposed to competitive federalism, which is characterised by the division of government activities between the central and regional governments.

In a cooperative form of federalism, on the other hand, different spheres of government share the same responsibilities. The constitution usually allocates legislative and executive powers to the central and regional government. The different spheres then interact with each other in a spirit of cooperation rather than in a spirit of competition. Chapter 3 of the Constitution is dedicated to the concept of cooperative government. SG 56

Section 40(1) provides for **three spheres of government**, which are:

- **distinctive**
- **interdependent and**
- **interrelated.**

Each of these spheres is directly elected, and each has some measure of autonomous legislative and executive power.

Section 41(2) makes provision for an **institutional framework for cooperative government**.

The wording of the chapter suggests that it is leaning towards an integrated model of federalism. For instance, the words ‘‘national government’’ as opposed to ‘‘central government’’ suggest a paradigm shift from the rigid hierarchical model of government that existed under the old parliamentary system of government to a cooperative and intergovernmental model.

This is reinforced by the use of the word **‘‘spheres’’ rather than ’’tiers’’.**

Chapter 4 of the Constitution

As outlined in **Chapter 4 of the Constitution**, Parliament has most of the characteristics of a federal assembly, consisting of a National Assembly (NA) whose members are selected from provincial lists, and a National Council of Provinces (NCOP), elected on the basis of equal representation from each province, elected by the provincial legislatures.

Provincial interests are represented in Parliament through the NCOP, which consists of provincial delegates, who must ‘‘*ensure that provincial interests are taken into account in the national sphere of government*’’ by ‘‘*participating in the national legislative process and by providing a national forum for public consideration of issues affecting the provinces*’’ (s 42(4)).

The provinces have some protection with regard to their boundaries, powers and functions, in that both the NA and the NCOP must enact any changes, and in the NCOP a majority of the representatives of a province must accept the change before the NCOP can enact it. This is not entirely the federal system, since the process can be initiated by the national legislature, but it does include some protection.

Moreover, the executive and legislative competencies of a province can only be changed with the consent of the provincial legislature.

The NCOP enjoys additional protection with regard to joint sessions of Parliament and constitutional change. Even more important is the fact that the boundaries, powers and functions of the provinces cannot be changed without the support of a two-thirds majority of all of the members of the NA, and also the support of at least six of the nine provinces in the NCOP.

The NA and the NCOP jointly elect the president.

All told, 290 of the 490 Members of Parliament, or nearly two-thirds, come from provincial constituencies.

Chapter 6 is devoted to provincial government.

The nine provinces are specified in the constitution as the provinces of the Republic, with extensive legislative and executive powers. At the same time, provision is made for agreement among the provincial legislatures to determine how the disputed areas will be assigned to particular provinces.

The framework regulating the size of provincial legislatures, which requires their election by proportional representation, and provides for their duration, dissolution, elections and organisation in either a general or a specific way, is also set.

Each province has a legislature with concurrent competence with Parliament to make laws for the province within a list of scheduled functional areas (Schedule 4).

Nevertheless, Acts of Parliament will prevail over those of provincial legislatures for a variety of reasons that are defined fairly vaguely to allow great parliamentary discretion.

Provincial legislatures also have areas of exclusive competence (Schedule 5).

In essence, Chapter 6 is a partial common constitution for the provinces, including nearly 50 sections and defining a fairly complete framework that provincial constitutions have to fit into. SG 57

The chapter also provides for provincial executive authority headed by a provincial premier in a parliamentary system, governing within the framework of the national and provincial constitutions in conjunction with an executive council consisting of not more than 10 members who are appointed by him or her from the ranks of the provincial legislature.

Provincial legislatures are authorised, in section 142 of the Constitution, to enact provincial constitutions, provided that they are certified by the Constitutional Court.

Chapter 7 provides for local government.

The Constitution also provides for local government in Chapter 7, a short general chapter designed, *inter alia*, to establish the autonomy of local government within the overall constitutional framework and delineate its powers in a general way. The points of contact between local and provincial government are covered either in general terms or in ways designed to protect the right of local government to obtain a share of provincial revenues.

Chapter 12 provides for constitutional status of Traditional Authorities

Traditional authorities are given constitutional status in Chapter 12. Although this is welcome, it is regrettably the shortest chapter in the Constitution, with only two sections on the recognition and role of traditional leadership. Traditional authorities have existed for centuries prior to the adoption of the Constitution, and this minimal recognition is therefore disappointing.

In addition, each province must establish and empower a house of traditional leaders with powers to delay legislation. A council of traditional leaders with advisory powers is to be established at the national level.

Chapter 13 provides for protection and imitations on government spheres

Chapter 13 provides both protection and limitations for the provinces and the national and local governments. Section 214 makes provision for enactment of legislation that will provide for the equitable sharing of revenue collected nationally between the national, provincial and local spheres of government.

However, **provinces** have limited powers to raise revenue on their own account, and **are expressly prohibited from imposing income tax, sales tax or VAT**. Revenue may only be allocated after consultation with the provincial governments, organised local government and the **Financial and Fiscal Commission** (s 214(2)).

Chapter 10 is dedicated to public administration,

A whole chapter 10 is dedicated to public administration, and of particular importance for federalism is the **establishment of the public service commission** with powers over both national and provincial governments.

The public service commission is designed, *inter alia*, to provide for a more equitable distribution of public service jobs among all groups in South Africa.

A **police service** has been established in terms of section 205 of the Constitution to function at both national and provincial levels under the direction of both the national and the provincial governments. The appointment of national and provincial police commissioners is provided for in the Constitution. Provincial police commissioners are given potentially extensive police powers within the national framework.

Despite all this, South Africa still fails to qualify as a fully-fledged federal state, as unitary features prevail over federal characteristics.

2.5 THE APPROACH OF THE JUDICIARY TO CONSTITUTIONALISM AND DEMOCRACY IN SOUTH AFRICA

2.5.1 Approach to constitutionalism

It is important to note that the 1996 **Constitution does not expressly provide for constitutionalism** as one of the foundational values of the new democratic state.

However, section 1(c) of the Constitution provides that the supremacy of the Constitution and the rule of law are fundamental values upon which South Africa is based. SG 58

As indicated above, **our understanding of the rule of law is that it is a system of government in which the law reigns supreme**, rather than *Dicey's* narrow formalistic version, which reduces the rule of law to the bare requirement that government must derive its authority from and be limited by law, without due consideration for the procedural and substantive aspects of that law.

In South Africa, the notorious apartheid regime frequently propagated the narrow legalistic version of the rule of law to justify its barbaric, racist and authoritarian actions by relying on the fact that their actions were authorised by law.

This was mainly the result of the system of parliamentary sovereignty that prevailed at that time.

Under the new **constitutional dispensation**, in which **parliamentary sovereignty is replaced by constitutional supremacy**, the Constitutional Court has made what *Currie* and *de Waal* (2005:11) describe as ‘‘*decisive use of the principle of the rule of law*’’ or constitutionalism in a number of cases.

According to Ackerman J in *S v Makwanyane* (para 156), the concept and values of a constitutional state, of the *Rechtsstaat*, and the constitutional right to equality before the law are foundational to the creation of the ‘‘*new order*’’. He indicated that the detailed enumeration and description in section 33 [limitation of rights] of the interim Constitution and in the general limitation clause of the criteria that must be met before the legislature could limit a right entrenched in Chapter 3 (the Bill of Rights) of the interim Constitution emphasise the importance, in our new constitutional state, of reason or justification when rights are sought to be limited.

This signalled a radical departure from a past, characterised by arbitrariness and inequality before the law to a present and a future in a constitutional state where state action must be such that it can be analysed and justified rationally.

The Rule of Law

The first judgment dealing with the rule of law directly was the decision of the Constitutional Court in *Fedsure Life Assurance LTD v Greater Johannesburg Transitional Metropolitan Council* 1998 (12) BCLR 1458 (CC); 1999 SA 374 (CC), where the Constitutional Court stated the following:

"It seems central to the conception of our constitutional order that the legislature and the executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred by law. At least in this sense, then, the principle of legality is implied within the terms of the interim constitution. Whether the principle of the rule of law has greater content than the principle of legality is not necessary for us to decide here. We need merely hold that the fundamental to the interim Constitution is a principle of legality (at para 58).

This means that although local government law could not be classified as administrative action and, therefore, need not comply with the principles of administrative justice, local government legislation and conduct still needed to comply with the constitutional requirement of legality. As Devenish (2005:7) points out, this is indeed a seminal premise of the rule of law, which in turn is fundamental to the philosophy of constitutionalism.

Another case in which the rule of law arose is that of *New National Party of South Africa v Government of the Republic of South Africa* (1995 5 BCLR 489 (CC); 1999 3 SA 191 (CC) para 24).

In this case, which involved a challenge to the provisions of the Electoral Act under which voters could only register to vote if they produced barcoded identity documents issued after 1986 or a temporary identity certificate on the grounds that this would practically violate the right to vote of people who did not have such documentation, the Court dismissed the challenge and held that the rule of law, as set out in the Constitution, required Parliament to act in a rational way in devising a scheme for the achievement of a legitimate purpose. Its conduct in this regard should not be perceived as arbitrary.

A third case involving the rule of law is *President of the Republic of South Africa v South African Rugby Football Union* (1999 (10) BCLR 1059 (CC); 2000 1 SA 1 (CC) (*SARFU*) para 148).

This case dealt with the power of the president to appoint a commission of enquiry in terms of section 84(2)(f) of the Constitution. As in the *Fedsure* decision, the Constitutional Court (para 34) held that the conduct in question did not constitute administrative action and, therefore, was not subject to the principles of administrative justice.

The question then arose whether there were other constraints in relation to the exercise of the president's power to appoint a commission. This question was answered in the affirmative as follows:

The constraints upon the President when exercising his powers s 84(2) are clear: the President is required to exercise powers personally and any such an exercise of power must be recorded in writing and signed; ... the exercise of the powers is clearly also constrained by the principle of legality and, as is implicit in the Constitution, the President must act in good faith and must not misconstrue the powers. These are significant constraints upon the exercise of the president's power. They arise from provisions of the Constitution other than the administrative justice clause, (at par 148).

The judgments in *Pharmaceutical Manufacturers Association of South Africa, In re: Ex Parte Application of President of South Africa* (2000 (3) BCLR 241 (CC) paras 84–85) and *Lesapo v North West Agricultural Bank* (paras 11 and 17) followed the sequence in the *SARFU* judgment (para 34).

In the ***Pharmaceutical*** judgment [*Pharmaceutical Manufacturers Association of South Africa, In re: Ex Parte Application of President of South Africa* (2000 (3) BCLR 241 (CC) paras 84–85] the Constitutional Court (para 85) discussed the constraints the Constitution places on the exercise of power in terms of the rule of law as follows:

[I]t is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given; otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by the Constitution for such action, (at para 85).

In ***Lesapo*** the [*Lesapo v North West Agricultural Bank* (paras 11 and 17)] the Constitutional Court made it clear that the rule of law did not apply only to organs of state but to everyone within the state. The Court held that no one is entitled to take the law into his or her own hands, as self-help is inimical to a society in which the rule of law prevails (at paras 11 & 17). SG 60

The ***Lesapo*** case clearly demonstrates that the rule of law constitutes more than ***''the value-neutral principle of legality''.*** It has both procedural and substantive attributes.

The procedural component of the rule of law forbids arbitrary decision making.

The substantive component of the rule of law requires that the state should respect an individual's basic rights.

This is in accordance with the new constitutional scheme and is a radical departure from the previous apartheid regime, where legality was merely a procedural formality.

2.5.2 Approach to democracy

Democracy was defined in SU 1. Despite the different ways in which it is defined, democracy implies that the people have their say in the government of their country, and that power is derived from them. This means that the people are entitled to participate in law making, to vote and express their opinion.

2.5.3 The judiciary and public participation in law-making

The elected legislative bodies are constitutionally mandated to facilitate public involvement in the legislative and other processes of their respective committees (ss 59 (1) (a), 72(1) (a) and 118(1) (a) of the Constitution). **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 affect them (Currie & De Waal 2005:15).

As Ncobo J held in *Matatiele Municipality and Others v President of the Republic of South Africa and Others* (2007 (1) BCLR 47 (CC):

[O]ur constitution 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 government is based on the will

of the people". Consistent with the constitutional order, section 118(1)(a) calls upon the provincial legislatures to facilitate involvement in [their] legislative and other processes, including those of their committees. As was held in Doctors for Life International v Speaker of the National Assembly and Others (CCT 12/05), our Constitution calls for open and transparent government and requires legislative organs to facilitate public participation in the making of laws by all legislative organs of the State.

2.5.3.1 The judiciary and the right to vote

The underlying principle in a representative democracy is that the voters elect persons or parties to represent them in Parliament.

In the South African Constitution this right is fully entrenched in section 19(3)(a). In terms of this section, every adult South African citizen is entitled to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret. This section is often the subject of much constitutional litigation in the run-up to elections.

Just before the 1999 elections the constitutionality of actions by the Independent Electoral Commission (IEC), which denied prisoners the right to vote, came under judicial scrutiny in *August v Electoral Commission* (1999 (4) BCLR 363 (CC) paras 1–6, 8–11 & 14–33).

- The Court held that it was unconstitutional for the Electoral Commission to disenfranchise prisoners by omission and thus deny them the right to vote.
- The Constitutional Court further held that the right to vote *"by its very nature imposes positive obligations upon the legislature and the executive"*. It also imposes an affirmative obligation on the Commission to take reasonable steps to ensure that eligible voters are registered.
- By omitting to take any steps, the Commission failed to comply with its obligations to take reasonable steps to create the opportunity for eligible prisoners to register and vote. In effect, the omission would have disenfranchised all prisoners without constitutional or statutory authority.
- Accordingly, the Court ordered the Electoral Commission to make reasonable arrangements to ensure that prisoners could register and thus be able to vote later. It is important to note that the Constitutional Court explicitly stated that its judgment should not be read as suggesting that parliament was not allowed to disenfranchise certain categories of prisoners by means of legislation, but simply that any such attempt at disenfranchisement was a limitation of the right to vote and, therefore, had to be supported by a law of general application to stand any chance of justification.

Shortly before the 2004 elections, Parliament amended the Electoral Act 73 of 1998 by the Electoral Laws Amendment Act 34 of 2003. *This amendment effectively disenfranchised prisoners serving sentences of imprisonment without the option of a fine, as it prevented them from registering as voters and voting while in prison.*

Prisoners who had not yet been sentenced and prisoners who were incarcerated because they were unable to pay fines were allowed to register and vote.

The constitutionality of section 8(2)(f) and the phrase ''*and not serving a sentence of imprisonment without the option of a fine*'' in section 24B(1), and section 24B(2) of the Electoral Laws Amendment Act was challenged in ***Minister of Home Affairs*** *v National Institute for Crime Prevention and Re-integration of Offenders (**NICRO**) and Others* (2004 (5) BCLR 445 (CC) (paras 12, 14, 16, 25 & 31). SG 62

The applicants argued that the above-mentioned sections were inconsistent with the provisions of sections 1(d) and 3(2) of the Constitution, which are absolute and not subject to limitation.

1 Republic of South Africa

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

(d) **Universal adult suffrage**, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

3 Citizenship

(2) All citizens are-

(a) equally entitled to the rights, privileges and benefits of citizenship; and

(b) equally subject to the duties and responsibilities of citizenship.

This argument was dismissed by the Court on the grounds that neither of these sections, which deal with the values of the Constitution and rights of citizens respectively, requires voting rights to be absolute and immune from limitation. **These sections are indeed subject to the limitation clause in the Constitution.**

However, the Court declared the above-mentioned provisions of the Electoral Act, as amended, to be unconstitutional and invalid on the grounds that they were inconsistent with the right to vote as enshrined in section 19(3)(a) of the Constitution, and there was no justifiable limitation of this right in accordance with section 36 of the Constitution.

Recently the Constitutional Court had an opportunity to consider whether South Africans living abroad had the right to vote in two important judgments, namely, *Righter v Minister of Home Affairs and Others* (DA and Others Intervening) 2009 (5) BCLR 448 (CC) paras 1–3, 5, 11, 15–16, 20–24, 32–36, 40–41, 44–45 & 47–98) and *The AParty v Minister for Home Affairs and Others; Moloko and Another v Minister for Home Affairs* 2009 (6) BCLR 611 (CC) paras 1–11, 13–25, 33–34, 36–42, 53–56, 67–70, 72–78 & 80).

On 12 March 2009, the **Court handed down its decision on various applications challenging the constitutional validity of certain sections of the Electoral Act and its regulations.**

On 9 February 2009, Ebersohn AJ of the Gauteng North High Court ruled that section 33 of the Electoral Act [**special votes**] and some of its regulations were unconstitutional. This was in response to an urgent application brought by Willem Richter, a South African teacher who was a registered voter, but was living and working in the UK at the time.

The Minister for Home Affairs applied to the Constitutional Court for permission to appeal against the Gauteng North High Court ruling and opposed the Richter application and two more similar applications.

The Court decided on the application of the *AParty* for an order declaring not only section 33 of the Act unconstitutional, but also sections 7, 8, 9 and 60. It held that these sections violated the right to vote and the right to equal treatment of South African citizens living abroad.

Two separate judgments were handed down at the same time.

The Court decided unanimously that South Africans living abroad had the right to vote if they were registered.

The Court further held that section 33 of the Electoral Act unfairly restricted the right to cast special votes while abroad to a very narrow class of citizens. This section was, therefore, declared unconstitutional and invalid.

The implication of this judgment for the elections that were to be held on 22 April 2009 was that all citizens who were registered voters at that time, and who would be out of the country on the date of the elections, would be allowed to vote in the national but not the provincial elections ‘‘*provided they give notice of their intention to do so**,** in terms of the Election Regulations, on or before 27 March 2009 to the Chief Electoral Officer and identify the embassy, high commission or consulate where they intend to apply for the special vote*’’.

Handing down the first of two separate judgments, **O’ Regan J** in the *Richter* judgment (para 53), held that the *right to vote had a symbolic and democratic value* and those who were registered should not be limited by unconstitutional and invalid limitations in the Electoral Act.

However, a second judgment by **Ngcobo J** in the *AParty* judgment (paras 59–70, 72–78 & 80) *found that unregistered voters who were overseas could not vote*. This was held to be due to the fact that the limitations on the right to vote of South Africans living abroad who did not fall within certain categories had been in effect since 2003 and the applicants had not explained why they had waited so long to challenge it.

2.5.3.2 The judiciary and public opinion

The Constitution is based on certain democratic principles and values, including human dignity, the achievement of equality, supremacy of the constitution and the rule of law, and universal adult suffrage as provided for in sections 1 and 2 of the 1996 Constitution.

These values and principles need to be upheld and enforced by the judiciary and in particular by the Constitutional Court as a custodian of the Constitution. *However, in attempting to do so, the judiciary might encounter problems such as the counter-majoritarian dilemma.*

This problem is reinforced by perceptions regarding the will of the majority versus the upholding of constitutional values and principles. The perception, which is referred to as the ‘‘***counter-majoritarian dilemma***’’ revolves around the legitimacy of judicial review.

The argument is that unelected and allegedly unaccountable judges should not be allowed to strike down legislation enacted by elected and legitimate representatives of the people in Parliament. **The issue is, therefore, whether judicial review is compatible with popular sovereignty and democracy.**

The question of unelected judges versus the will of the majority was settled in *Makwanyane*. The judgment dealt with the constitutionality of the death penalty. *The Court dismissed the argument of the state that since South African society does not regard the death penalty for extreme cases of murder as a cruel, inhuman, and degrading form of punishment, the death penalty should not be abolished*.

The issue of public opinion*:*

As indicated by Chaskalson P, ‘‘*[t]he question before us, however, is not what the majority of South Africans believe a proper sentence for murder should be. It is whether the Constitution allows the sentence.*’’

At para 87, he went on to say that: "*Public opinion may have some relevance to the enquiry, but in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive there would be no need for constitutional adjudication*".

Public opinion might be a relevant factor, but it is definitely not a decisive one. As indicated by **Chaskalson P** (para 88) in the *Makwanyane* case, the court must interpret and uphold the constitution without fear or favour, and public opinion should not be a substitute for this duty.

Public opinion is relevant to the law-making function of Parliament because Parliament is mandated by and accountable to the public, while the court is accountable to the Constitution.

Furthermore, according to Kentridge AJ in *Makwanyane* (para 200), ‘‘*were public opinion on the question clear it could not be entirely ignored*’’. In the same paragraph, he added that: ‘‘*[t]he accepted mores of one’s own society must have some relevance to the assessment whether a punishment is impermissibly cruel and inhuman* ’’.

Didcott J (para 188) reasoned that "*even assuming that public opinion supports the retention of the death penalty, that support is given in the belief that there is a unique deterrent force in the death penalty, and that the public is safer with it than without it*". & that this would be an understandable belief if its premise was a good one. SG 64

He further stated that *no “homage” need be paid to public opinion if it is founded on a false premise*. He also held that in any event it would be wrong ‘‘*[t]o allow ourselves to be influenced unduly by public opinion*’’.

STUDY UNIT 3

CONSTITUTIONAL INTERPRETATION & THE ROLE OF COURTS SG 68 - 88

3.1 INTRODUCTION: SG 71

It is essential that you understand at the outset what constitutional interpretation entails. *Currie and De Waal* (2005:45) argue that constitutional interpretation involves a process of determining the meaning of a constitutional provision.

Ducat (2004:79–80) gives a more extensive definition by saying that it is a justification for the judicial review power, the standard of constitutionality to be applied by the courts, and the methods by which judges support the conclusion that a given government action does or does not violate the Constitution.

Murphy et al (1986:2) argue that constitutional interpretation requires finding and justifying one's understanding of the fundamental values and aspirations that the Constitution may reflect, then explaining how they, along with the more specific rules and procedures of the Constitution, fit concrete problems.

Hence they argue that constitutional interpretation should be handled with care, particularly because it has the ability to change the Constitution from what it was before its interpretation.

By explaining what a constitution means in the context of a particular problem, an interpreter can shape what that constitution will mean in the future – what fundamental values it will enshrine, what aspirations it will encourage, and what concrete policies its more particular rules will nourish or stifle (*ibid*).

It is also essential, they further argue, to handle constitutional interpretation with care since constitutional interpretation changes as times change. The changing nature of the problems the nation faces demands that interpreters frequently re-examine their own and the countries' values as well as its traditions, thus producing a dynamic process that will end only when the Constitution itself ends (Murphy et al 1986:3).

Baker argues that jurists, scholars and students have to apply theories of constitutional interpretation in order to be able to assign meaning to the past and shape arguments over the future of constitutional law (Baker 2004:120).

It is against this background that you will have to understand the theories of constitutional interpretation as applied in constitutional jurisprudence in the USA, and the methods of constitutional interpretation from the perspective of some of the European countries that we will discuss in this SU.

Moreover, we will also investigate constitutional interpretation under the 1996 Constitution of the Republic of South Africa in this SU. You should in particular pay attention to how the South African courts have applied the methods of constitutional interpretation from the perspective of some of the European countries in a complementary manner, given that these overlap with the South African methods of constitutional interpretation.

Before we analyse the theories and methods of constitutional interpretation we will first try to find out whether there is a difference between constitutional interpretation and Bill of Rights interpretation, and constitutional interpretation and statutory interpretation.

It is worth noting that constitutional interpretation refers to the interpretation of the constitution as broadly defined in SU 1.

3.2 CONSTITUTIONAL INTERPRETATION AND INTERPRETATION OF THE BILL OF RIGHTS

SG 72

In trying to establish whether there is a difference between constitutional interpretation and Bill of Rights interpretation one should remember that despite the interrelationship constitutional interpretation extends beyond interpretation of the Bill of Rights, which is only part of the Constitution, to other provisions of the Constitution.

S v Mhlungu 1995 (3) SA 867 (CC); 1995 (7) BCLR 793 (CC) (par 63) however seems to suggest that there is no difference between the two. In this case, despite the divided opinion of the court on the meaning of section 241(8) of the Interim Constitution, the court left no doubt, in the words of Kentridge AJ that a purposive construction is as appropriate here as in other parts of the Constitution.

The interim Constitution prescribed that all proceedings which are pending must be dealt with as though the Constitution had not been passed.

The criminal trial of Mhlungu was pending on 27 April 1994.

- Mhlungu argued he was entitled to the constitutional right to a fair trial (certain evidence was no longer admissible). The state rejected this according the interim constitutional provision.

The CC was divided:

- Majority held the provision only meant the old apartheid courts should complete the cases before them. The Constitution had to be applied and the evidence excluded.
- Minority held the courts had to conclude pending cases under the old law as though the Constitution had not been passed and the evidence therefore allowed.
- Majority rejected this as it violated the principle that every word and clause must be given meaning.

- The purpose was that the provision deals with jurisdictional issues and not with substantive law. The interpretation of the minority only focused on one section and not on the interpretation as a whole.
- Decided - There are no absolute, definite & final answers in constitutional interpretation
- Constitutional interpretation involves an ongoing but principled judicial dialogue with society, in this dialogue marginalised groups must be empowered to participate in the dialogue to be heard
- Constitutional values must be actively promoted in the interpretation of the BOR
- The separation of powers must be respected when the BOR is interpreted;
- The Constitution must be used as an instrument for social & economic empowerment.

Kentridge and Spitz also seem to share the sentiments of the court. They argue that the difference between the interpretation of the Bill of Rights and the Constitution as a whole is **more a difference of degree than a difference in kind**.

Because the bill of rights is more broadly worded, there is room for explicit value judgments in interpreting the bill of rights. *Where other chapters of the Constitution are being interpreted the words themselves tend to provide a clearer indication of what is required*. Nevertheless, whether it is more or less explicit or obvious, **the exercise of interpretation is one of giving effect to constitutional values** (1996: 11–14).

3.3 CONSTITUTIONAL INTERPRETATION AND STATUTORY INTERPRETATION

A number of provisions of the 1996 Constitution of the Republic of South Africa apply to legislative interpretation. These provisions include sections 39, 233, and 239.

39 Interpretation of Bill of Rights

(1) When interpreting the Bill of Rights, a court, tribunal or forum-
  (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
  (b) must consider international law; and
  (c) may consider foreign law.

(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.

(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

233 Application of international law

When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

239 Definitions

In the Constitution, unless the context indicates otherwise-

'national legislation' includes-

(a) subordinate legislation made in terms of an Act of Parliament; and

(b) legislation that was in force when the Constitution took effect and that is administered by the national government;

'organ of state' means-

(a) any department of state or administration in the national, provincial or local sphere of government; or

(b) any other functionary or institution-

(i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer;

'provincial legislation' includes-

(a) subordinate legislation made in terms of a provincial Act; and

(b) legislation that was in force when the Constitution took effect and that is administered by a provincial government.

240 Inconsistencies between different texts

In the event of an inconsistency between different texts of the Constitution, the English text prevails.

While these sections may be considered to apply to statutory interpretation, sections 39(1) and 240 refer expressly to constitutional interpretation.

Kentridge and Spitz (1996:11–11) *say that the essential difference between statutory and constitutional interpretation is the understanding of the character of the Constitution as a whole and the Bill of Rights in particular*.

They argue that judges interpreting the Constitution are concerned with understanding and clarifying the way the government is required to function according to a scheme or pattern of government which is **consistent with the values of the Constitution** or to establish such a scheme or pattern, while judges interpreting a statute are concerned with the task of **determining the legislative intention** (*ibid*).

They further argue that, unlike with ordinary statutes, constitutional interpretation is not the voice of the people speaking through legislature. *It is rather that the interpretation acknowledges that democracy is something more than mere majority fiat, and that there are areas into which the majority may not trespass* (*ibid*).

The difference between constitutional interpretation and statutory interpretation also lies in **the role of judges when interpreting a statute and when interpreting a constitution**.

This was stressed by Froneman J in the case of *Matiso v Commanding officer, Port Elizabeth Prison, and another* 1994 (4) SA 592 at 596 E–I as follows:

The interpretation of the Constitution will be directed at ascertaining the foundational values inherent in the Constitution, whilst the interpretation of the particular legislation will be directed at ascertaining whether that legislation is capable of an interpretation which conforms to the fundamental values or principles of the Constitution.

Constitutional interpretation is aimed at ascertaining the fundamental values inherent in the Constitution and legislation interpretation is directed at ascertaining the purpose of the legislation and whether it is capable of interpretation which conforms with the values of the Constitution.

Constitutional interpretation in this sense is thus primarily concerned with the recognition and application of constitutional values and not with the search to find the literal meaning of statutes. SG 73

It was further held that:

That the courts bear a responsibility of giving specific content to the wide and general values contained in the Constitution. **In doing so, the courts will invariably create new law.**

That the Constitution should be considered in its complete context and that the courts should adopt a contextual and purposive approach to both legislative and constitutional interpretation. This is known as interpretation *ex visceribus actus*, in other words, all the parts of the particular legislation have to be studied.

Du Plessis refers to this as the ***"structural wholeness of the enactment".***

Constitutional interpretation also activates – and gives content to – the values inherent in the Constitution. I.e. (constitutionalism, *Rechtsstaat*, democracy, human rights etc) enshrined in the Constitution.

- For instance, section 39 of the Constitution requires any court, tribunal or forum to promote democratic values, and also to consider international law or foreign law when interpreting the Bill of Rights.
- However, when interpreting any legislation and when developing common law or customary law, any court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
- This implies that the Bill of Rights and the Constitution of which it is part prevails over any other legislation.

3.4 THEORIES AND METHODS OF CONSTITUTIONAL INTERPRETATION

African and South African constitutional lawyers still have to develop their own theories of constitutional interpretation. Up to now they have relied on the theories of constitutional interpretation in US constitutional jurisprudence.

According to Du Plessis (2008:32–29) the theory enhances the principles on which the practice is based. Hence Du Plessis argues that interpretive theories can also be referred to as interpretive approaches as they are explanatory and justificatory at the same time (*ibid*).

3.4.1 Theories of constitutional interpretation

The following theories of constitutional interpretation will be discussed herein:

- Textualism
- Doctrinalism
- The philosophical approach
- Purposivism
- Originalism
- Developmentalism
- Systemic and transcendent structuralism
- Balancing

3.4.1.1 Textualism

Textualism entails that one can and should ascertain the meaning of the Constitution by reading **the text itself**, since the Constitution consists of the document and its amendments (Murphy et al 1986:302).

According to *Tushnet* (1985:683) textualism is based on the contention that at least some provisions of the Constitution need not be interpreted but only applied because they are entirely clear, as the meaning of the text is available to courts without interpretation. SG 74

There are several textual approaches:

- a clause-bound textualist approach
- a structural textualist approach
- a purposive textualist approach (Baker 2004:95).

A clause-bound textualist would focus on a particular clause to examine its meaning;

A structural textualist scrutinises a clause in the context of the rest of the text, especially any closely related clauses, and

A purposive textualist seeks to articulate the purpose or goal behind the clause (*ibid)*.

The difficulty with the application of the textual approach is that it cannot be relied on when the text itself is confusing (*ibid*).

3.4.1.2 Originalism

There are a variety of originalists.

Some examine **historical materials** to ascertain the ‘‘original intent’’, that is how the framers of the Constitution themselves subjectively would have decided the very issue before the Court.

Others take a more objective **‘‘original understanding’’** of the Constitution, namely how the words of the Constitution would have been understood by a reasonable and informed interpreter at the time it was written (Baker 2004:73).

Originalism thus is an exercise in historiography as an originalist looks backwards in time to recapture some purported meaning of the Constitution in the past (*ibid*).

Simon (1985:1483) **argues that the argument for originalism rests on three claims:**

- First, the framers of the original Constitution and its amendments shared a collective state of mind, called the **framers' intent**, which reveals the meanings of various constitutional provisions.
- Second, it claims that judges understand this state of mind by following the **plain language of a provision** and by researching the proceedings and/or the legal and social context surrounding the adoption of a provision.
- The third claim suggests that the meanings supplied by the plain language and the research into the originators' state of mind are, or ought to be, authoritative.

According to *Murphy et al* (1986:303), this **theory of originalism** is normally applied when the interpreters of the Constitution are faced with broad, perplexing, or incomplete language.

This theory is complimented for being the best method to keep judges *from freelancing and imposing their own subjective policy preferences under the pretext of interpreting the Constitution* (Baker 2004:73).

One of the most difficult challenges for an originalist is to distinguish between circumstances that are constant and circumstances that are variable, or between the time the Constitution was framed and the present time and then to factor them into the constitutional decision one way or the other (Baker 2004:75).

3.4.1.3 Doctrinalism

In the United States this theory gives a central place to precedent or *stare decisis*

which is hierarchical in that all the other courts in the country are obliged to follow supreme court pronouncement on the Constitution (Baker 2004:84).

Thus **doctrinalism basically contemplates past interpretations** as they relate to **specific problems** and tries to *organise them into a coherent whole and fit the solution of current problems into that whole* (Baker 2004:84-96). SG 75

Stare decisis **proceeds in three steps:**

- Firstly, a judge sees a **similarity** between the problems now presented and those of earlier cases.
- Secondly, he or she determines the **rule of law** used to settle earlier cases.
- Thirdly, he or she **applies that rule to the dispute** on hand (Murphy et al 1986:303).

The advantage of this theory is that, it maintains consistency and objectivity in Supreme Court decision making and it also reduces the subjectivity and discretion of lower court judges (*ibid*).

3.4.1.4 Developmentalism

Constitutional developmentalism is an approach to interpretation that considers the historical events, such as informal practices, usages and political culture (Baker 2004:97).

The emphasis is on resolving contemporary issues with contemporary constitutional understandings *that are the product of past authoritative interpretations by courts and relevant historical changes in the broader political culture* (*ibid*).

This approach normatively plays out in a polarised debate between those who try to keep the ***Constitution in tune with the times*** *and those who try to keep the* ***times in tune with the Constitution*** (Baker 2004:98).

3.4.1.5 Philosophical approach

Philosophical approach to constitutional interpretation calls on the courts to think critically about the meaning of constitutional prohibition or requirements.

Most importantly philosophical approach requires judges to articulate or rely upon ***critical moral judgment*** not just in choosing among interpretative strategies, but as part of interpretation itself (Baker 2004:98).

Baker further argues that even though the courts may think that they followed a formal legal interpretation of the Constitution, in practice their interpretations often seem to have a great deal to do with the norms and values the Justices read into the text (Baker 2004:91).

3.4.1.6 Structuralism

Structuralism refers to the interpretation where the ***textual organisation*** of the Constitution plays the central role.

It is essential to consider the structure in constitutional interpretation as the principal *structural ideas of the Constitution such as the separation of powers, checks and balances, and federalism are not provided for in so many words but are inherent in the design and function of the Constitution* (Baker 2004:99).

One of the cases where the structure of the Constitution was applied is *United States Term Limits, Inc v Thornton* 126 514 U.S. 779 (1995) where there was a debate between Stevens J and Thomas J over the federal structure regarding the power of the state to impose term limits on its own members of congress. For the majority *Stevens J said that the structure of the Constitution and the principle of democratic theory forbade an individual state from adding to the qualifications in the Constitution* (Baker 2004:79).

3.4.1.7 Purposivism SG 76

The purposive approach to constitutional interpretation has ***sought to identify and implement the basic and profound purposes of the system of government*** (Baker 2004:99).

3.4.1.8 Balancing

The metaphor of balancing refers to theories of constitutional interpretation that are based on the ***identification, valuation and comparison of competing interests*** (Aleinikoff 1987:945).

When applying the interpretative theory of balancing a constitutional question is thus analysed by identifying interests implicit in the case and reaching a decision or *constructing a rule of constitutional law by explicitly or implicitly assigning values to the identified interests* (*ibid*).

The balancing theory consists of two parts:

- *first the court discusses whether one interest outweighs the other.*
- *secondly, a balance is struck between or among competing interests* (Aleinikoff 1987:946).

To ascertain whether one interest outweighs another, the Court places the interests on a set of scales, and rules the way the scales tip (*ibid*). For example, in *New York v Ferber*, (1982) 458 US 747 at 763–764 the Court upheld a statute criminalising the distribution of child pornography because ‘‘the evil ... restricted [by the statute] so overwhelmingly outweighs the expressive interests, if any, at stake (*ibid*).

When *striking a balance between or among competing interests*, the court employs a different approach which entails inter alia that *one interest does not override another*.

In other words, *each interest survives and is given its due*. In the case of *Tennessee v Garner* 471 US 1 (1985), which concerned the state statute permitting the use of deadly force against fleeing felons, the court ruled *neither that the state interest in preventing the escape of criminals outweighed an individual's interest in life nor that the individual interest outweighed the state's*. **The balancing process recognised both interests**: *the court ruled that an officer may* ***not*** *use deadly force unless such force is necessary to prevent escape and the officer has probable cause to believe that the suspect poses a threat of serious physical harm* (*ibid*).

3.4.2 Some European methods of constitutional interpretation

The methods of constitutional interpretation are *"ways of doing" or procedures for attaining an object*, in this particular case ascertaining the meaning of a constitutional provision in accordance with a particular theory (Du Plessis 2008: ch 32; 135).

The different ***methods of interpretation endorsed on the European Continent and in Africa, including South Africa, are the following:***

- Grammatical interpretation
- Systematic interpretation
- Historical interpretation
- Teleological interpretation
- Comparative interpretation SG 77

3.4.2.1 Grammatical (textual, literal) interpretation

This approach acknowledges the ***importance of the language of the constitutional text*** and focuses on the *linguistic and grammatical meaning* of the words, phrases, sentences and other parts of the text.

3.4.2.2 Systematic (contextual) interpretation

This method underscores that a constitutional provision should be understood ***with reference to its context, which*** includes the *other provisions or parts of the Constitution*, as well as its *social and political environment*.

3.4.2.3 Historical interpretation

According to this interpretation the text is also to be understood *in the light of its context*, which includes factors such as the c***ircumstances prior to the adoption of the provision***, preceding discussions and negotiations (travaux preparatoires), as well as the ***"original intent"*** of the drafters of the Constitution.

3.4.2.4 Teleological interpretation

This interpretation holds that a constitutional provision must be understood in the ***light of its aim and purpose***, which must be *ascertained from the fundamental constitutional values*.

3.4.2.5 Comparative interpretation

This approach entails that a constitutional provision is examined or interpreted in ***comparison to other legal provisions*** in domestic, international or foreign law. The Constitution is interpreted in comparison to *previous constitutions* of the country or *to foreign constitutions*.

Encapsulating all the above five methods of constitutional interpretation in *S v Makwanyane* decided by the Constitutional Court of South Africa, *Mahomed J, at paragraph 65, held that the following should be considered in examining the relevant provisions of the Constitution*:

(a) their text and their context

(b) the interplay between the different provisions

(c) legal precedent relevant to the resolution of the problem in South Africa and abroad

(d) the domestic common-law and public international law impacting on its possible solution

(e) factual and historical considerations bearing on the problem

(f) the significance and meaning of the language used in the relevant provisions

(g) the content and sweep of the ethos expressed in the structure of the Constitution

(h) the balance to be struck between different and sometimes potentially conflicting considerations reflected in the text

(i) a judicious interpretation and assessment of all these factors to determine what the Constitution permits and what it prohibits. SG 78

3.5 CONSTITUTIONAL INTERPRETATION UNDER THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA 1996 SG 78

3.5.1 Constitutional provisions relevant to constitutional interpretation

The starting point in the interpretation of the Constitution is to look at the provisions of the Constitution itself. The constitution provides interpretational assistance in at least three distinct ways:

The first is through self-explanation or definitions as contained in section 239 (Definitions). However, section 239 is not an exhaustive guide to the meaning of words or phrases as some expressions, such as ‘‘Act of Parliament’’, are not contained in section 239. Therefore, if you are dealing with a term in the Constitution, turn to section 239 to check whether it has been defined.

> **239 Definitions**
> In the Constitution, unless the context indicates otherwise-
> **'national legislation'** includes-
> (a) subordinate legislation made in terms of an Act of Parliament; and
> (b) legislation that was in force when the Constitution took effect and that is administered by the national government;
> **'organ of state'** means-
> (a) any department of state or administration in the national, provincial or local sphere of government; or
> (b) any other functionary or institution-
> (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
> (ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer;
> **'provincial legislation'** includes-
> (a) subordinate legislation made in terms of a provincial Act; and
> (b) legislation that was in force when the Constitution took effect and that is administered by a provincial government.

The second is through guidance or a method of interpretation contained in sections 39 and 240. Section 39 applies to Chapter 2 of the Constitution (*Bill of Rights interpretation*) and section 240 provides that *in the event of inconsistencies between the different texts of the Constitution, the English text prevails*.

One might add section 8(2) and (3), which deals with the *application of the Bill of Rights to natural and juristic persons*.

Section 39 (1) contains three important directions:

* **Firstly,** it directs the interpreting court to promote the values underlying an open and democratic society based on human dignity, freedom and equality.
* **Secondly**, a court must consider international law.

- **Thirdly** a court may consider foreign law.

  The recommended articles by Botha ‘‘International law in the Constitutional Court’’ (1995) *South African Yearbook of International Law* 222–231 and by Olivier ‘‘Interpretation of the Constitutional provisions relating to international law’’ (2003) *Potchefstroom Electronic Law Journal* 1–14, will be very helpful in understanding the influence of international law on the interpretation of the Constitution.

Section 39(2) provides that when interpreting any legislation, and developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights. The case of *K v Minister of Safety and Security* paras 15–17 is one of the cases which required the interpreting court to indirectly apply the Bill of Rights. In this case the court indirectly applied the Bill of Rights by developing the common law principle of vicarious liability to comply with the Bill of Rights.

Section 39(3) *allows other rights conferred by legislation, common law or customary law to exist unless they are contrary to the Bill of Rights*. This simply means that the courts have to interpret and enforce those rights as long as they comply with the Constitution. The subsection should be read in conjunction with the supremacy clause in section 2 and the application clause in section 8.

The third is through gleaning the values from all provisions of the Constitution, especially from the Preamble and the provisions of Chapter 2 of the Constitution, such as section 39(1) which refers to the values underlying an open and democratic society. SG 79

Let’s take, for example, dignity as a core value enshrined in the Constitution.

The importance of the value of human dignity, i.e interpretation of rights, was stressed by the court in the case of:

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

In *Thomas and Another v Minister of Home Affairs and Others* 2000, *the court stressed that human dignity as a value is crucial as it informs the interpretation of many, possibly all, other rights* (para 35). Some of the rights that have been interpreted in view of the value of human dignity are:

Cultural life

- *MEC for Education: KwaZulu-Natal v Pillay,*2008 SA 474 (CC), 2008 (2) BCLR 99 (CC) para 53, 62;

Religious rights

- *Minister of Home Affairs v Fourie and Another*, (CCT60/04) (2005) ZACC 19; 2006 (3) BCLR 355 (CC); 2006 SA 524 (CC) paras 94, 114 and the

Right to privacy –

- *NM v Smith (Freedom of Expression Institute as Amicus Curiae)*, 2007 (5) SA 250 (CC), 2007 (7) BCLR 751 (CC) para 31.

Please study the Constitution and ascertain for yourself the variety and richness of other values underpinning our Constitution and which are crucial to constitutional interpretation. Other provisions contained in **Chapter 14 of the Constitution** are also very helpful when interpreting the Constitution.

3.5.2 The courts

There are various interpreters of the Constitution. However, for the purposes of this SU, **much emphasis is on the interpretation of the Constitution by the courts.**

Section 39(1) – commonly referred to as the ‘‘interpretation clause’’ – expressly refers to **‘‘any court, tribunal or forum’’** as actors of constitutional interpretation or interpreters of the Constitution.

The wording is so broad so as not to determine the exact number or status of those entitled to interpret the Constitution in general and the Bill of Rights in particular. However, for a number of reasons, the courts in general and the Constitutional Court in particular are the privileged actors in constitutional interpretation.

First: the Constitution provides that the judicial authority is vested in the judiciary, which is independent and must uphold the Constitution without favour or prejudice (section 165).

As far as the **Constitutional Court** is concerned, it is the *“highest court in all constitutional matters”* (section 167(3)(a)) and must confirm all orders of constitutional invalidity made by inferior courts from the High Court to the Supreme Court of Appeal.

Second: unlike section 39, which refers to *“every court, tribunal or forum” as “authorised interpreters”* of the Bill of Rights or any legislation, **section 233** refers to the ‘‘court’’ only as the legislative or statutory interpreter which it orders to *“prefer any reasonable interpretation of the legislation that is consistent with international law”* when interpreting any legislation.

Third: the decisions of the courts are binding. While the decisions of inferior courts on constitutional matters are to be confirmed by the Constitutional Court…

those of the Constitutional Court are binding and final as there is no other jurisdiction above it. SG 80

This gives a particular importance to constitutional interpretation by the courts and especially by the Constitutional Court.

It also explains why constitutional interpretation is primarily seen as the interpretation of the Constitution by the judiciary.

Constitutional interpretation therefore generally refers to the authoritative interpretation of the Constitution by the judiciary through judicial review of legislation and government action.

3.5.3 Methods of constitutional interpretation

As mentioned, African and South African constitutional lawyers still have to develop their own theories and methods of constitutional interpretation.

When interpreting the Constitution, *South African courts use the methods of Constitutional interpretation developed within the international community in a complementary manner* given, that they overlap.

Since *Chapter 2 of the Constitution with its Bill of Rights has been far more actively pursued than any other part of the Constitution*, the methods of constitutional interpretation in this SU focuses on or are derived from the interpretation of the Bill of Rights. However, this does not mean that the other provision of the Constitution do not enjoy the attention of the courts.

Case Law - interpretations of the Constitution - other than BoR:

Some of the cases which have already embraced the interpretation of other provisions of the Constitution other than the Bill of Rights provisions are as follows:

- *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others (*CCT27/95) [1995] ZACC 8; 1995 (10) BCLR 1289; 1995 (4) SA 877 (22 September 1995)(CC) (powers of the President in terms of the Constitution);
- *President of the Republic of South Africa v Hugo* 1997 (6) BCLR 708 (CC) (the exercise of President's power of pardon);
- *Pharmaceuticals Manufactures Association of South Africa: Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC); 2000(3) BCLR 241 (CC) and the case of *S v Mhlungu* 1995 (3) SA 867 (CC); 1995 (7) BCLR 793 (CC) (interpretation of section 241(8) of the Interim Constitution).
- Just recently the Constitutional Court delivered a crucial judgment on the disbanding of the Directorate of Special Operations (DSO)

In the case of *Glenister v President of the Republic of South Africa and Others* (CCT 48/10) [2011] ZACC 6 (17 March 2011) paras 71–82. One of the questions was whether the *National Prosecuting Authority Amendment Act* 56 of 2008 (NPAA Act) and the *South African Police Service Amendment Act* 57 of 2008 (SAPSA Act), which resulted in the disbanding of the Directorate of Special Operations (DSO), violated the provisions of section 179 of the Constitution. SG 81

3.5.3.1 Grammatical/textual interpretation

Grammatical/textual interpretation concentrates on ways in which the natural or everyday language can assist in and direct the interpretation of a constitutional provision.

The role of the text in the interpretation of the Bill of Rights was emphasised by Kentridge AJ in ***S v Zuma*** **1995** (2) SA 642 (CC) (para 17):

While we must always be conscious of the values underlying the Constitution, it is nonetheless our task to interpret a written instrument. I am well aware of the fallacy of supposing that general language must have a single 'objective' meaning. Nor is it easy to avoid the influence of one's personal intellectual and moral preconceptions. But it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean.

However, due to the fact that the Constitution is abstract and open-ended in much of its formulation, constitutional interpretation should involve more than the determination of the literal meaning of particular provisions.

Hence, in ***S v Makwanyane*** **1995** 3 SA 391 (CC) (para 9), the Court adopted the following approach to the **interpretation of the Bill of Rights**:

Whilst paying regard to the language that has been used, an interpretation of the Bill of Rights ***should be generous and purposive and give expression to the underlying values of the Constitution****.*

This simply means that, while literal meaning must be taken into account, when interpreting the Constitution, it is not necessarily conclusive (Currie & De Waal 2005:148).

3.5.3.2 Purposive interpretation

Purposive interpretation **is aimed at teasing out the core values that underpin fundamental rights i**n an open and democratic society based on human dignity, equality and freedom (*ibid*).

This was affirmed by the Constitutional Court, in *S v Zuma* (para 15), where it approved the following statement by the Canadian Supreme Court in *R v Big M Drug Mart Ltd* 1985 18 DLR (4th) 321, 395–396:

The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interest it was meant to protect. This analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought, by reference to the character and larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where possible to the meaning and purpose of the other specific rights and freedoms the interpretation should be a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection (par116–117).

Currie and De Waal (2005:149) argue that this approach to interpretation *inevitably requires a value judgment to be made about which purposes are important and protected by the Constitution and which are not*. *These values must be objectively determined by reference to the norms, aspirations, expectations and sensitivities of the people, and may not be derived from or equated with public opinion* (*S v Williams* 1995 7 BCLR 861 (CC); 1995 3 SA 632 (CC) paras 36–37 in Currie & De Waal 2005:149).

Thus, purposive interpretation is "value-based interpretation", which, in terms of section 39(2), ***promotes the values that underlie an open and democratic society***. The judgment of Froneman J in *Qozoleni v Minister of Law and Order* 1994(1) BCLR 75(E); 1994(3) SA 625(E) (paras 80–81), quoted with approval in *S v Zuma*, paragraph 17, affirms this: SG 82

Because the Constitution is the supreme law against which all law is to be tested, it must be examined with a view to extracting from it those principles or values against which such law ... can be measured.

Recently the importance of the purposive approach was stated in no uncertain terms by Streicher AJ in *City of Johannesburg and Others v Mazibuko and Others* 489/08) [2009] ZA SCA 20 (25 March 2009) (para 16), when interpreting the **right to sufficient water:**

In interpreting the right to sufficient water a purposive approach should be followed. In determining the purpose of the right one should have regard to the history and background to the adoption of the Constitution and the other provisions of the Constitution, in particular the other rights with which it is associated in the Bill of Rights.

Please note that in many cases a **purposive approach results in a generous interpretation,** but this would be a consequence of ascertaining the purpose of the right in question and not a basis for interpretation (*De Klerk & Another v Du Plessis & Others* 1995 (2) SA 40 (T) at 45J–46D in Kentridge and Spitz (1996:11–27).

The purposive approach to the interpretation of rights **may also at other times require a narrower or specific meaning to be given** (*S v Makwanyane* para 325 in Kentridge and Spitz 1996:11–27).

Thus, *it is important to maintain a conceptual distinction between the purposive approach and generous approach* which may overshoot the purpose of the right (*ibid*).

3.5.3.3 Generous interpretation

Generous interpretation is an interpretation that is in favour of rights and against their restriction, as it entails drawing boundaries of rights as widely as the language in which they have been drafted and the context in which they are used make possible (Currie & De Waal 2005:150).

This was affirmed by the court in the case of *S v Zuma* (para 14), where it approved of the following passage from the case of *Minister of Home Affairs* (Bermuda) *v Fisher* (1980) AC 319 (PC) 328–329:

A supreme constitution requires a generous interpretation suitable to give to individuals the full measure of the fundamental rights and freedom referred to.

Currie and De Waal (2005:150) argue that this approach was put to decisive use by the court in *S v Mhlungu* (para 8), where it argued as follows:

A Constitution is an organic instrument. Although it is enacted in the form of a statute it is sui generis. It must broadly, liberally and purposively be interpreted so as to avoid 'the austerity of tabulated legalism' and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation, in the articulation of the values bonding its people and in disciplining its Government. SG 83

Using this approach, Currie and de Waal argue, the court supported a generous interpretation of section 241(8) of the Interim Constitution that allowed persons involved in cases pending at the commencement of the Constitution to rely on the rights in the interim Bill of Rights in spite of the clear literal meaning of section 241(8) (*ibid*).**Section 241(8) provides as follows**:

All proceedings which immediately before the commencement of this Constitution were pending before any court of law, including any tribunal or reviewing authority established by or under law, exercising jurisdiction in accordance with the law in force, shall be dealt with as if this Constitution had not been passed:

Provided that if an appeal in such proceedings is noted or review proceedings with regard thereto are instituted after such commencement such proceedings shall be brought before the court having jurisdiction under this Constitution.

Currie and De Waal seem to criticise the approach of the, approach which could be interpreted to mean that where the text reasonably permits, a broad interpretation should be preferred over a narrow interpretation, if the result of the latter would be to deny persons the benefits of the Bill of Rights (C & D 2005:151).

- They argue that, while it is all very well to ensure that individuals get the full benefit of the Bill of Rights, the problem with the *Mhlungu* judgment is that it failed to explain why this case required a generous interpretation of constitutional provisions (*ibid*).
- They further argue that, the use of a generous interpretation in cases where other principles and rules of constitutional interpretation point to a different, narrower meaning of a provision may lead to a strained interpretation of the text, and may also run counter to the court's commitment to purposive interpretation (*ibid*).

3.5.3.4 Historical interpretation

In the case of *S v Makwanyane* (para 19) the court argued that the background material (drafting history of the constitution) can be taken into account by the court in interpreting the Constitution if it is clear, not in dispute and relevant to showing why particular provisions were or were not included in the Constitution. However, the court, in the same case, called for caution in reverting to the alleged views of individual participants (para 18).

Apart from background material, historical interpretation also includes South Africa's political history. (See for instance:

Executive Council of the Province of the Western Cape v Minister for Provincial Affairs and Constitutional Development and Another, Executive Council of KwaZulu-Natal v President of the Republic of South Africa and Others (CCT15/99, CCT18/99) [1999] ZACC 13; 2000 (1) SA 661; 1999 (12) BCLR 1360 (15-10-99) (par43–44).

It is also worth noting that the historical background in constitutional interpretation is closely related to the purposive approach as it plays a very important role in determining the purpose of the right. This is stressed by Streicher AJ in *City of Johannesburg and Others v Mazibuko and Others* (para 16) as follows:

In determining the purpose of the right one should have regard to the history and background to the adoption of the Constitution and the other provisions of the Constitution, in particular the other rights with which it is associated in the Bill of Rights.
SG 84

3.5.3.5 Comparative interpretation

Comparative interpretation is **affirmed by section 39(1) of the Constitution** *which requires any court, tribunal or forum to promote the values that underlie an open and democratic society based on human dignity, equality and freedom, and to consider international law*.

International law assists the court, when interpreting the Bill of Rights, to determine if the state has complied with its obligation of taking reasonable measures to protect and fulfil the rights in the Bill of Rights. Moseneke J and Cameron J, in *Glenister v President of the Republic of South Africa and Others* (para 192) said the following in this regard:

Section 39(1)(b) states that, when interpreting the Bill of Rights, a court must consider international law. The impact of this provision in the present case is clear, and direct. What reasonable measures does our Constitution require the state to take in order to protect and fulfil the rights in the Bill of Rights? That question must be answered in part by considering international law.

Comparative interpretation also takes into account **foreign law**. *S v Makwanyane* is probably the best case where the Constitutional Court used such a comparative approach to constitutional interpretation, referring to values underlying other democratic societies, to international law and to foreign law.

3.5.3.6 Contextual interpretation

* Contextual interpretation entails reading the provisions of the **Constitution must be read in context to ascertain their purpose.** Contextual interpretation closely relates to history and background to the adoption of the Constitution (*S v Makwanyane* para 10).
* Contextual interpretation must also be construed in a way **which secures for ''individuals the full measure'' of its protection** (*S v Makwanyane* at para 10). In *S v Makwanyane* (para 10), the court treated the right to life, the right to equality and the right to dignity as together giving meaning to the prohibition of cruel, inhuman or degrading treatment or punishment in section 11(2) of the interim Constitution (Currie & De Waal 2005:156).
* As mentioned, according to the contextual interpretation a constitutional provision **should be understood with reference to its context**, which includes the other provisions or parts of the Constitution, as well as its social and political environment.
* In *Ferreira v Levin NO* 1996 (1) SA 984 (CC) (paras 45–48) the Constitutional Court used the structure of the interim Constitution as well as the formulation of other fundamental rights to interpret the right to **freedom of the person.**

* Contextual and purposive interpretations **go together with systematic interpretation**. In *Matatiele Municipality v President of the Republic of South Africa & Others* 2006 (5) BCLR) 622 (CC) (paras 45–48), Ngcobo J explained the need for and significance of systematic (or contextual) interpretation, stressing that **constitutional provisions must be construed purposively and in the light of the Constitution as a whole**.

* **Systematic, contextual or purposive interpretation goes far beyond the ordinary or textual meaning of the phrases. It must also be a holistic reading.**

STUDY UNIT 4 - FUNDAMENTAL RIGHTS & CONSTITUTIONAL PROTECTION SG 90 - 105

OVERVIEW: SG 92

This second part of the study guide focuses on the constitutional protection of fundamental rights. **It provides a review of the role played by the South African judiciary in the protection of fundamental rights**.

Please revise SU 1, in which fundamental rights or human rights were discussed as a requirement for constitutionalism and democracy. It is also worth reminding you of a few points regarding the protection of fundamental rights in the world in general and in South Africa in particular.

First, although human rights are generally classified into three generations (**civil and political**; **economic, social and cultural**; **community rights**), they are **essentially indivisible and interrelated**.

Second**,** the 1996 Constitution of the Republic of South Africa takes fundamental rights seriously. They feature prominently in the Preamble and in Chapter 1 and also dominate the second chapter, which is entitled the Bill of Rights. Generally, the protection of human rights is deeply entrenched in section 1 of the Constitution, which emphasises the promotion of foundational values in order to give effect to everyone's rights.

Section 7 (1) *provides that the Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in the country and affirms the democratic values of human dignity, equality and freedom*.

According to **section 8**, the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state. It also binds natural and juristic persons.

Third, a number of institutions have been established to protect human rights. Key among them is the judiciary, which has already played a *critical role in enforcing not only civil and political rights, but also economic, social and cultural rights*. The chapter 9 institutions should not be overlooked either when discussing the protection of human rights in South Africa.

Two other LLB modules examine fundamental rights, namely, Fundamental Human Rights (FUR2601) and International Human Rights Law (LCP4807). FUR2601 deals with the application and promotion of human rights in South Africa, while LCP4807 deals with the protection of fundamental rights under international law.

To avoid any duplication, the second part of this study guide discusses the protection of fundamental rights under the 1996 Constitution of the Republic of South Africa. Apart from its links with SU 1, SU 4 is also closely related to SU's 2 and 3, which deal with constitutionalism and democracy in South Africa, and constitutional interpretation and the courts respectively. The first three SU's provide a solid background to a better understanding of SU's 4 and 5.

4.2 ENFORCEMENT MECHANISMS FOR THE PROTECTION OF FUNDAMENTAL RIGHTS IN SOUTH AFRICA

4.2.1 Chapter 9 Institutions

The establishment of the institutions supporting constitutional democracy in Chapter 9 of the 1996 Constitution of the Republic of South Africa, which *De Vos* (1997:67) refers to as ***''soft protection mechanisms''***, broadens the net of inclusion for the promotion of human rights.

De Vos points out that the reference to these institutions as ***''soft mechanisms'' recognises that it is not exclusively through the courts that fundamental rights may be realised and achieved*** (*ibid*). According to *Holness* and *Vrancken* (2009:240), the broad aim in establishing these institutions is to ensure: *"protection and promotion of human rights through monitoring and effective investigation of complaints against violations of these rights and to make recommendations on the steps to be taken to address the alleged violations".*

Devenish (2005:351) similarly emphasises that the idea behind the establishment of these institutions ***encapsulates a commitment to transparency and social justice*** which involves the synthesis of the law and justice.

The Constitution provides for the following state institutions to support constitutional democracy in South Africa:

- the Public Protector
- the South African Human Rights Commission
- the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities
- the Commission for Gender Equality
- the Auditor-General
- the Electoral Commission

Section 181(a) of the Constitution ***establishes the office of the Public Protector,*** with functions spelt out in section 182, namely to investigate any conduct in state affairs or in the public administration in any sphere of government that is alleged or suspected to be improper or to result in any impropriety or prejudice.

Section 182 is supplemented by the *Public Protector Act* 23 of 1994, as amended by Act 22 of 2003. Report No 28 of 2008/09 released by the Public Protector is one of many that attest to the *investigative and monitoring role of the institution in the promotion of human rights*.

Section 181(b) establishes the **South African Human Rights Commission**; its functions are entrenched in section 184. The Commission is mandated to require relevant organs of state to provide information on the measures that they have taken towards the promotion of human rights.

Section 184 is further supplemented by the *Human Rights Act* 54 of 1994, which seeks to *regulate matters incidental to the establishment of the Commission and to provide for associated concerns*.

Section 181(c) establishes the ***Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities***; its functions are entrenched in section 185. Section 185 is further supplemented by the *Cultural Commission Act* 19 of 2002 to ensure the *protection and promotion of the rights of ethnic, religious and linguistic communities within the framework of the spirit and purport of the Bill of Rights*. SG 94

Section 181(d) establishes the ***Commission for Gender Equality***, with its functions entrenched in section 187. The Constitution recognises the difference between sexes and gender in the ***equality clause*** (section 9(3)) *by listing them as independent grounds upon which it is impermissible to discriminate unfairly against any person*.

The other institutions are

- ***the Auditor-General*** (181(e)) and
- ***the Electoral Commission*** (181(f)).

Holness and Vrancken (2009:239) have emphasised the importance of these institutions and noted the difficulties associated with the enforcement of human rights through the courts. They **contend that:**

- the enforcement of human rights through the courts is highly confrontational
- the justice system is simply not equipped to deal with every single human rights dispute that may arise
- court procedures are such that the courts take a long time to deal with cases that they are prepared to adjudicate
- litigation is usually an expensive exercise, which may discourage the more vulnerable people from appealing to the courts due to their lack of financial means, with the result that they do not have proper and equal access to the courts.

The difficulties associated with the promotion of human rights, as noted in the factors above, give due recognition to the importance of the soft protection of human rights through the monitoring and investigation of instances of the lack of implementation or abuse of human rights.

Holness and Vrancken (2009:240) hold that this role is particularly important when one considers that the courts are not in a better position to enforce their own orders because of human and financial resources necessary to monitor the implementation of their own court orders.

Without providing a review of the protection of human rights under the *African Charter on Human and Peoples Rights*, which is dealt with extensively in LCP4807, the soft protection of human rights through the non-judicial institutions is also provided for on the African continent by the establishment of the African Commission on Human and Peoples Rights (see further analysis in Murray & Wheatley 2003:213–236).

The **traditional system** of protection of human rights ***is another ''soft mechanism''*** as opposed to the rigidity of the mainstream courts. The legitimacy of the traditional system in the dispensation of justice is derived from the ***traditions and practices*** that have since existed in South Africa.

The continued **recognition of traditional courts** in section 166(e), Schedule 6 and section 16 of the Constitution acknowledges the indispensable service that these courts render in ***nurturing the principles of democracy***, namely the ***rule of law***.

The Constitutional Court itself, in the *Certification* judgment, endorsed the status of these courts as legitimate institutions in the administration of justice (at para 198). Since customary law is not written down and develops as changes take place at societal level, the *enforcement of human rights within the traditional justice system has benefits that the ordinary courts do not have*.

The protection of human rights is enhanced by the sense of ownership by traditional communities in the resolution of disputes. The system **encourages mediation** of disputes in order to reach decisions that are restorative, as opposed to the approach in the mainstream courts. The protection of human rights through the t*raditional justice system also gives effect to the high levels of illiteracy that South Africa* is trying to come to terms with *while moving away from its historic past of discrimination and inequalities* (see Roberts 2001:757). SG 95

The *language that is used in these courts is the language of all the parties and officers* whereas in the ordinary courts English and Afrikaans are still dominant. Another encouraging development is that the Department of Justice and Constitutional Development launched a pilot project for the use of indigenous languages at the magistrates' courts in February 2009.

4.2.2 The judiciary

The Constitution vests the judicial authority of the Republic in the courts as entrenched in section 165.

This section affirms the principle of the independence and impartiality of the judiciary in the adjudication of matters that come before it.

The principle of independence **imposes a duty** on all persons and organs of state not to interfere with the functioning of the courts (section 165(4)). It further provides legal protection to all individuals (including natural and juristic persons) in the enforcement of their rights.

The Constitution further provides in section 166 that the judicial system consists of the:

- Constitutional Court
- Supreme Court of Appeal
- High Courts
- Magistrates' Courts and any other court established in terms of an Act of Parliament.

The courts are empowered to interpret the Bill of Rights (section 39) and to enforce rights (section 38).

The Constitution also recognises every court, including courts of traditional leaders that were in existence before it took effect in 1996.

The Constitution acknowledges the flexible character of the indigenous justice system where the Kgosi (chief) or King was the judge but acted on the advice of his traditional council. The indigenous system of enforcing justice is endorsed in section 211(2) of the Constitution. The latter section affirms the role of traditional leadership as an institution that deals with matters affecting local communities in the enforcement of justice within the framework of the traditional system.

The matters for consideration include but are not limited to the traditional justice system which has existed since time immemorial. The resolution of disputes through the traditional justice system is still of the utmost importance in this new constitutional dispensation in order to address the vacuum in the system of justice at large, especially the lack of access to the courts by people living in rural areas. SG 96

The importance of the traditional justice system in the enforcement of customary law values and principles is reinforced by section 211(3) of the Constitution - which requires the courts to apply customary law when that law is applicable, subject to the Constitution and other relevant legislation that deals with it.

This means that the indigenous values developed within the framework of the traditional justice system should be given due respect and recognition in resolving issues related to the application, development and enforcement of customary law principles.

Similarly, **the retention of the traditional justice system is important for the following reasons**:

- the need to re-affirm the system as an **alternative form of dispute resolution** with the capacity to address disputes at all levels of society
- the **review of the traditional mechanisms** of dispute resolution *in order to conform to the general framework that recognises the rights enshrined in the Constitution of South Africa*
- the **re-establishment of confidence** between the institution of traditional leadership and various stakeholders in order to redeem the institution from the ills of the past when it was used in a negative way under colonial and apartheid rule (see Jobodwana 2000:26–49).

In this regard, the tabling of the **Traditional Courts Bill** (published in Government Gazette 30902 of 27 March 2008) before Parliament is part of a larger collective effort by the legislature to enhance the essential role of traditional leadership and customary law in the advancement and consolidation of democracy and justice (see further analysis in Ntlama & Ndima 2009:6–30).

The equal recognition of the traditional justice system along with the broader system of dispensing justice affirms the principles of judicial independence as they signify the deep-rooted values and principles that promote:

- the **supremacy of the Constitution** *as a sound framework for the regulation of state authority among the three branches of government* (legislature, executive and the judiciary itself)
- the **judiciary as an upper-echelon institution** that *interprets, applies, develops and enforces constitutional provisions in order to give effect to the basic principles of constitutional democracy*
- the **entrenchment of judicial authority**, *which is advanced through its reasoned judgments, and is binding on the state and all other related state organs*

In essence, **the independence of the judiciary** which includes the role of the traditional justice system in the dispensation of justice serves as an important instrument **not only in the promotion of human rights but also in guaranteeing the rule of** law.

Vrancken and Killander (2009:251) argue that **the protection of human rights would be of little value in practice if:**

- there were no judicial bodies to turn to,
- those bodies were not impartial and independent,
- access to these bodies could be denied,
- the hearing did not need to be fair and public, and
- other bodies could refuse to comply with the decisions of the judicial bodies.

It is within the framework of the **right of equal access to the courts** as envisaged in section 34 of the Constitution that *the judiciary plays an important role in the adjudication of disputes concerning human rights that come before it*. SG 97

The right of equal access to the courts in the enforcement of human rights was given content by **Mokgoro J** in *Lesapho v North West Agricultural Bank* 1999 (12) BCLR 1420 as she held that:

the right of access to court is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes, without resorting to self-help. The right of access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes.

Construed in this context of the rule of law and the principle against self-help in particular, access to court is indeed of cardinal importance. As a result, very powerful considerations would be required for its limitation to be reasonable and justifiable (at para 22).

4.2.2.1 The judiciary and the protection of civil and political rights

The courts, particularly the Constitutional Court, have been largely instrumental in the promotion of human rights and have played a fundamental role here. The importance of the role of the judiciary in the protection of human rights lies in South Africa's deep-rooted history of inequalities and discrimination.

The Constitutional Court in *Brink v Kitshoff* 1996 (4) SA 197 acknowledged the impact of the past on the promotion and enjoyment of human rights in holding that:

the policy of apartheid, in law and in fact, systematically discriminated against Black people in all aspects of social life, and the deep scars of this appalling programme are still visible in our society (at para 40).

In responding to the negative impact of past, the Constitutional Court has restored the legitimacy of the judiciary as an independent arbiter in the resolution of disputes that come before it.

The order of the Court, regarding **the right to vote** as entrenched in section 19(3) of the Constitution, in ***August*** *v Electoral Commission* 1999 (3) BCLR 1 (CC) at paras 37–41, afforded an opportunity for the government to review section 33 of the Electoral Act 73 of 1998 in order to allow **prisoners** to vote in the 1999 general elections.

In ***AParty*** *and Another v The Minister for Home Affairs and Others*; ***Moloko*** *and Others v The Minister for Home Affairs and Another* 2009 (3) SA 649 (CC), the Court again protected the right of South African **citizens living abroad** to vote in the 2009 general **elections** held on 22 April (at paras 66–68).

What is evident in these cases is that the state marshalled its resources in order to fulfil the protected right to vote of all South African citizens, without distinguishing on the grounds of the place of habitual residence.

The Court has also protected vulnerable groups such as women, children and people in same-sex relationships, particularly with regard to the highly **disputed and narrowly defined right to equality**. For example, the case of ***Gumede*** *v President of the Republic of South Africa* 2009 (3) BCLR 243 (CC), which dealt with the **proprietary consequences of a customary marriage**, attests to the balancing of the right to gender equality against the upholding of customary law values and principles that have the *potential to undermine the spirit and purport of the Bill of Rights*. The Court in this case invalidated section 20 of the KwaZulu Act and the Natal Code of Law, which provided that the husband is the head and owner of all family property (at para 9). SG 98

The effect of this section was that upon dissolution of a marriage that was entered into before the adoption of the Recognition of Customary Marriages Act 120 of 1998, which came into effect on 15 November 2000, the wife was effectively entitled to nothing at para 9.

The case of *Minister of Home Affairs v* ***Fourie*** 2006 (3) BCLR 355 is another one that demonstrated the role of the Court in the affirmation of the constitutional values of equality and human dignity. The Court **elevated the status of partners in same-sex relationships** to that of heterosexuals by declaring invalid the common law definition of marriage and the provisions of the Marriage Act 25 of 1961. The result of this invalidation was the adoption of the **Civil Union Act** 17 of 2006, which gives equal legal recognition to partners in same-sex relationships.

The Court has also **developed a substantive conception of the right** to equality that may be used as a strategy to ensure the promotion of human rights.

In ***Harksen v Lane*** 1997 (11) BCLR 1489, **it developed a three-stage approach in assessing the legitimacy of the discrimination.**

The three-stage process makes use of the following criteria to establish the substantive nature of the right to equality:

- *the **position of the complainants** in society and the question whether they suffered in the **past** from patterns of **disadvantage** and whether the discrimination under consideration is on a specified ground or not,*
- *the **nature of the provision** or power and the **purpose sought** to be achieved by it, and*

- ***any other relevant factor*** *that serves to determine the extent to which the discrimination has affected the rights or interest of the complainants, and whether it has led to an impairment of the right to human dignity (at para 51).*

The essence of this approach lies in the recognition that the formal conception of the right to equality does not go far enough to ensure its substantive translation into reality.

Section 9(2) of the Constitution provides that ***"equality includes the full and equal enjoyment of all fundamental freedoms"***, and this is entrenched in the Bill of Rights without any distinction. *The emphasis in this strategy is on the recognition of "difference" in the enforcement of claims for the promotion of fundamental rights* (see Albertyn & Goldblatt 1998:248).

4.2.2.2 The judiciary and the protection of socio-economic rights

The inclusion of socio-economic rights alongside civil and political rights in the Constitution was met with mixed reactions. As Pieterse (2004:882–905) says:

[T]he inclusion of socio-economic rights in the Constitution was welcomed with nervous optimism by human rights lawyers, both in that country and beyond. As experiments in human rights enforcement go, it was certainly a bold one – especially in a country infamous for the atrocious human rights violations committed by and on behalf of its apartheid regime, where a large scale social and economic deprivation of its (majority) black population was accompanied by the persistent violation of their civil and political rights. SG 99

The arguments that were raised against their inclusion were that socio-economic rights

- **had budgetary implications.**
- **were not universally accepted.**

would interfere with the doctrine of separation of powers (See *Certification of the Constitution of the Republic of South Africa* 1996 (10) BCLR 1253, at para 77). The arguments were rejected and the Court held that the enforcement of civil and political rights also has budgetary implications, as evidenced by the two cases mentioned above concerning the right to vote: *August* and *The AParty.*

In ***August*** the state was ordered to come up with a plan and to report to the Court within two weeks on how it was going to implement the **rights of prisoners to vote**, considering the urgency of the matter at the time (at paras 39–41).

The case of *Government of the Republic of South Africa v* ***Grootboom*** 2000 (11) BCLR 1169 (*Grootboom*) **has been hailed as a landmark judgment in the enforcement of socio-economic rights**, namely the right of access to adequate housing (section 26), following the **dismal failure in** ***Soobramoney*** *v MEC Health, KwaZulu-Natal* 1997 (12) BCLR 1696, to protect the right of access to health care (section 27(3)).

The Court in *Grootboom* ordered the government to provide houses for a group of squatters who were living in intolerable conditions in Wallacedene in Cape Town. In reaching its decision, it found that the national housing policy of the Department of Housing was ''unreasonable'', as it did not cater for those people who find themselves in emergency situations (at para 54).

The judicial enforcement of socio-economic rights was endorsed by the Constitutional Court in *Minister of Health v* ***Treatment Action Campaign*** 2002 (10) BCLR 1033 when it held that:

the judicial review of the legislations and policies of the state [in relation to the enforcement of socio-economic rights] constituted an intrusion into the domain of the executive, but an intrusion mandated by the Constitution itself. There is also no merit in the argument advanced on behalf of government that a distinction should be drawn between declaratory and mandatory orders against government.

Even simple declaratory orders against government or organs of state can affect their policy and may well have budgetary implications. The government is constitutionally bound to give effect to such orders whether or not they affect its policy and has to find the resources to do so, (at para 99).

The enforcement of socio-economic rights, *which requires an assessment by the Court as to whether legislative and other policies developed by the state in the promotion of these rights are "****reasonable****", has become an instrument for the promotion of human rights*.

The principle of ''reasonableness'' was also established in the ***TAC*** **judgment** as an instrument to determine government compliance with the promotion of human rights; namely, **the right of access to health care**.

In the latter case, it was found that the establishment of two pilot sites per province for access to the mother-to-child transmission therapy was unreasonable, in view of the vastness of the country.

This could compromise the rights of people living in rural areas, because they would not readily be able to reach these centres.

The importance of the *Grootboom* and *TAC* judgments lies in the development of the ''reasonableness approach'' for the realisation of socio-economic rights, as they depend on the availability of resources for their implementation.

The ''reasonableness'' principle was endorsed in ***Mazibuko*** *v City of Johannesburg* (CCT 39/09) [2009] as the Court held that the City's Free Basic Water policy falls within the bounds of reasonableness and, therefore, is not in conflict with either section 27 of the Constitution or with the national legislation regulating water services.

The installation of pre-paid meters in Phiri was found by the Court to be lawful (para 9). The bone of contention in this case was the introduction of pre-paid meters for access to water.

The Court had further examined the applicant's argument that the applicants argued that the installation of such a system was inconsistent with section 9(1) of the Constitution because it draws a distinction between categories of people.

The applicants further affirmed their argument by noting that the ***differentiation was not rationally connected to a legitimate government purpose*** (at para 145).

The ''reasonableness approach'' affirms the intersection of socio-economic rights with civil and political rights, particularly the right to **equality and human dignity**. The Court in ***Grootboom*** held as follows:

... [T]he proposition that rights are interrelated and are all equally important is not merely a theoretical postulate.

The concept has immense human and practical significance in a society founded on human dignity, equality and freedom. It is fundamental to an evaluation of the reasonableness of state action that account be taken of the inherent dignity of human beings.

The Constitution will be worth infinitely less than its paper if the reasonableness of state action concerned with housing is determined without regard to the fundamental constitutional value of human dignity.

Section 26, read in the context of the Bill of Rights as a whole, must mean that the respondents have a right to reasonable action by the state in all circumstances and with particular regard to human dignity.

In short, I emphasise that human beings are required to be treated as human beings. This is the backdrop against which the conduct of the respondents towards the appellants must be seen (at par 83).

The intersection of these rights was further endorsed by the Constitutional Court in *Khosa* *v Minister of Social Development* and *Mahlaule* *v Minister of Social Development* 2004 (6) BCLR 569 (CC).

Khosa is distinct from other socio-economic cases (*Grootboom* and *TAC*) in that an element of ***unfair discrimination was argued***. The bone of contention in *Khosa* was section 3 of the Social Assistance Act 59 of 1992, which restricted the right to social security to South African citizens.

The Court examined the reasonableness of ‘‘citizenship’’ as a criterion of differentiation in the context of the said Act. It found that the Act ***discriminated unfairly against people of foreign origin who are permanent residents*** of the country and who have also contributed to the economic growth of the country (see *Khosa* at para 573D–E).

Therefore, socio-economic rights are indeed justiciable as civil and political rights and the state is required to marshal its resources to protect fundamental rights. The protection of human rights is based on a principled and objective reasoning that endorses not only the promotion of human rights but also the rule of law.