Advanced Constitutional Law and Fundamental Rights

PART 1 - CONSTITUTIONAL LAW - STUDY GUIDE ACTIVITIES

Q&A LCP4806 SG Activities rework by Pierre Louw. The provision does not imply 100% accuracy. Be advised to ensure accuracy for yourself.

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

ACTIVITY 1 SG p5

1.1 Discuss the origin, meaning and classifications of constitutions, and explain why a constitution forms a crucial part of constitutional law and fundamental rights.

The Origin of Constitutions

*The origin of the concept "constitution" is u*ncertain, 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*.

Academic scholars held the following views:

It is argued that the earliest form of a constitution was discovered by *Ernest de Sarzec* in 1877 when he found evidence of the earliest known code of justice issued in 2300 BC by a *Sumerian king Urukagina* near the modern day city of Lagash in Iraq.

Stourzh held that - *the concept developed during the debate on the American Federal Constitution in 1787 to 1788*.

McIlwain argued that ***Sir James Whitelocke***, first referred to the ''constitution'' in the context of the legal system of the UK which was based on the *jus publicum regni* - broadly translated as the *public law of the kingdom.*

Constitutions are classified as*:*

- 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

Constitutions are the primary source of constitutional law, the other sources being legislation, case law, international law and common law.

The meaning and effect of Constitutions and therefore Constitutional law is that they constitute 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 - rules that are generally found in or constitute the constitution of a country.

Constitutions therefore secure constitutional law and fundamental rights.

This is accomplished through application of the values embodied in a constitution that are brought into operation, thus it 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.

1.2 Refer to the relevant provisions of the constitution of your country, and explain why you think it qualifies as a supreme, inflexible and autochthonous constitution.

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The Constitution of the Republic of South Africa comprises the following characteristics:

- It is a written document promulgated by the South African Parliament and assented to on December 16th 1996.
- The Constitution is enshrined as the Supreme Law of the Land. Founding provision 1(c) of the Constitution provides for the *supremacy of the constitution and the rule of law.*
- The constitution can only be amended in the instance of a clear majority on 66% in both houses. Accordingly the constitution is inflexible.
- The Constitution - whilst having considered international and municipal constitutional and customary law - finally drafted the interim and final constitutions of South Africa after protracted CODESA negotiations in the early nineties. This constitution was essentially the product of deliberations by South Africans and based on indigenous dictum and precedent.
- Accordingly the Constitution 1996 was autochthonous.
- The 1996 Constitution was finally certified by the Constitutional Court of South Africa on December 4th 1996.

ACTIVITY 2 SG p7

2. Distinguish between negative or procedural constitutionalism and positive or substantive constitutionalism.

Negative / Procedural constitutionalism:

McIlwain holds that *"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.**"*

Accordingly the protection of individuals against the arbitrariness of political power or despotic government is to be anchored by certain predetermined political norms, such as the fundamental principles of the rule of law. This is the basis of procedural constitutionalism.

These predetermined political norms, such as the fundamental principles of the rule of law, procedurally limit the incursion of government in the lives of individuals. *Carpenter* therefore viewed *procedural constitutionalism as a doctrine that is prescriptive rather than descriptive.*

This position drew criticism from *Behaviourist and Marxist* scholars - citing that the focus on individual rights usurped the rights of the collective. This stance resounded in the opinion of *Shivji* who viewed constitutionalism as "*an imperialist design imposed by the imperialist state with the power of its monopolies*"

These opinions are best distilled in the opinion of *Nwabueze* when he states, "*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 *imperialist* and *individualist* dictum which lay at the essence of procedural constitutionalism afforded it the title of *negative constitutionalism*. Consequently scholars, such as *Zoethout and Boon* holds that traditional constitutionalism is unable to respond adequately to contemporary problems of the welfare society.

Positive / Substantive constitutionalism:

Scholars of substantive constitutionalism hold that Constitutionalism ought to transcend this negativism; not only should it *provide for individual rights and freedoms*, but it should also *include enlightened approaches to socio-economic and collective rights* (ie the second- and third-generation rights), *as fundamentals of substantive and positive constitutionalism.*

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.

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.

ACTIVITY 3 SG p8

3.1 Discuss the paradox of *"constitutions without constitutionalism in Africa"* as identified by Okoth-Ogendo.

The paradox identified by Okoth-Ogendo is that almost all African countries have adopted constitutions. Unfortunately few of them comply with the requirements of constitutionalism. The closing remarks of Okoth-Ogendo profoundly focusses one's perception on the prevalent paradox in African Constitutionalism, and also on the dilemma the continent faces when aligning itself those ideals that nurture collective fundamental rights and the rule of law.

Okoth-Ogendo remarks: *"Constitutionalism is the end product of social, economic, cultural, and political progress; it can become a tradition only if it forms part of the shared history of a people".*

Frankly - this is the quintessential reality required to bring African Constitutional States in line with the core values of substantive constitutionalism which all truly free and democratic states aspire to.

The post-colonial emancipation of Africa secured a geo-political and ideological legacy wherein colonial style constitutions attempted to dictate the "correct" exercise of power in Africa which would entail the limitation of the governmental authority and to regulate political processes in the state - based on the doctrine of the separation of powers and the rule-of-law.

Okoth-Ogendo makes it clear that few African governments have not valued these principals of constitutionalism. Not only have constitutions "failed" but, devastatingly, their reception had not constituted more than paying rhetoric lip service thereto. This had created both a dilemma and a paradox.

The dilemma is whether to abandon the study of constitutions as a superfluous act in an African context due to the absence of a body of constitutional law or principles of constitutionalism and hope that state elites in Africa will eventually internalize and live by them.

Alternatively the paradox manifests in the commitment of the African Elite to the constitutional paradigm whilst emphatically rejecting the classical liberal democratic notion of constitutionalism.

The analysis of the paradox begins with a simple but important assertion: *all law,* and *constitutional law* in particular, is concerned, not with abstract norms, but with the creation, distribution, exercise, legitimation, effects, and reproduction of *power;* it matters not whether that power lies with the state or in some other organized entity. The nature of the African paradox lies therein that over the past 3 decades the African elite have professed

their *commitment to the idea of the constitution* but countered that position with a *rejection of the classical notation of constitutionalism.*

Contrary to the fundamental elements of constitutionalism, the African political application considers the constitution as "*a means to demonstrate the sovereignty of the state*" thus retaining the constitutive value of some form of constitution remains preeminent.

This having been said Okoth-Ogendo's debate shows that in an African context, the notion of a basic law entails no element of sanctity. Constitutions afford a means-to-an-end, whilst Africa - in the words of Julius Neyrere will refuse to put themselves in a straitjacket of constitutional devices - not of the continent's own making. In this context he convincingly argues that: *"This search for autochthony involves not only the rejection of external institutions and constitutional "devices," but, more emphatically, the abandonment of the classical notion that the purposes of constitutions are to limit and control state power, not to facilitate it".*

The author further identifies the origins of the paradox and states that this lies in the following modalities:

- the labyrinthine *bureaucracy* and *coercive orientation* of western-centric dicta of constitutionalism
- the legacy of socio-geo-political discrimination inherent in the colonial system
- the vesting of economic power that resulted from the interplay between the legal-bureaucratic order and a fragmented political process
- the Montesquieuan legacy of constitutional tripartism from the French colonialists vs the principles of a Westminster model as instilled by British colonialism.

The African elite viewed the imposition of constitutionalism on Africa would frustrate the goals of equity and faster delivery of services which the fact of independence, was exposed to facilitate. Based on this perception the state elites then proceeded to insert new devices whose purpose was to recentralize power - primarily to serve their own interests - including:

- the expansion of the coercive powers of the state by allowing extensive derogation from Bills of Rights
- ensuring that the constitutional order conformed to the inherited legal order - accordingly - translating a *political* option or decision into a *constitutional* device.

Accordingly the re-constituted African states embraced:

- imperialistic presidentialism supported by discretional constitutionalism
- indefinite eligibility for re-election as president e.g. Pierre Nkurunziza seeking a 3rd term in as president in spite of Burundi's constitution which does not permit the same.
- presidential immunity
- exclusion of the citizenry to the facilities and protection of the state

"The most liberal of jurists will concede that though the essence of constitutionalism may lie in the limitation of arbitrary power, "the limiting of government... is not to be the weakening of it. The problem is to maintain a proper balance between power and law." This reflects both the paradox of African constitutionalism and its challenge for the future.

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*.’’

3.2 Explain the three major tests that must be passed by a constitution if it is to comply with the principles of constitutionalism.

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)

If a constitution or a legal system fails to pass the above tests it is said to exist without constitutionalism.

Summary:

The three tests that a constitution must pass in order to comply with the principles of constitutionalism are the following:

i. The constitution must impose limitations on the powers of the government.

ii. The constitution must be legitimate in the sense that it should emanate from the people.

iii. It must protect and promote human rights.

A constitution or a legal system which fails to pass these tests exists without constitutionalism.

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.

ACTIVITY 4 SG p11

Discuss the principle of the separation of powers and its justification.

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.

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.

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.

ACTIVITY 5 SG p12

Discuss the four basic precepts of the principle of the separation of powers and state whether the separation of powers is absolute.

The four basic principles of the doctrine of the separation of powers are:

- the principle of *trias politica*
- the principle of the separation of functions
- the principle of the separation of personnel
- the principle of checks and balances

The separation of powers is not absolute**,** however the separation of powers may be horizontal or vertical.

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*.

***The four precepts of the principle of the separation of powers*:**

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 separation of powers is not absolute…. 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.

ACTIVITY 6 SG p12

6.1 Explain the paradox of 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*.

6.2 Discuss the importance of judicial review for constitutionalism.

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.*

The entrenchment of fundamental rights:

The entrenchment of fundamental human rights in the Constitution 1996 - and more particularly the Bill of Rights is indispensable for the entrenchment of the people as sovereign above the state and its institutions as essential constituents of the very nature and existence of the state.

Control by the people as constituents of the state

Concurrently the principle of the separation of powers is indispensably bound to the inherent control by the people as constituents of the state and accordingly bound to the need for inherent control. This establishes and confirms the need for checks and balances to scrutinise the actions of those empowered by the state to act on behalf of the people.

Judicial review lies at the core.

Whilst - as stated - each branch of government must act as the people's fiduciary, each branch is not infallible. Where these infallibilities of the branches of state and there functionaries arise, scrutiny thereof is paramount. Clearly the judicial system [whilst not beyond reproach itself] is best positioned to address occurrences of fallibility.

Judicial intervention in the form of judicial review is indispensable for the protection of human rights, the entrenchment of accountability of the state and organs of state, and protection of the sovereignty of the Constitution and the rule of law.

ACTIVITY 7 SG p13

Identify the main features of a parliamentary system.

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.

ACTIVITY 8 SG p14

Distinguish a parliamentary from a presidential system of government.

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.

ACTIVITY 9 SG p15

Discuss the South African system of government, and state whether it is a parliamentary or a presidential system?

The South African system has some features of a presidential system, such as the existence of a powerful president and a deputy president, but it is essentially parliamentary, as the features of the latter prevail (indirect presidential election, accountability of cabinet to parliament, and possible dismissal of the cabinet by parliament following the adoption of a motion of no confidence).

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.

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.

ACTIVITY 10 SG p16

Discuss the advantages and disadvantages of federalism.

The Advantages of a Federal State:

A federal system of government encourages democracy, efficiency and accountability through the distribution of power to all spheres of government authority. Within this pretext, government is brought closer to the people, which, in a diverse national-, demographic-, cultural-, religious-, linguistic- and political society, fosters measures of autonomy - and - in so doing protects fundamental human rights and minorities. This creates a dynamic environment for social and economic prowess, facilitating development and inclusivity.

The Disadvantages of a Federal State:

Federal systems of government on the other hand run the risk of affording disproportionate and costly autonomy, including duplication of structures, which may threaten the very existence of the system and diminish cohesive modalities between the constituents of the state. This may include the reinforcement of ethnic and regional sentiments which may become counter-productive to achieving national unity and reconciliation.

ACTIVITY 11 SG p17

Distinguish between a divided and an integrated model of federalism.

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.

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.

ACTIVITY 12 SG p17

Differentiate between integrative federalism and devolutionary federalism.

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.

ACTIVITY 12 SG p17

Distinguish between territorial and personal 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.

ACTIVITY 14 SG p20

Identify the main features of a unitary state

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

ACTIVITY 15 SG p20

Distinguish a federation from a confederation.

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.

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.**

ACTIVITY 16 SG p22

Discuss the doctrine of 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*.

ACTIVITY 17 SG p22

Explain and distinguish between the following concepts:

1. Constitutionalism
2. Rule of Law
3. Rechtsstaat (material and procedural)

1. 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.

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*’’ - *including the protection of human rights, individual rights and civil liberties*.

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*…. being….

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

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2. Rule of 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*.

3. Rechtsstaat (material) and Constitutional (procedural)

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.

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.

Procedural or negative constitutionalism

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.

ACTIVITY 18 SG p22

Distinguish between the formal and material *Rechtsstaat*.

The formal *Rechtsstaat* - A formal *Rechtsstaat relates to institutions and procedures, whereas a material Rechtsstaat relates to values.*

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.

The *material* Rechtsstaat

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ACTIVITY 19 SG p26

Assess the minimalist and maximalist conceptions of democracy critically and explain whether you hold minimalist or maximalist views?

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.

Minimalist conceptions and liberalism maintain that democracy…

- is essentially procedural, formal and institutional supported by specific political machinery made up of institutions, processes and roles
- is founded in *systems of polyarchy* which *Dahl* identifies as
  - elected officials
  - free and fair elections
  - inclusive suffrage
  - right to run for office
  - freedom of expression
  - alternative info &
  - associational autonomy.

  defined by citizenship, broad based suffrage and protection of civil rights, being synonymous with competitive and multiparty democracy - based on the accountability of rulers and of other institutions that are crucial to sustaining a democratic system… as argued by *Sandbrook, Haden* and *Sorensen.*

Criticism of minimalist democracy came mainly from Marxist and socialist scholars.

- *Amin* (1996:70) holds that ‘‘*Western democracy has no social dimension*’’ and *ignores the masses to serve the minority* by:
  - *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*
- *Ake* referred to this as impoverished democracy which ignored - the mode of politics of the vast majority of the working people - and - was not the substantive or popular democracy which *Shivji* argued democracy should be.
- Critics further held that minimalist views irretrievably associated democracy with individualism, formalism and reformism. - *Glazer* - to which *Duverger* referred to as ‘‘*de´mocratie sans le peuple*’’ (*democracy without the people*) - a *partycracy* and *plutocracy* of the social- economic- and political elite.
- Amin referred to minimalist democracy as: "*a caricature of bourgeois democracy and thus ensuring alienation from the people - and - external vulnerability".*

Maximalist conceptions and socialism

Maximalist conceptions are built on criticism of liberal and Western democracy and concentrate on the substance and values of democracy - including social equality, and on socio-economic rights - thus - creating a socio-economic and popular or socialist democracy focussing on ensuring collective- and socio-economic rights.

This *Nyang'oro* once referred to as ‘‘*Jacobin democracy*” or *“people-driven democracy”* which opposes liberal and bourgeois or elite-driven democracy. Unsurprisingly, the stance of maximalist scholars echo Marxist persuasions, emphasising concrete political, social and economic rights and constituting as much emphasis on collective rights as it does on individual rights - thus securing civil liberties and political pluralism.

The choice of dictums of democracy:

My opinion and approach is best distilled in the precepts of law, democracy and human dignity formulated as early as the circa 43 BC by Ciciro, when he stated that the law should reflect the will of the people. His famous words "*salus populi suprema lex*" resound!

Equally Abraham Lincoln's vision *“government of the people, by the people and for the people”* which he formulated in 1863 constitutes a guiding beacon for a constitutional democracy which embraces the elements of order akin to the minimalist conceptions in balance with the elements of broad based inclusiveness akin to the maximalist conceptions of democracy…. This distills my point of view.

ACTIVITY 20 SG p27

Explain the interplay between democracy and elections with specific reference to Africa?

Democracy and elections

Democracy and elections are not synonymous. There may be elections without democracy, but true democracy entails the organisation of regular, free and fair 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
- 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.
- **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*.
- *Terry* warned against ''*the fallacy of electoralism"*.
- *Ake* and *Mkandawire* expressed their concern regarding the growing incidence of *"choiceless democracies"* - particularly in an African context - where *elections without democracy* are countenanced, inter alia to covet the good graces of foreign donors and critical international democrats as *one of the major inducements for African authoritarian regimes to open up their systems*.
- Accordingly numerous elections, albeit hardly free and fair, have been held regularly in Africa since independence without countries establishing and consolidating democracy.
- Whilst elections are the most tangible demonstration that democratic values are being pursued in an effort to secure the survival of democracy - the lip service to the principles of democracy, in effectively staged elections, merely result in *cosmetic electoral democracies* - that arise as a consequence.
- Clearly - 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.*

ACTIVITY 21 SG p28

Explain the relationship between democracy and multi-partyism.

Democracy and multi-partyism are not synonymous. Modern democracy goes with multi-partyism, but a multiparty system may exist without democracy.

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.

ACTIVITY 22 SG p29

Discuss the counter-majoritarian dilemma critically.

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.

ACTIVITY 23 SG p29

Assess the counter-majoritarian debate with reference to African constitutional 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.

Advanced Constitutional Law and Fundamental Rights

PART 1

CONSTITUTIONAL LAW

STUDY UNIT 2 - CONSTITUTION, CONSTITUTIONALISM, AND DEMOCRAC IN SOUTH AFRICA SG 39 - 65

ACTIVITY 1 SG p45

Distinguish between constitutionalism, democracy and the rule of law, and discuss how they are protected and promoted under the 1996 Constitution?

Constitutionalism

- Unlike traditional constitutionalism with its overemphasis on procedure and restraint, modern constitutionalism is said to be more concerned with values. Modern constitutionalism embraces an enlightened and inclusive approach to individual-, socio-economic and collective rights (ie the second- and third-generation rights), that are viewed as fundamentals to the creation of a constitutional dispensation and the rule of law.
- This represents a value-laden, teleological or purposive constitutionalism which lie at the core of modern constitutions that are primarily value based or "*rights-based constitutionalism*" bringing equity in in the way constitutions embrace not only individual and first-generation rights, but also collective, second- and third generation rights - as argued by *Ivison*.
- It is 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.***

Concepts of democracy

Minimalist conceptions and liberalism maintain that democracy…

- is essentially procedural, formal and institutional supported by specific political machinery made up of institutions, processes and roles
- is founded in *systems of polyarchy* which *Dahl* identifies as
  - elected officials
  - free and fair elections
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  defined by citizenship, broad based suffrage and protection of civil rights, being synonymous with competitive and multiparty democracy - based on the accountability of rulers and of other institutions that are crucial to sustaining a democratic system… as argued by *Sandbrook, Haden* and *Sorensen.*

Maximalist conceptions of democracy and socialism

- Maximalist conceptions are built on criticism of liberal and Western democracy and concentrate on the substance and values of democracy - including social equality, and on socio-economic rights - thus - creating a socio-economic and popular or socialist democracy focussing on ensuring collective- and socio-economic rights.
- This *Nyang'oro* once referred to as ''*Jacobin democracy"* or *"people-driven democracy"* which opposes liberal and bourgeois or elite-driven democracy. Unsurprisingly, the stance of maximalist scholars echo Marxist persuasions, emphasising concrete political, social and economic rights and constituting as much emphasis on collective rights as it does on individual rights - thus securing civil liberties and political pluralism.
- 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.

- According to liberal theory, there is no democracy without political pluralism, understood as multi-partyism.

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

***The doctrine of the rule of law*.**

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

- the independence of the judiciary

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

Democracy & the rule of law

In *Conac's* view

- 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.

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 & democratic one.

Constitutionalism and the 1996 Constitution

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 **three tests** that a constitution must pass in order **to comply with the principles of constitutionalism** are the following:

iv. The constitution must impose limitations on the powers of the government.
v. The constitution must be legitimate in the sense that it should emanate from the people.
vi. It must protect and promote human rights.

A constitution or a legal system which fails to pass these tests exists without constitutionalism.

The 1996 Constitution and the Limitation of Powers

The limitation of powers under the Constitution 1996 lies within its reception of the doctrine of separation of powers, wherein the constitution upholds the principles of the *trias politica* which encompasses the separation of functions, of personnel, the principle of checks and balances which includes the doctrine of judicial review.

Legitimacy of the 1996 Constitution - 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"***.
- The fundamental principles of the rule of law, procedurally limit the incursion of government in the lives of individuals and the collective.
- Judicial intervention in the form of judicial review is indispensable for the protection of human rights, the entrenchment of accountability of the state and organs of state, and protection of the sovereignty of the Constitution and the rule of law.

The protection of Human Rights and the 1996 Constitution:

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.

The embrace of our Constitution of value-laden and purposive constitutionalism, was 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 preamble and founding provisions of the Constitution 1996 embrace a democratic and open dispensation wherein government is based on the will of the people, the supremacy of the Constitution, equality before the law, human dignity and the advancement human rights and freedoms and the accountability of the state and its institutions. Clearly the precepts of the Constitution 1996 embrace and protect the principles of constitutionalism.

ACTIVITY 2 SG p45

Critically discuss the interplay between constitutionalism and the Constitution of South Africa?

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.

In *Makwanyane, Zuma, Soobramoney* and others 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*.

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

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.

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.

ACTIVITY 3 SG p47

Examine the entrenchment of the principle of separation of powers in the 1996 Constitution of the Republic of South Africa?

The principle of the separation of powers is entrenched in the 1996 Constitution of the Republic of South Africa. Reference should be made to the separation between the legislature, the executive and the judiciary (*trias politica*), the origin of the doctrine, its rationale and its interpretation by the South African courts.

Whilst 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.***

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]**

ACTIVITY 4 SG p47

Study the entire Chapter 4 of the Constitution, with particular emphasis on provisions relating to the composition of Parliament, membership and functioning of the National Assembly, and those relating to the National Council of Provinces, the passage of Bills, and the president's function in assenting to and signing Bills.

REFER TO CSL 2601 & FUR2601 NOTES

ACTIVITY 5 SG p50

Study section 172 on the powers of courts in constitutional matters, and section 173 on the inherent powers of the Constitutional Court, the Supreme Court and the High Court.

172 Powers of courts in constitutional matters

(1) When deciding a constitutional matter within its power, a court-

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(b) may make any order that is just and equitable, including-

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

(2) (a) The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.

(b) A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct.

(c) National legislation must provide for the referral of an order of constitutional invalidity to the Constitutional Court.

(d) Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection.

173 Inherent power

The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.

ACTIVITY 6 SG p50

Study both the judgment of the **High Court in *Zuma v National Director of Public Prosecutions*** (2009 (1) BCLR 62 (N), paras 7–19; 41–118, 127–244 and 247; and that of the **Supreme Court of Appeal in *National Director of Public Prosecutions v Zuma*** (2009 (4) BCLR 393 (SCA) (paras 1–88), which shed some light on the challenges faced by the independence of the judiciary in South Africa.

Zuma v National Director of Public Prosecutions (2009 (1) BCLR 62 (N):

In this matter the applicant in this case was the current president of the African National Congress. He sought a declaration that a decision to prosecute him, taken by the National Prosecuting Authority during or about June 2005, was invalid. Zuma also sought to declare invalid an indictment served pursuant to the decision to prosecute.

The proceedings had nothing to do with the guilt or otherwise of the applicant on the charges brought against him. They dealt with the disputed question of a procedural step that the State was required to comply with prior to instituting proceedings against the applicant.

If there were defects, at best for the applicant, the indictment might be set aside. Once the defects were cured, subject to any other applications that are brought, the State was at liberty to proceed with any charges they deemed met.

The crux of the dispute was whether the applicant was entitled to make representations to the prosecuting authorities before the decision was taken to prosecute him. It was common cause that the applicant was not afforded an opportunity to make representations. The obligation to hear representations forms part of the *audi alteram partem* principle.

Addressing the question of the nature of the proceedings, the Court concluded that the application was in the nature of a civil review. The Court went on to express the opinion that the executive might have interfered in the decision to prosecute the applicant.

The application succeeded.

National Director of Public Prosecution v Zuma [2009] ZASCA

The judgment of the Supreme Court of Appeal ("**SCA**") in *National Director of Public Prosecution v Zuma* [2009] ZASCA 1 ("**the Zuma judgment**") is a good illustration of how constitutional and administrative law issues underlie a political saga and may influence the country's political future.

Former Deputy-President Jacob Zuma challenged the decision of the National Director of Public Prosecution ("**the NDPP**") to indict him on an array of criminal charges on the basis of a legitimate expectation to be invited to be heard prior to the decision to indict him.

He founded this expectation on sections 33 and 179(5)(d) of the Constitution of the Republic of South Africa 1996 ("**the Constitution**").

Section 33 enshrines the constitutional right to just administrative action, whereas section 179(5)(d) provides that the NDPP may review a decision not to prosecute after consulting the relevant Director of Public Prosecutions ("**DPP**") and taking representations from the accused.

The SCA analysed the meaning of section 179(5)(d) and **concluded that section 179(5)(d) does not apply to a reconsideration by the NDPP of his own earlier decisions** not to prosecute but is limited in its application to a review of a decision made by a DPP or a prosecutor. The 2007 decision by Mr Mpshe, the then acting NDPP, to indict Mr Zuma was not a review of the 2003 decision by Mr Ngcuka, the previous NDPP, not to indict Mr Zuma.

The decision by Mr Mpshe was a "fresh decision" based upon additional and compelling evidence which justified the indictment of Mr Zuma. A fresh decision falls outside the purview of section 179(5)(d) and as a result Mr Zuma was not entitled to an invitation to make representations prior to the making of the decision.

Insofar as the legitimacy of Mr Zuma's expectation was concerned, the SCA confirmed the long established principle that an expectation will only be legitimate if it is based on a practice of or a clear and unambiguous representation by the decision-maker.

The SCA found that Mr Zuma's expectation appeared somewhat self-created, based upon his version of the facts and not upon an established practice or a representation by the NDPP, which effectively debased its legitimacy and enforceability.

The decision to indict and the subsequent events surrounding the indictment of Mr Zuma has fuelled a political controversy. Ironically, the less captivating and more principled interpretation of the Constitution had resolved the controversy.

The role of judges and legal interpretation in guiding the political future of the country remains to be seen.

In the case of *National Director of Public Prosecutions v Zuma* (573/08) [2009] ZASCA 1 (12 Jan 2008). upheld an appeal by the NDPP against a judgment by Nicholson J in which he had set aside the indictment of Mr Zuma on 18 main counts of racketeering, corruption, money laundering, tax evasion and fraud.

The effect of the judgment on appeal is that the prosecution may proceed.

The case concerned in the main the interpretation of section 179 of the Constitution. The SCA held that the section did not require that the NDPP had to invite Mr Zuma to make

representations as to why he should not be prosecuted before indicting him and to provide him with a full explanation why a former decision not to prosecute was not adhered to.

The SCA also held that Mr Zuma had no legitimate expectation that he would have received such an invitation and explanation. It noted that Mr Zuma, knowing that he could make representations, chose not to make any.

Aware of the possible political implications of the judgment, the SCA emphasised that the judgment is not about the guilt of Mr Zuma; it is not about the question whether the decision to prosecute was justified; it is not about who should be the president of the ANC; it is not about whether the decision of the ANC to ask Mr Mbeki to resign was warranted; and it is not about who should be the ANC's candidate for the presidency in 2009. More particularly, it is not about whether there was political meddling in the decision-making process.

The judgment, however, deals with the question whether the findings by Nicholson J relating to political meddling were appropriate or could be justified.

It came in this regard to the conclusion that his findings were inappropriate and could not be justified on the papers before him. The SCA found that the learned judge had failed to have regard to some basic tenets concerning the judicial function and that he had failed to apply fundamental rules of procedure. This led to the erroneous findings.

The SCA nevertheless dismissed an application by Mr Mbeki and the Government of the RSA to intervene on the ground that they had no interest in the relief but only in the reasons of the court below.

The members of the Court were Harms DP and Farlam, Ponnan, Maya and Cachalia JJA.

- 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.**

ACTIVITY 10 SG p52

10.1 Distinguish between a presidential and a parliamentary system of government?

Parliamentary features

- 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).
- 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).
- 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).
- 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 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.
- 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).
- Once elected, the president ceases to be a Member of Parliament (s 87).
- 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).

ACTIVITY 10 SG p52

10.2 Indicate which system describes South Africa's form of government and give reasons.

The application of the horizontal separation of powers 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

- 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).
- 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).
- The president is elected by the NA from among its members.
- The president he must resign if the NA adopts a motion of no confidence in him or her (section 102 of the 1996 Constitution).
- 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:

- The South African tresident performs dual functions as head of state and head of government/the executive (s 83).
- 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).
- Once elected, the president ceases to be a Member of Parliament (s 87).
- 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 Presidential system of government. Rather, it has adopted a hybrid form of government characterised by both parliamentary and presidential features.

ACTIVITY 8 SG p52

Compare the British and South African systems of government.

Both the United Kingdom and South Africa have parliamentary systems of government. Parliament is bicameral in both countries. The cabinet is also accountable to Parliament (House of Commons or National Assembly). However, unlike the UK, which is a monarchy, South Africa is a Republic. There is no prime minister in SA, the president being the *de facto* prime minister.

Parliamentary features

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

- Whereas in the UK the head of state - the regent succeeds to the throne due to inheritance and lineage, 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 UK, where the Regent is accountable to the House of Lords and the people, SA 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 UK where the regent can only be requested to abdicate by the House of Lords. The Regent can however not be forced or indicted.
- In South Africa, the NA may be dissolved by the president (section 50 of the 1996 Constitution). In the UK the Regent may disband parliament and call new elections.
- In SA 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). In the UK the cabinet is appointed by the prime minister from serving members of Parliament.

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 UK

- 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 UK, where the Regent cannot be forced to resign for political reasons, for example, after the passing of a motion of no-confidence in him, because the UK Regent is not elected by the legislature
- In South Africa, once elected, the president ceases to be a Member of Parliament (s 87). In the UK, the Regent is not elected from the legislature. However the Regent's Prime Minister and his cabinet are members of the legislature.
- In the UK the Regent as the President in South Africa, may not veto legislation, however either may refer a Bill back to the NA or Parliament 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.

ACTIVITY 9 SG p52

Compare the US and South African systems of government.

The US has a presidential system while South Africa has features of both a parliamentary system and a presidential system. In both countries, Parliament is bicameral and the president is assisted by a deputy-president. However, the US president is elected by the people and not by the National Assembly as in South Africa.

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.

ACTIVITY 11 SG p54

Discuss the approach of the Constitutional Court to cooperative government. Do you think South Africa qualifies as a fully-fledged federal state?

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:

*"[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.

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 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.

Whilst embracing most of the characteristics of Federalism - South Africa is not a fully-fledged federal state, as it also embraces many unitary state characteristics. South Africa's form of state can therefore be best described as a hybrid system of state. Re: *Elazar* and *Watts*.

ACTIVITY 12 SG p52

Study the prescribed article by Simeon R "Considerations on the Design of Federations: the South African Constitution in Comparative Context" (1998) 13 SAPR/L 42–71 and **discuss whether South Africa qualifies as a fully-fledged federal state like the USA, Germany and Canada?**

'Explanatory memorandum' to the new text could state that, 'This text therefore represents the collective wisdom of the South African people and has been arrived at by general agreement.'

I will illustrate the issues by looking at how South Africa has thought about federalism and the ideas associated with multi-level governance in the development of its new democratic constitution. I begin with some of the

Canada,

very much in question. This crisis in turn has generated a wide-ranging debate about almost every aspect of Canada's institutional design: the division of powers, the mechanisms and processes of intergovernmental relations, fiscal arrangements, and so on. In striking contrast to South Africa, despite at least five rounds of 'mega-constitutional' discussion, Canadians have, in Peter Russell's words, failed to 'constitute themselves as a sovereign people'.[6]

Perhaps the most fundamental question raised by the recent Canadian experience is whether, and under what conditions, and with what institutional designs,

Canadians must think about reforming a long-established federal system. The constitution-makers in South Africa following the end of apartheid were starting with a blank sheet of paper. They had to answer the threshold question of whether to have a unitary or a federal system. The general historical position of the African National Congress has been to argue for a unitary state largely on the grounds that only it could secure majority rule, that only it could ensure the concentration of resources necessary to undertake the massive tasks of providing schools, housing, hospitals, and eroding economic disparities, and that only it could contain the potentially centrifugal tendencies of race and tribe.[7] The language and concepts of federalism were also associated with the racist and discredited previous policy of African 'homelands'. But other political forces (the mainly white parties seeking an American style system of checks and balances against majority power, some

for a more or less federal state.[8] The interim Constitution of 1993,[9] the result of the imperative of finding consensus among these political forces in order to pave the way for free elections,[10] stated in its Constitutional Principles' that 'Government shall be structured at national provincial and local levels' (CP XVII); that constitutional amendments require the approval of the provinces, or their representatives in a provincially-constituted second house of parliament (CP XVIII); that each level will have 'exclusive and concurrent powers' (CP XIX). It also endorses the principle of subsidiarity, stating that the 'level at which decisions can be taken most effectively ... shall be the level responsible and accountable' (CP XXI). So, while the word 'federalism' does not appear anywhere in the constitution, the federal principle was to be deeply embedded in it. 'In the Republic, government is constituted as national, provincial and local spheres[11] of

government, which are distinctive, interdependent and interrelated' (s 40(1)). Each sphere is to be directly elected; each has at least some autonomous powers; and a constitutional court is the final arbiter of their relationships.

provinces play within the national government, etc. So, despite the enormous differences between these two countries they face similar questions of institutional design. Each also must find ways of managing deep ethnocultural cleavages, and strong autonomist movements – Quebec in Canada, KwaZulu-Natal in South Africa.

conflicts, struggle, and the balance of power among competing forces. Constitutions, especially new ones which have yet to become deeply rooted, are no guarantee of democracy; they must be sustained by a democratic culture, and a supportive social and economic environment. Nevertheless, I think it useful to

First principles

Three vantage points are especially relevant to debates about federalism in Canada and South Africa: the link between federalism and democracy; the link between federalism and what we might call effective government, or policy-making capacity; and the link between federalism and the ability to manage territorially concentrated ethnocultural divisions, or between federalism and varying conceptions of community.[14]

first principles, with a reminder of the underlying values with which federalism is supposed to be associated, and with some criteria for judgement and evaluation which might be put to political institutions, such as federalism.

To summarise briefly, from a democratic perspective, federalism serves or promotes democracy by: increasing opportunities for citizen participation; maximising the potential fit between preferences and outcomes, and offering citizens the choice of different 'packages' or baskets of services in different jurisdictions. In the American literature on federalism, especially, it is also closely linked to the avoidance of tyranny through checks and balances, with the possibility that each level of government can check the excesses of the other.[15] From an effective government perspective, the virtues expected of federalism are such things as the ability to tailor policy choices to local needs; the avoidance of policy overload at the centre, and the opportunity for innovation and experiment.

From a conflict management perspective the basic argument for federalism is that it minimises the potential for conflict by empowering territorially-concentrated distinct minorities with the tools to protect and promote their distinctiveness, without fear of the national majority imposing their values on the minority, or vetoing their aspirations. It is conflict management through empowerment, disengagement, and the recognition of difference.[16] Donald L Horowitz, in an analysis of the application of federalism to South Africa, adds that federalism can 'furnish support for an accommodative electoral formula'; provide arenas for socialising leaders to deal with conflict; disperse conflict more widely; and make hegemonic domination by one group more difficult.[17]

What is interesting from the perspective of institutional design is that on each of these dimensions, federalism is Janus-headed; it points in two directions. Thus from the democratic perspective, it can be replied that federalism values the rights

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of minority communities over those of national majorities. How to balance these two was at the heart of the South African debate over the division of powers, and the ability of the national government to assert a national interest over provincial priorities. 'Progressive' interests in Canada have often been similarly worried that the 'complexities of federalism', and the powers of the provinces, have frustrated

intergovernmentalism and duplication? Does the interdependence among governments characteristic of all federations argue for high levels of concurrency and shared responsibilities (increasing the need for intergovernmental relations); or does the need to minimise these costs argue for what in Canada is called 'disentanglement', an attempt to reconstitute powers into something like the original water-tight compartments, with each government solely responsible for a clearly defined set of functions?

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launching a plausible secessionist movement. Federalism in Canada has indeed had many successes in managing French-English conflict, but it has also helped transform French-English relations into a Quebec-Canada confrontation, and it is hard to imagine that the Quebec independence movement would be so strong without the resources of the Quebec provincial state behind it.[20]

government. Hence his powerful opposition to any form of 'special status', and to increased decentralisation. His alternative was to strengthen the presence of French-Canadians in the national political system. The contrary view is that only by granting recognition of Quebec as a distinct society and enhancing its powers can Quebeckers be reconciled to the federal state, and the move towards independence stopped. If this is not done, Quebec will certainly opt for independence.[21]

participate in 1994 national elections, to get a 34th constitutional principle added. It provides a somewhat ambiguous 'right to self-determination' by any community sharing a common cultural and language heritage. This is transferred, equally ambiguously, into the new constitution. Provinces are also given the right to prepare their own provincial constitutions, subject to the overarching Republic constitution, and to certain nationally defined norms.

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The other problem with federalism and the management of communitarian divisions also occurs both in South Africa and in Canada. That is the problem of 'minorities in minorities'. Thus to grant more autonomy to Quebec, for example, is seen as a threat by non-Francophone persons in the province; just as more autonomy to the Zulus in KwaZulu-Natal might be seen as a threat to non-Zulus in the province. This tension has led Alan Cairns to argue persuasively that 'federalism is not enough'[22] – that provincial autonomy must be supplemented by nation-wide guarantees of minority rights as well. And in fact, a very strong bill of rights is at the heart of the new South African constitution.

Two models of federalism

As South Africans considered how to design their federal system, and Canadians considered how to reform theirs, there were many models from which to draw. Indeed, it has been said that there are as many variants of federalism as there are federations. Each federation seems *sui generis*, and it is clear that the actual operation of the federal system (centralised or decentralised, conflictual or cooperative) has as much to do with other political and institutional factors as it does with the federal design itself. Among the models which South Africa considered were those of Canada and Germany – Canada perhaps because of the Commonwealth link, and its marriage of federalism with a parliamentary system of government; Germany perhaps because of other cultural affinities, and its quite

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different model. The United States, India and Australia have also been sources of ideas, in the latter two cases in large part because they are relatively centralised models.

The divided model

The image suggested by the divided model, as illustrated broadly by Canada, is of two separate, independent sets of political institutions, federal and provincial, which interact with each other through bargaining which often looks more like the relations among independent countries than the interactions among component elements of the same political system. Hence the terms used to describe intergovernmental relations in Canada – competitive 'executive federalism'[24] or 'federal-provincial diplomacy'.[25]

The division of powers

The model here is the classical one of clearly divided sets of responsibilities.

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This experience, however, underlines a critical issue in the division of powers: under what conditions, if any, should the central government be able to override provincial powers, even in areas assigned exclusively to them? What principles

nalities, etc) as it is to justify devolution. Canadian commentators have recently embraced subsidiarity largely as an argument to justify further decentralisation; in the new South African constitution, while appearing as one of the original Constitutional Principles, it has turned out to underpin a broad set of criteria justifying federal paramountcy in shared or concurrent powers, and even in areas of exclusive provincial competence.

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Fiscal arrangements

Similarly, each level of government in the divided model is given independent taxing powers – in Canada, Ottawa can raise revenues by any means; the provinces are restricted to direct taxation, but in practice, apart from tariffs and a few other revenue sources, there are virtually no limits on provincial taxing and borrowing powers. Each level of government is free to levy its own independent taxes. Again, this is not the whole story. Through equalization payments (uncon-

by the centre. Put another way, Canadian intergovernmental transfers are highly respectful of provincial autonomy. In any case, driven by fiscal crisis, these flows are now rapidly declining. There are, in addition, enormous differences in taxation

Fiscal arrangements also highlight two other critical design issues. If there are to be large fiscal flows between governments (on the assumption that central governments have more revenue-raising capacity), then to what extent should such

autonomy, formal jurisdictional autonomy can be meaningless. Second, to what extent should it be a goal to use central powers to redistribute revenues between richer and poorer areas, and how much should fiscal federalism assure the equal capacity of the provinces to carry out the responsibilities assigned to them? In

Intergovernmental relations

The high degree of interdependence and de facto concurrency inevitable in any federal system ensures that intergovernmental relations are indeed at the heart of the Canadian system. But several characteristics of these relations are consistent with the divided model. The machinery of intergovernmental relations has grown up in an ad hoc way: it is nowhere mentioned in the constitution, or enshrined in

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Intrastate federalism

Perhaps the clearest manifestation of the divided model in Canada is that there is no formal institutional bridge linking provincial and national politics, no institutional means through the interests of provinces (whether their people or their governments) are directly represented with the central government. In most federal

as well. In Canada, as is well known, the Senate has conspicuously failed to play this role.[28] Indeed, Canada is an outlier among federal systems in this regard, though there are important informal norms about provincial representation in the cabinet and the Supreme Court. Moreover, the Westminster-style Canadian parliamentary system, with its tight party discipline and executive dominance sharply limits the ability of individual members of parliament explicitly to represent and speak for their regions (unlike, eg, Congressmen in the United

party system does not integrate or bridge national and provincial politics.

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The role of the courts

The courts have played a critical role in the movement of Canadian federalism from the 'quasi-federal' pattern noted by Wheare to the more classical, decentralised and divided model of today. Reflecting Canada's colonial past, until

assigned areas of jurisdiction.[29] The Supreme Court of Canada has continued to be an umpire of the federal system, consistently seeking an appropriate balance between federal and provincial powers. This role has become more rather than less important as Canadian federalism, especially in the 1970 and 1980s became more

GERMANY - INTEGRATED FEDERALISM

Integrated federalism

The integrated model, exemplified in large part by Germany, is different on all these counts. It is designed to integrate and pull together central and provincial politics at all levels. 'The resulting institutions and horizontal federal arrangement are of the intrastate variety, which, perforce, requires consensus-building and cooperative behaviour if any degree of coordination is to be achieved.'[30] While the German federal system is considerably more centralised than the Canadian, it is undeniably federal. Article 79(3) states that: 'Amendments to this Basic Law affecting the division of the federation into *Länder*, and their participation in the legislative process ... are prohibited.'

The division of powers

Instead of water-tight compartments there are wide areas of concurrency or shared

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responsibility. In Germany, a limited number of powers are allocated for both legislation and administration to the national government, including foreign affairs

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exercise of governmental powers and the discharge of governmental functions shall be incumbent on the *Länder*' (a 30). However, in the case of conflict, federal law overrides *Länder* law (a 31). There is also a long list of concurrent powers,

ranging from the administration of justice, to welfare, to education, the environment and other matters (a 74). *Länder* have the right to legislate in these areas, but only to the extent the federal government does not. Article 72 spells out

Länder; where *Land* regulation might prejudice the interests of other *Länder* or the country as a whole; or where it is necessary for the maintenance of legal and economic unity' (a 72(2)). Similar language was incorporated into the South African constitution. Another key element of the German division of powers is that

African constitution. Another key element of the German division of powers is that it takes the form of a national/local distinction within policy areas in which the centre is responsible for broad national 'framework' legislation, within which provinces are responsible for fleshing out local variations and for implementation, with varying degrees of federal supervision, subject to approval by the *Länder*-appointed *Bundesrat* (a 75, 83-85). Most federal law is implemented by the

planning and financing. The model is one of shared powers; there are few exclusive powers, at either level. It is also one in which, subject to approval through the *Bundesrat*, the centre has broad latitude to act, and to shape *Land* legislative and administrative discretion. 'The de facto legislative quasi-monopoly held by the Bund is counterbalanced by the undisputed supremacy of the *Länder* in the administrative sphere.'[31]

Financial arrangements

Again, the model is not one of independent states and federal government exercising revenue raising powers autonomously: rather the model is primarily one of shared revenues and taxing powers, based on negotiated formulae. Income

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Intergovernmental relations

operation between the various levels of government is absolutely necessary.'[32] As a result, Germany, compared to Canada, has a far more structured and institutionalised set of intergovernmental institutions, whose decisions are formalised by treaties or agreements, which have the full force of law.

Canadian reformers have considered adopting the *Bundesrat* model as an antidote to the weak intrastate elements in Canadian federalism, in the form of proposals to replace the existing Senate with a council or house of the provinces, with direct provincial representation. In recent years, however, such proposals have been superseded by arguments in favour of a directly elected Senate, with procedures designed to enhance its sensitivity to regional interests and to temper majority rule

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Implications of alternative constitutional designs

First, the divided model seems to weigh more heavily a view of democracy focused on the rights and autonomy of provincial communities. The integrated model tends to a more centralised, majoritarian federalism, or what Samuel Beer calls 'national federalism'.

Second, the divided model seems to simplify transparency and accountability; at least in principle. It suggests a lower democratic deficit, as each government is more directly and visibly responsible to its electorate for its activities. It is interesting to note that democratic criticisms of federalism in Canada, for example in constitutional negotiations, are raised in the context of those more limited areas where responsibility is in fact shared.

Third, with respect to policy-making, the picture is mixed. The integrated model tends to emphasise the need for harmony and consistency in policy across provinces. It gives provinces *collectively* a large influence on policy, but places less emphasis on the autonomy of each individual province to pursue its own policy choices, and therefore less emphasis on the federalist virtues of variety, experiment and innovation. The integrated model enhances the likelihood of consensual policymaking, at the potential cost of the 'joint decision trap' – delay, lowest common denominator solutions, etc. The divided model enhances the

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likelihood of contradiction and conflict among policies, with the advantage, again of decisiveness and variety of policy outcomes. As Martin Painter points out, 'where federal-provincial political interactions are conducted in a climate of competitive political interaction, rather than under the banner of a managerially-inspired model of rational, cooperative planning, then some of the potential costs of intergovernmentalism may be avoided.'[35]

Fourth, with respect to conflict, the integrated model places a very high value on consensus and agreement; the divided model leans towards a more competitive, adversarial federalism.

Fifth, with respect to deep-seated territorial conflict the messages seem mixed. But one might argue that by setting provinces into a competitive relationship, and by so encouraging distinct, separate political processes in each province, the divided model both produces more autonomy for minority groups, and makes it easier for them to move in a secessionist direction. There are fewer ties to cut. The integrated model might avoid this, by stressing the multiplicity of ties that link federal and provincial governments into a single system, making disengagement or secession more difficult. The constant interaction and need for cooperation in the shared system may also be more conducive to the building of relationships of mutual trust between officials at both levels. On the other hand, once a strong regional or separatist movement did exist, then the integrated model would be a recipe for paralysis, since the emphasis on consensus multiplies the opportunities for veto.

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The Constitutional Court

A separate Constitutional Court has the full power to interpret the Basic Law, and to rule on any matters of conflict between the federal and land governments. As with divided federalism, this integrated model spills over into other aspects of the federal political system. Thus, much more than in Canada political parties are unified across state and national lines, providing a powerful integrating force. Mobility of politicians between *Land* and *Bund* is common. And Germany has a public service which is highly integrated across federal and state lines.

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Towards a South African federalism

As I have mentioned, South Africa has opted for a federal model, however reluctant it is to use the term. The 1993 Constitution and the permanent constitution both envisage federal, provincial (and local) spheres of government, each elected separately by proportional representation. The provincial executive consists of a council, headed by the premier, who is accountable to the provincial legislature. The federal character of the South African constitution was made necessary by the imperative of finding all-party agreement on an interim Constitution in 1993, and South African constitution writers remained highly ambivalent about it. As the Constitutional Assembly worked towards a permanent constitution for the country, many issues for federalism remained highly contentious, and these were among the very last major questions to be resolved. In this section I outline some of the choices South Africans have made in their new constitution. In general, South Africa leaned strongly towards the shared model, much closer to the German than the Canadian example. As one leading ANC

This model of cooperative, collaborative governance is asserted from the outset in chapter 3. 'In the Republic, government is constituted as national, provincial and local spheres [not 'levels' or 'orders'] of government, which are distinct, interdependent and interrelated' (s 40(1)). All spheres of government are enjoined to 'exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional, or institutional integrity of government in another sphere.' They are to 'cooperate with each other in mutual trust and good faith', by 'fostering friendly relations, assisting and supporting one another, informing one another of, and consulting one another on, matters of common interest; co-ordinating their actions and legislation with one another', 'adhering to agreed procedures', and 'avoiding legal proceedings against one another' (s 41(1)). This embraces what the ANC calls a concept of

Division of powers

Legislative authority for the country is exercised by national, provincial and local governments.[38] The national parliament is empowered to legislate on 'any matter', including a broad list of concurrent powers spelled out in schedule 4 (s 44(1)). Unlike Germany, the general residual power is left to the national government (s 44 (1)(ii)). There is also a much shorter, and more limited, schedule 5, which lists areas of 'exclusive' [provincial] legislative competence.[39] However, parliament

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also has the power to legislate in these areas of provincial jurisdiction, if it is deemed necessary to 'maintain national security', 'maintain economic unity', 'maintain essential national standards', 'to establish minimum standards required for the rendering of services', or 'to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole' (s 44(2)). Otherwise, provincial legislation is to prevail. Provincial powers include the right, under strict conditions, to pass their own constitutions, to legislate in the concurrent and exclusive areas set out in schedules 4 and 5, and to act in areas where the centre has delegated powers to them (s 104 (1)).

In the concurrent areas listed in schedule 4, section 146 sets out the conditions under which federal law will prevail. It must apply uniformly across the country; must deal with a matter that cannot be regulated effectively by the provinces acting individually; must set out national norms, standards or policies; and must be 'necessary' for the maintenance of national security, economic unity, and the common market, the promotion of economic opportunities across provincial boundaries, the promotion of equal opportunity, or the protection of the environment (s 146(2)). Federal legislation also prevails where it is aimed at 'preventing unreasonable action by a province' that is 'prejudicial to the economic, health or security interests of another province or the country as a whole' (s 146(3)). Thus, the federal government has broad powers to exercise paramountcy – but the constitution does require that its actions be justified, and linked to specified national purposes, reflecting the ide.. of subsidiarity.

In its assessment of the constitution, the Constitutional Court concluded that the provinces do have real, genuine and meaningful exclusive and concurrent powers, with 'provision for extensive legislative and executive competencies' (par 252); and that the conditions for federal override were based on clear and justifiable

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competencies' (par 259) Thus, the new South African division of powers suggests a highly centralised federal system, but one in which there is the potential for considerable provincial initiative, given sufficient political will and institutional capacity.

Fiscal arrangements

The central dominance extends into fiscal arrangements. Provinces will have very limited powers to raise revenues on their own account, and are barred from income and sales or value added taxes (s 228). Other provincial revenue raising and borrowing is subject to national regulation and legislation. And no provincial revenue raising activities are permitted that 'materially and unreasonably' affect national economic policies, interprovincial commerce, or the mobility of economic factors. However, the provinces are entitled to an 'equitable share' of revenues collected by the national government

also to take into account provincial fiscal capacities, needs, and disparities, thus building in the principle of interprovincial revenue equalisation, which is an important feature of both Canadian and German fiscal federalism. In addition

members of both houses. If the Bill originated in the National Assembly, and the NCOP refuses to pass the Bill despite the recommendation of the Mediation Committee, the National Assembly may pass the Bill with a two-thirds super majority (s 76(4)).

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impose their own.[42] At the moment, there is an enormous mismatch between revenues and responsibilities – and provinces raise only 4 per cent of their operating revenue. Provinces are highly dependent on federal funding, and are constantly under the threat of falling victim to unfunded federal mandates.[43] Giving provinces a stronger role in formulating national budgetary policy, and some greater autonomy in raising their own revenues will be a critical issue if provinces are to develop as viable institutional actors.

Intergovernmental relations

Details of intergovernmental machinery are not spelled out in the constitutional draft: as in many other areas they are left to future legislation. In the summer of 1997 officials of the ministry of

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procedures to facilitate settlement of intergovernmental disputes'. And there should be every effort to exhaust such remedies before recourse to the courts to resolve disputes (s 40 (3)). Section 148 also tries to minimise the role of the courts in adjudicating intergovernmental conflicts, stating that 'if a dispute cannot be resolved by a court, the national legislation prevails...' . When considering conflicts, the courts must also 'prefer any reasonable interpretation ... that avoids a conflict over any alternative interpretation that results in a conflict'. The Constitutional Court

ministerial forums (MINMECS) have been established to facilitate harmonisation, consultation, and joint action in a number of functional areas. Each of these has important parallels in both Canada and Germany. And, as in these cases, the IGF and MINMECS have been criticised for lack of interest and participation by national ministers, failure genuinely to consult, and lack of a common information base. In addition, their link to the NCOP, and to national and provincial cabinets remains unclear.[45]

Intrastate federalism

As in Germany, the counterweight to the legislative superiority of the national government, and the centrepiece for the model of 'cooperative governance' is a provincially oriented second chamber in the national parliament. Two distinct models were on the table, with important implications for whether the body would be able to exercise significant provincial government control over national legislation.

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Senate model was on the cards…. But…..

A much more robust alternative was to establish a body much more akin to the *Bundesrat*. This is the model that has been chosen – one of the last big breakthroughs in the negotiations. The new second chamber is called the National Council of Provinces (NCOP). It represents the provinces 'to 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)). Its members comprise a single, 10-person delegation from each of the nine provinces. The delegation is headed by the premier, and consists of three other 'special delegates', who are selected by the legislature and, it appears, rotate according to the issues under discussion. There are six other 'permanent delegates', also selected by the legislature, under nationally determined rules to 'ensure the participation of minority parties ... in a manner consistent with democracy' (s

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The powers of the NCOP are significant, though varying according to the type of legislation. On ordinary legislation, not affecting the provinces, it may support, amend or reject bills passed by the Assembly. In such cases, members of NCOP vote as individuals. The National Assembly could [illegible] provinces (s 76(4)), the NCOP's powers are much greater. In this area, the NCOP may also initiate legislation. If the two houses cannot agree, then a mediation committee is established (made up of nine members of the Assembly, and one representative of each provincial delegation – s 76(1)). If the mediation committee cannot agree (its decision requires the support of five of the nine representatives from each house), the Bill can still be passed by the National Assembly, but it requires a two-thirds vote (s 76(1)(d)). The mediation [illegible]

The NCOP is also the vehicle through which provinces participate in constitutional amendment. Proposed amendments to section 1, which declares South Africa 'one, sovereign, democratic state', or to the amending procedure itself, must be passed by at least 75 per cent of the members of the National Assembly, and 6 of the nine provinces (s 74(1)). Chapter 3, which sets out the principles of cooperative government, can be [illegible] considerable protection against amendments affecting them negatively. This protection, however, is not as strong as in Germany (where a 79 requires approval of two-thirds of the members of the *Bundestag*, and two-thirds of the votes of the *Bundesrat* to amend the Basic Law; and where amendments 'affecting the division of the Federation into *Länder*, or their participation in the legislative process' are

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The NCOP does appear to give the provinces collectively considerable influence on federal legislation, especially in the many areas of concurrent jurisdiction. While not as powerful as the German *Bundesrat*, it injects a large measure of intrastate federalism into the South African system. But, as the Constitutional Court pointed out, how effective it will be in this role is dependent on too many other factors to make a definitive judgement.[47] As a new player in South Africa's institutional structure, it will take time for the role of the NCOP to become clear.

The Constitutional Court

What role the Constitutional Court will play in interpreting the federalist aspects of the new constitution remains unclear.

As we have seen, chapter 3 on cooperative government seeks to minimise the role of the court, relying instead on political and bureaucratic mechanisms to manage the intergovernmental relationship. On the other hand, the constitution grants the Constitutional Court unlimited powers to determine whether a matter is a constitutional issue or not, and 'to decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state' (s 167(3)a, (4)(a)). Whether in its two

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Conclusion

The emerging South African federalism is much closer to the shared than the divided model. It is a relatively centralised federal system, in which, subject to comparatively few constraints – such as the principle of subsidiarity – the central government has broad-ranging powers to legislate, and to override provinces, in the name of the national interest. This is tempered by the representation of the provinces in the national sphere, through the NCOP. The emphasis, both in the division of powers and the fiscal arrangements, is strongly on shared, concurrent governance, a long way from the Canadian model.

Thus, in terms of policy effectiveness, the new constitution may well have struck the right balance for South Africa. Provinces, especially if they develop the [illegible] to its own needs, set its own priorities, and get on with its own job. In this, as in other areas of the new constitution, 'cooperative governance' places an enormous premium on the processes of consultation and consensus building, which may in turn slow down the process of effective policy-making.

In terms of democracy, the federalist elements are only a small part of the commitment to democracy spelled out in the constitution, with its careful balance between majority rule and protection of the rights of individual citizens and groups. The existence of three effective orders of government will permit greater citizen involvement in public affairs than would be possible in a unitary state,

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but are central to the South African's desire for 'cooperative governance'. The hope, as President Mandela put it on the signing of the constitution,[50] is that the 'preoccupation of elected representatives, at all levels of government, will be how to cooperate in the service of the people, rather than competing for power, which otherwise belongs not to us, but to the people'. The danger is that it will be the other way around. The complexity of the new constitution may be both its greatest strength (ensuring consensus by incorporating all points of view and spelling out the fundamental requirement of on-going consultation), and its greatest weakness (creating a system in which the preoccupation with process precludes action).[51]

because there is no single geographic area where Afrikaners would constitute a clear majority. There will however be a constitutionally mandated Commission for the Protection of the Rights of Cultural, Religious and Linguistic Communities, which may recommend 'cultural or other councils' to serve the many self-defined communities in South Africa (s 185).

The most incendiary and difficult regional/cultural issue in South Africa remains the conflict between the ANC-controlled central government and the IFP controlled KwaZulu-Natal. This is the only area in South Africa in which high levels of political violence continue. The IFP only signed on to the interim

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Constitutional Principle XXXIV (which had been added to the CPs at the last moment to bring the IFP on board.) The court rejected this claim. 'In this context, "self-determination does not embody any notion of political independence or separateness. It clearly relates to what might be done by way of the autonomous exercise of these associational individual rights, in the civil society of one sovereign state.[52]

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What is clear, is that a federalist South Africa will continue to be a work in progress for many years. Despite its detail and complexity, the new constitution is full of uncertainties, contradictions and even silences. What, for example, will be the relationship between provinces and municipal governments, which in South Africa, and unlike Canada, have a constitutional status of their own? How will the tests to determine the legitimacy of federal overrides of provincial legislation evolve? Will the provinces have any real financial autonomy? And how stifling will be the role of the national government with its many powers to supervise provinces in areas such as public finance and the public service?

Despite these uncertainties, the achievement of writing the constitution is itself extraordinary. It profoundly reflects the fundamental democratic values of constitutionalism, rule of law, protection of rights, citizen participation – and federalism. Given the ANC hostility to the idea, few would have predicted this result.

[illegible] communities, the Constitutional Assembly reinvigorated civil society in a way that no other process in recent times has done'. Canadians frustrated by our own constitutional processes can only react with wonder and envy at the way in which South Africans have developed their federal constitution. It is a remarkable blend of principle and pragmatism, politics and idealism. It is impossible to imagine that Canadians would ever accept a constitution as centralised as the South African. But they should be able to learn much from the process. And the ideal of 'cooperative governance' has much to recommend it.

[illegible] emerged as an important part of the mix. Whether or not the term appears in the constitutional document, and whether or not the institutional design meets Wheare's strict definition of federalism, the reality is that South Africa has chosen a multi-level system of government; one which incorporates many elements found in other federal constitutions, such as Germany's, but which also responds, as all federal systems do, to the unique cultural, political, and economic dynamics of its own setting.

ACTIVITY 13 SG p58

Critically discuss the *different approaches* followed by Ackerman J, Langa J, and Mokgoro J in *Makwanyane* (paras 152–172, 215–234, 300–317 respectively), to the principles of constitutionalism and the rule of law in South Africa?

In *S v Makwanyane* the death penalty for murder was declared unconstitutional by the Constitutional Court

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.

155 The constitutional importance of equality is further underscored in section 35(1) which enjoins the courts to promote the values which underlie an open and democratic society based on freedom and equality in interpreting the provisions of Chapter 3.

156 We have moved from a past characterised by much which was arbitrary and unequal in the operation of the law to a present and a future in a constitutional state where state action must be such that it is capable of being analysed and justified rationally. Neither arbitrary action nor laws or rules which are inherently arbitrary or must lead to arbitrary application can, in any real sense, be tested against the precepts or principles of the Constitution.

157 - 163 As to the more general principle that arbitrariness conflicts with the idea of a right to equality and equality.

[166] The conclusion which I reach is that the imposition of the death penalty is inevitably arbitrary and unequal. Whatever the scope of the right to life in section 9 of the Constitution may be, it unquestionably encompasses the right not to be deliberately put to death by the state in a way which is arbitrary and unequal. I would therefore hold that section 277(1)(a) of the Criminal Procedure Act is inconsistent with the section 9 right to life. They render the death penalty a cruel, inhuman and degrading punishment.

[167] It is one which the framers of our Constitution borrowed in part from article 19(2) of the German Basic Law ("Grundgesetz") which provides that - "*In keinem Falle darf ein Grundrecht in seinem Wesensgehalt angetastet werden*" "*In no case may the essence of a basic right be encroached upon*"

[168] However important it undoubtedly is to emphasise the constitutional importance of individual rights, there is a danger that the other leg of the constitutional state compact may not enjoy the recognition it deserves. I refer to the fact that in a constitutional state individuals agree (in principle at least) to abandon their right to self-help in the protection of their rights only because the state, in the constitutional state compact, assumes the obligation to protect these rights.

[172] Article 102 of the German Basic Law declares that capital punishment is abolished. The German Federal Constitutional Court considered the constitutionality of life imprisonment in 1977[19]. The provision in the criminal code which prescribes life imprisonment for murder was challenged on the basis that it conflicted with the protection afforded to human dignity (art 1.1) and personal freedom (art 2.2) in the German Basic Law.

[215] **LANGA J**:

[216] The death sentence, in terms of the provisions of section 277 of the Criminal Procedure Act, No. 51 of 1977, is unconstitutional, violating as it does:

(a) the right to life which is guaranteed to every person by section 9 of the Constitution;

(b) the right to respect for human dignity guaranteed in section 10;

(c) the right not to be subjected to cruel, inhuman and degrading punishment as set out in section 11(2).

[220] When the Constitution was enacted, it signalled a dramatic change in the system of governance from one based on rule by parliament to a constitutional state in which the rights of individuals are guaranteed by the Constitution. It also signalled a new dispensation, as it were, where rule by force would be replaced by democratic principles and a governmental system based on the precepts of equality and freedom.

[222] Implicit in the provisions and tone of the Constitution are **values of a more mature society**, which relies on moral persuasion rather than force; on example rather than coercion. In this new context, then, the role of the State becomes clear.

[224] ***Ubuntu*** The concept is of some relevance to the values we need to uphold. It is a culture which places some emphasis on communality and on the interdependence of the members of a community. It recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be part of.

- humanist disposition towards the world - Compassion, tolerance, fairness.
- ubuntu translates as humanness. Collective unity.
- ubuntu lives on the references to human dignity in the Constitution.
- Forms a bridge between individual western approach and unity approach of ubuntu.

[300] **MOKGORO J:** [301] Now that constitutionalism has become central to the new emerging South African jurisprudence, legislative interpretation will be radically different from what it used to be in the past legal order. In that legal order, due to the sovereignty of parliament, the supremacy of legislation and the absence of judicial review of parliamentary statutes, courts engaged in simple statutory interpretation, giving effect to the clear and unambiguous language of the legislative text - no matter how unjust the legislative provision.

[302] The constitution makes it particularly imperative for courts to develop the entrenched fundamental rights in terms of a cohesive set of values, ideal to an open and democratic society. To this end common values of human rights protection the world over and foreign precedent may be instructive.

[303] While it is important to appreciate that in the matter before us the court had been called upon to decide an issue of constitutionality and not to engage in debate on the desirability of abolition or retention, it is equally important to appreciate that the nature of the court’s role in constitutional interpretation, and the duty placed on courts by Section 35, will of necessity draw them into the realm of making necessary value choices.

[304] The application of the limitation clause embodied in Section 33(1) to any law of general application which competes with a Chapter 3 right is essentially also an exercise in balancing opposing rights. To achieve the required balance will of necessity involve value judgements. This is the nature of constitutional interpretation. Indeed Section 11(2) which is the counterpart of Section 15(1) of the Constitution of Zimbabwe[1], and provides protection against cruel, inhuman or degrading punishment, embodies broad idealistic notions of dignity and humanity.

In order to guard against what Didcott J, in his concurring judgement terms the trap of undue subjectivity, the interpretation clause prescribes that courts seek guidance in international norms and foreign judicial precedent, reflective of the values which underlie an open and democratic society based on freedom and equality.

[305] The described sources of public opinion can hardly be regarded as scientific. Yet even if they were, constitutional adjudication is quite different from the legislative process, because “the court is not a politically responsible institution”[2] to be seized every five years by majoritarian opinion. The values intended to be promoted by Section 35 are not founded on what may well be uninformed or indeed prejudiced public opinion. One of the functions of the court is precisely to ensure that vulnerable minorities are not deprived of their constitutional rights.

[307] In interpreting the Bill of Fundamental Rights and Freedoms, as already mentioned, an all-inclusive value system, or common values in South Africa, can form a basis upon which to develop a South African human rights jurisprudence. It is well accepted that the transitional Constitution is a culmination of a negotiated political settlement. It is a bridge between a history of gross violations of human rights and humanitarian principles, and a future of reconstruction and reconciliation.

308 ***Ubuntu -*** *The concept was applied and explained by the Constitutional Court in this case*

"Generally, ubuntu translates as 'humaneness'. In its most fundamental sense, it translates as 'personhood' and 'morality'... While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity; in its fundamental sense it denotes humanity and morality".

Completing the triad of good faith - *ubuntu* - was defined by *Langa J* in ***S v Makwanyane*** as encompassing the communality, solidarity, interdependence, unconditional respect, dignity, value, acceptance and reciprocal responsibility that binds the greater society.

[309] In American jurisprudence, courts have recognised that the dignity of the individual in American society is the supreme value. Even the most evil offender, it has been held, “remains a human being possessed of a common human dignity” (Furman v Georgia 408 US 238 at 273 (1972)), thereby making the calculated process of the death penalty inconsistent with this basic, fundamental value.

The International Covenant on Civil and Political Rights in its preamble, makes references to “the inherent dignity of all members of the human family” and concludes that “human rights derive from the inherent dignity of the human person”. This, in my view, is not different from what the spirit of ubuntu embraces.

[311] South Africa now has a new constitution however, which creates a constitutional state. This state is in turn founded on the recognition and protection of basic human rights, and although this constitutes a revolutionary change in legal terms, the idea is consistent with the inherited traditional value systems of South Africans in general - traditional values which hardly found the chance to bring South Africa on par with the rest of the world.

[313] Our new Constitution, unlike its dictatorial predecessor, is value-based. Among other things, it guarantees the protection of basic human rights, including the right to life and human dignity.

[317] It is inconsistent with Section 11(2) of the Constitution. In my view, therefore, the death penalty is unconstitutional. Not only does it violate the right not be subjected to cruel, inhuman or degrading treatment or punishment, it also violates the right to life and human dignity.

ACTIVITY 14 SG p60

The National Assembly passes an Amendment to the Constitution (the Constitution Nineteenth Amendment Bill of 2008), which changes the provincial boundaries, including the boundary between Gauteng and Mpumalanga. In terms of this Bill, the Dinokeng Tsa Taemane Local Municipality is to be relocated from Gauteng to Mpumalanga.

The Bill is referred to the National Council of Provinces, which refers the Bill to both the Gauteng and the Mpumalanga Provincial Legislatures.

The Mpumalanga Provincial legislature decides not to hold public hearings on the Bill because "the Bill was initially published and written comments were incorporated". The Portfolio Committee on Local Government of the Gauteng Provincial legislature holds public hearings in which the overwhelming majority of members of the community oppose the envisaged relocation of Dinokeng Tsa Taemane into Mpumalanga as they consider themselves part and parcel of Gauteng.

In agreement with the views of the community, the Portfolio Committee on Local Government of the Gauteng Provincial Legislature adopts a "negotiating mandate", according to which it does not support the Bill.

However, after this, the Portfolio Committee changes its mind and without consulting the community again, the representative of this committee votes in support of the Bill in the NCOP. The Bill is then passed by Parliament, and assented to and signed by the President and thus becomes an Act (the Constitution Nineteenth Amendment Act of 2009).

The Dinokeng Demarcation Forum, a community organisation in Dinokeng Tsa Taemane Local Municipality, challenges the constitutionality of this amendment on the grounds that its members were not properly consulted when this legislation was passed.

The members of the DDF and asks you for legal advice in this regard. Advise them with reference to the provisions of the Constitution and case law?

ACTIVITY 15 SG p63

Critically discuss the approach of the judiciary to the right to vote in South Africa.

The right to vote in a democratic society

In democracies throughout the world, the supreme power is anticipated to be vested in the people -exercised directly or indirectly through a system of representation. Accordingly the underlying principle in a representative democracy is that the voters elect representative to national and provincial spheres of government.

The constitutional entrenchment of this right

Section 19(3)(a) of the Constitution enshrines general suffrage for all eligible adult citizens of South African citizen. It entitles those thus enfranchised with the right cast a secret vote in elections for any legislative body established in terms of the Constitution. This section has often been the subject of much constitutional litigation in the run-up to elections.

Scrutiny by the Constitutional Court:

The right to vote of those incarcerated by the state:

In ***August*** *v Electoral Commission* (1999 (4) BCLR 363 (CC) paras 1–6, 8–11 & 14–33). 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 herein.

- 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.

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). 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.

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 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.
>
> **19 Political rights**
> (3) Every adult citizen has the right-
> (a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret;

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) read with section 1(d) of the Constitution, and there was no justifiable limitation of this right in accordance with section 36 of the Constitution.

Scrutiny by the Constitutional Court: - The right to vote of South African expats abroad:

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.

Concluding comments:

Clearly the right to vote *"by its very nature imposes positive obligations upon the legislature and the executive"* in a constitutional democracy.

The imposition of an affirmative obligation on the state i.t.o section 19(3)(a) read with section 1(d) of the Constitution places an obligation on organs of state to take reasonable steps to ensure that eligible voters are registered and have the opportunity to vote.

O' Regan J's position in the *Richter* judgment (para 53), that the *right to vote had a symbolic and democratic value and that those who were registered should not be limited by unconstitutional and invalid limitations in the Electoral Act* deems to be supported as touchstone for the electoral rights of the citizens of any democratic state.

ACTIVITY 16 SG p64

Study the prescribed article by *Carpenter G "Public Opinion, the Judiciary and Legitimacy" 1996 SAPR/L 110. Also study the judgments of Chaskalson P, Kentridge AJ and Didcott J in S v Makwanyane 1995 (3) SA 391 in respect of* **the role of public opinion in judicial decision making and make a critical assessment of these judgments.**

Carpenter G "Public Opinion, the Judiciary and Legitimacy"

Carpenter argued that effective government is largely dependent on a legal system that is respected by those it is intended to serve. Concurrently the

Carpenter argued that constitutional legitimacy required more than just formal legal validity. Legitimacy depended on the existence of a constitutional order, which would secure formal validity and moral authority. Reflecting that moral authority was lacking in the old order - she insisted that a Constitutional order had to meet the objective and qualifying principles of constitutionalism which included democracy, a constitutional state and the "rule of law". Clearly - she argued - legitimacy of the state, has a prominent subjective component. It is countenanced and informed by public perceptions which are the source of public opinion.

Carpenter postulated that even judges were not in a position to effectively determine public perception and/or opinion regarding contentious issues such as the question regarding the legitimacy or not of the 'death penalty'. Consequently - the Constitutional Court was left to decide on the issue and set the scene for the practical application of the precepts of human dignity, equality and fundamental rights, enshrined in the Constitution.

She warned that even when interpreting the common law or legislation, it would be dangerous to utilise the extrajudicial values of the community to fill the gaps in contemplation. She stated that only extrajudicial values not expressly mentioned in the Constitution may be considered as advisory dictum, but that the judiciary cannot refer to a complete value system outside the text of the Constitution.

If extrajudicial values and values outside the text of the Constitution are utilised, even contextually, these should be treated with caution. She argued that the public opinion is untested and unreliable - and - at times even too irrational - to serve as a basis for a legal decision. Whilst the Parliament may be swayed by public opinion, it is not the duty of the courts to countenance public opinion - she held.

The Constitutional Court 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.

S v Makwanyane **1995**

In this matter two accused were convicted in the WWR Local Division of the Supreme Court on 4 counts of murder, one count of attempted murder and 1 count of robbery with aggravating circumstances. They were sentenced to death on each of the counts of murder and to long terms of imprisonment on the other counts. The Appellate Division dismissed their appeals.

CHASKALSON P:

- **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*.

- **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.

KENTRIDGE AJ:

- **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:

- **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*’’.

Conclusion:

The Constitution is clear on the matter. Section 165 determines that the judicial authority of the Republic is vested in the courts - and confirms that our courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.

These are the precepts an independent judiciary should honour - and - whilst cognizant of the mores of society and precepts of policy, the judiciary cannot countenance public opinion beyond its mere persuasive value. The premise of serving objective justice - dictates the alternative.

STUDY UNIT 3

CONSTITUTIONAL INTERPRETATION & THE ROLE OF COURTS SG 68 - 88

ACTIVITY 1 SG p73

Distinguish between constitutional interpretation and statutory interpretation and explain whether there is a difference between constitutional interpretation and Bill of Rights interpretation?

Interpretation of Statutes

Section 39 of the Constitution peremptory determines that, 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.

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*.

Accordingly - the most important principle of statutory interpretation is to ascertain and apply the purpose of the legislation in the light of the Bill of Rights.

Constitutional interpretation

Kentridge held 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.

- *Currie and De Waal* (2005:45) argue that constitutional interpretation involves a process of determining the meaning of a constitutional provision.
- 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.
- 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

Constitutional interpretation - and - Interpretation of the Bill of Rights

Despite the interrelationship constitutional interpretation extends beyond interpretation of the Bill of Rights

- In *S v Mhlungu* 1995 Kentridge AJ held that a purposive construction is as appropriate for interpretation of the Bill of Rights as it is in other parts of the Constitution. In this matter the Court decided that there are no absolute, definite & final answers in constitutional interpretation.
- I.r.o Constitutional interpretation Kentridge AJ in *S v Mhlungu* 1995 held that this 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.
- That - Constitutional values must be actively promoted in the interpretation of the BOR.
- That the separation of powers must be respected when the BOR is interpreted - and that - the Constitution must be used as an instrument for social & economic empowerment.

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.

ACTIVITY 2 SG p76

Critically discuss the different theories of constitutional interpretation.

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.

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).

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

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*).

ACTIVITY 3 SG p79

With reference to the 1996 Constitution of the Republic of South Africa, identify the different provisions relevant to constitutional interpretation and the interpretation of the Bill of Rights.

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.

ACTIVITY 4 SG p80

Explain the role played by the judiciary in constitutional interpretation. Refer to the relevant provisions of the 1996 Constitution of the Republic of South Africa.

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.

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.

ACTIVITY 5 SG p84

With reference to case law discuss the role played by the following methods of constitutional interpretation under the 1996 Constitution:

- **textual**
- **historical**
- **comparative**
- **contextual**

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).

3.5.3.4 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 October 1999) (paras 43–44).

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.*

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

ACTIVITY 1 SG p95

1.1 What are the similarities between the traditional system of justice and the Chapter 9 institutions in the enforcement of human rights?

Chapter 9 institutions are referred to by *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

On the other hand 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.

Chapter 9 of the Constitution establishes various institutions to support constitutional democracy. The general purpose of these institutions is to investigate complaints against the violations of human rights, and make recommendations on the steps to be taken against the alleged violations.

These institutions play a mediatory role, in contrast to the binding judicial enforcement of human rights through the courts.

The South African Human Rights Commission (SAHRC) and the Independent Electoral Commission (IEC) are the two institutions that are best placed to investigate the alleged violation of human rights during the run-up to the general elections in SA. See the powers and duties of these institutions in section 181(b) and 181(f) respectively.

It is worth recalling that the SAHRC has a broader mandate than the IEC. It is empowered to investigate all forms of human rights abuses, including abuse of the rights in the Bill of Rights such as equality, human dignity, freedom and security, life, and other related grounds of abuse and discrimination. See for example, *Bhe v Khayelitsha Magistrate* where the SAHRC was an *amicus*.

The IEC has a specific mandate to give effect to the right to vote and manage the elections in a proper and effective way to ensure that they are free and fair. The mandate of the IEC requires it to increase public confidence in the democratic processes, encourage people to take part in the electoral process, promote public awareness of electoral matters and regulate the conduct of political parties during the election process. The IEC has been taken to Court on a number of occasions in order to ensure the promotion of the right to vote – see *August* and *AParty* judgments. The IEC's functions and powers are set out in the Electoral Act 73 of 1998.

1.2 What are the benefits associated with the enforcement of human rights through these systems?

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

1.3 *South Africa held its fourth general election on 22 April 2009, in terms of the five-year cycle adopted. The events preceding the holding of the elections were affected by high levels of violence, which included fights between the followers or members of the African National Congress (ruling party) and the Inkatha Freedom Party in KwaZulu-Natal. Zimbabwe also held its elections in March 2008, and were also affected by threats to and the intimidation of opposition parties, resulting in opposition leaders being harassed and arrested by police and charged with treason. Women and children were severely affected by the level of violence, to the extent where some were brutally raped and others displaced.*

With reference to the above scenarios, identify at least two institutions that could play a fundamental role in the investigation of the causes of the violence and the impact it has on the promotion of human rights?

Inter alia the following institutions will play a fundamental role…

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*.

Clearly the ***Commission for Gender Equality***, [**Section 181(d)**] 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*.

- and the -

Electoral Commission (181(f)) will play an important roll to address the malaise.

ACTIVITY 2 SG p97

Explain in detail the importance of the independence of the judiciary in a constitutional democracy?

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).

Section 165 entrenches the independence of the judiciary, and requires it to apply the law without fear or favour. The independence of the judiciary falls within the framework of the doctrine of separation of powers, which requires the non-interference of any branch of government with other branches. The doctrine of separation of powers was further endorsed in *TAC* at para 98, in which it was stated that the doctrine was established by the Constitution itself and, therefore, the argument that the court was interfering in the functioning of the other branches was without substance.

Section 41 further reinforces the non-interference principle by affirming that all spheres of government must respect the constitutional status, institutions, and powers of other spheres. While section 165 prohibits interference with the functioning of the courts, it further requires other state organs to protect the courts to ensure their independence. See *Makwanyane* (paras 87–88) on the essence of judicial independence. The judiciary must be perceived as enjoying essential conditions of independence, which must be contextualised within the social and political conditions of the country.

The essence of judicial independence is affected by political statements made by high-profile people, who have the potential to undermine the integrity of the courts. The Nicholson judgment in the long and protracted legal wrangle between Mr Zuma and the NPA in Pietermaritzburg attracted numerous comments, which have the potential to show the courts as being biased against high-profile people. Bias could potentially undermine public confidence in the courts. The court in this matter validated theories of conspiracy against Mr Zuma, which were never tested and proved. The judgment in this case was remedied by the SCA as Judge Harms established that Nicholson's reasoning had been seriously flawed and compromised judicial independence. Harms held that: ''he red-carded everybody'' (para 13).

ACTIVITY 3 SG p97

3.1 Discuss the approach adopted by the Court in *Harksen v Lane* 1997 (11) BCLR(CC) 1489 **in the interpretation of the right to equality in order to assess the legitimacy of the discrimination.**

Harksen v. Lane, it was found that differentiation will amount to discrimination if it is based on one of the specified grounds in section 9 of the Constitution, or if it is objectively based on a ground which has the `potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.'

The issues of whether discrimination is unfair (and therefore unconstitutional), was addressed in this case.

Unfairness is presumed if the discrimination is based on a listed or specified ground (i.e. race or gender). This question is clearly at the heart of the equality enquiry.

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.

Vesting of assets in trustee

- In ***Harksen v Lane*** *it was contended that Section 21* is ***invalid for violating the solvent spouse's constitutional rights.***

  Section 21(1): *The additional effect of a sequestration order* (including provisional order) *is to vest the separate property of the spouse of the insolvent in the Master and subsequently the trustee*, as if it were property of the insolvent estate - and - to empower the Master or trustee to deal with the property accordingly.

- The majority of the ***Constitutional Court*** *("CC")* **rejected this argument** as:

- It ***doesn't expropriate*** solvent spouse's property since it ***doesn't contemplate permanent transfer*** to the Master and trustee;
- It differentiates between the solvent spouse and other persons, but this **differentiation *does not infringe the right to equality* and is *legitimate as it has a rational connection*;** and
- It does *not* amount to *unfair discrimination*.

See *Harksen v Lane* (para 51). The differentiation approach developed by the Court in the interpretation of equality focuses on ''disadvantage and difference''. This approach takes into account the socio-political and cultural conditions of inequalities and discrimination that South Africa inherited from its past.

ACTIVITY 3 SG p97

3.2 With reference to the decision by Sachs J in *PE Municipality v Various Occupiers* *2004 (12)* BCLR 1268 CC, discuss the concept: ''we are not islands unto ourselves''.

In response to a petition by residents of a certain area, the Port Elizabeth Municipality (Applicant) sought an eviction order against a number of persons living in shacks on privately owned land. Most of the occupiers had been there for periods ranging from two to eight years after eviction from other land. They were willing to move if given suitable alternative land. Applicant proposed that they move to Walmer Township.

The occupiers rejected this, saying that Walmer was crime-ridden and unsuitable. Furthermore, they also feared further eviction. Applicant contended that it had embarked on a comprehensive housing development programme and that making land available to the occupiers in question would treat them preferentially, allowing them to "jump the queue".

The South Eastern Cape Local Division of the High Court had held that since the occupiers were in unlawful occupation of the land, and it was in the public interest to terminate their occupation, they should be evicted.

On appeal against this order to the Supreme Court of Appeal, the latter set aside the order of eviction.

Applicant then approached the Constitutional Court for leave to appeal to it, seeking a ruling that it was not constitutionally obliged to find alternative accommodation or land when seeking an order evicting unlawful occupiers.

Section 25 of the Constitution provides that "no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property." Section 26(3) of the Constitution provides that "no one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances."

In a unanimous judgment (per Sachs J) the Constitutional Court dismissed the application for leave to appeal. Applicant had taken no action against the occupiers for many years. It had then suddenly decided to act to secure their eviction. It appeared that the land in question was not needed for immediate productive use by its owners. Applicant had taken only cursory steps to determine the exact circumstances of the individual occupiers. Although it was not under a constitutional duty in all cases to provide alternative accommodation or land, its failure to take all reasonable steps to do so would generally be an important consideration in deciding what was just and equitable.

In the circumstances *in casu*, it was not just and equitable for the eviction order to be granted.

ACTIVITY 4 SG p100

Discuss the intersection of socio-economic rights with civil and political rights and the importance of the ‘‘reasonableness principle’’ in the promotion of these rights?

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.

The framework for the intersection of socio-economic rights and civil and political rights was laid in the *Certification* judgment at para 77 when the arguments against the inclusion of the former rights in the Constitution were rejected.

The intersection of these rights is clearly manifested in the Constitution (see *Khosa* at 573 D–E). The important ‘‘reasonableness principle’’ developed in *Grootboom*, *TAC* and *Khosa* is necessary to guide and facilitate the promotion of equality and thereby contribute directly to the protection of our democracy. It requires a proper balancing of all fundamental rights for the future implementation of these rights.