CONSTITUTIONAL LAW

Only study guide for CSL2601

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INTRODUCTION

Welcome to the Constitutional Law module. By its nature, this module is rather challenging, because it involves the institutional organisation of state power and the basic principles relating to the form of government that we have in place to look after the day-to-day running of the country.

To pass this module, all that is required is that you approach your studies with a great degree of commitment and hard work. Studying is an active process, so you need to read in order to understand, write so as to summarise, and, of course, learn your summaries. You should make full use of the 120 notional hours it will take to actively work through the module. It is our intention to provide you with the necessary support and as much guidance as possible to make your studies meaningful, relevant and enjoyable.

In this module, we shall focus on the following components:

- gaining sufficient knowledge, skills, aptitudes and competencies to analyse and critically evaluate legal material (the Constitution, legislation, case law and academic opinion) directly pertaining to constitutional law (in particular, the institutional framework within which state power is organised and exercised)
- understanding the relationship between the different institutions that exercise state power (i.e. the rules relating to the distribution and exercise of state authority), the interrelationship between state institutions and other organisations, and the limitations that are imposed on the exercise of this power
- the ability to formulate legal arguments and to apply the knowledge acquired to practical problems that may arise in a constitutional state and the state structures created by the Constitution.

The outcomes of this module are to:

- understand the fundamental concepts relevant to constitutional law, including: the rule of law, the separation of powers, constitutionalism, democracy, judicial review, and judicial independence
- discuss in whom the power to govern is vested and how such power is acquired
- classify and compare the functions, rights and obligations of the bearers of state power and the mechanisms that are in place to ensure that the bearers of state power do not abuse their powers
- understand the limitations that exist with regard to the exercise of constitutional powers and the performance of key functions
- understand the concept of cooperative (multilevel) government and the rules applicable to conflicts of law

PURPOSE OF THIS STUDY GUIDE

This study guide not only introduces your prescribed textbook, but also guides you through the textbook. You must, therefore, keep the study guide handy at all
times when working through the prescribed textbook. The study guide serves as a guide to the prescribed study material and indicates to you which chapters and/or sections of the textbook you MUST STUDY for examination purposes.

PREScribed, RECOMMENDED AND OTHER STUDY MATERIAL

(a) The prescribed textbook

In March 2014, a new textbook on constitutional law (P de Vos & W Freedman (eds), with D Brand, C Gevers, K Govender, P Lenaghan, D Mailula, N Ntlama, S Sibanda & L Stone (2014) *South African constitutional law in context* Cape Town: Oxford University Press SA) was published. *South African constitutional law in context* contains a clear and comprehensive introduction to the study of constitutional law. Contextualised through the framework of South Africa's historical, political, social and economic environment, and approached through the paradigm of the separation of powers, the textbook enables students to determine the meaning, theoretical basis, operation and practical effects of the South African Constitution and to understand its importance and potential. What sets it apart from other textbooks on the subject is its critical and enquiring approach, providing a depth and diversity of perspectives and engaging students in an interactive, topical and stimulating manner.

You will need the following combination of study material to effectively study this module:

(i) **You MUST purchase and study the prescribed textbook.** The price is approximately R500. *South African constitutional law in context* Cape Town: Oxford University Press SA. (P de Vos & W Freedman (eds), with D Brand, C Gevers, K Govender, P Lenaghan, D Mailula, N Ntlama, S Sibanda & L Stone (2014 (reprinted in 2015))

(ii) **Download from the internet or buy:** *The Constitution of the Republic of South Africa, 1996*

(iii) **The study guide and Tutorial Letter 101, and any other tutorial letters**

As indicated this study guide guides you through the textbook. Tutorial Letter 101, however, contains important information about the scheme of work, resources, assessment criteria and assignments, as well as instructions on the preparation and submission of the assignments.

(b) **Prescribed case law**

Many cases are referred to in this study guide and in the textbook. Make sure that you know and understand the facts of each case, the law referred to, and the judgment. It is always helpful to look up cases in the law reports and to read them, but, for examination purposes, you only need to know the cases to the extent that they are discussed in the textbook. All cases discussed are available on [www.saflii.org.za](http://www.saflii.org.za).

You will find summaries of these cases at the end of this study guide in the appendices.
INTRODUCTION

(c) Recommended academic resources
In addition to studying this study guide, the textbook, the Constitution and the cases, recommended sources such as journal articles are referred to in this study guide. Study the journal articles as they appear at the end of the study guide. We have also referred you to two important reports by the Public Protector.

(d) myUnisa
You need to log on at least once a week and take note of any guidance the lecturer places on the site. Refer to Tutorial Letter 101 for more information on how to access the myUnisa student site.

CONTENTS OF THE STUDY GUIDE
This study guide contains an indication of the prescribed chapters and sections in the prescribed textbook; the prescribed sections of the Constitution; and the outcomes for each study unit. In addition, it includes activities and self-assessment questions for each study unit.

THIS STUDY GUIDE ALSO CONTAINS SOME SUBJECT MATTER FOR THIS MODULE THAT MUST BE STUDIED FOR EXAMINATION PURPOSES. FOR INSTANCE, THE WHOLE OF STUDY UNIT 1 IS CONTAINED IN THIS STUDY GUIDE. OTHER STUDY UNITS REQUIRE YOU TO REFER TO A NUMBER OF SOURCES RANGING FROM THE TEXTBOOK TO LEGISLATION.

HOW TO USE THIS STUDY GUIDE
This study guide serves as a guide to the prescribed study material. It guides you through the prescribed chapters, the prescribed sections in some chapters, and the provisions of the Constitution. The study guide, as you will see, divides the prescribed chapters of the textbook into manageable study units.

THIS STUDY GUIDE SHOULD, THEREFORE, BE USED AS A STARTING POINT. You should have it beside you at all times as you work through the prescribed study material.

LAYOUT OF THE STUDY UNITS
The prescribed study material is organised and divided into manageable study units. Each study unit is based on a chapter of the prescribed textbook, except for study unit 1, which is not entirely part of the textbook. At the beginning of each study unit, the outcomes of that particular study unit are set out and the prescribed material for each study unit (relevant chapter of the textbook, sections of the Constitution and case law) is indicated.

Once you have studied all the concepts and principles in a particular study unit, you will be required to apply them to actual constitutional law problems encountered in everyday life that are set out in the activity questions contained in each study unit. It is essential that you complete these activities in order to understand the principles explained, because the activities require you to apply the principles to the
problem. Not only will these activities enable you to concentrate on those aspects of the work that are really important, but they will also give you an indication of the type of questions you can expect in the examination.

You are encouraged to complete all the activities and then only contact the lecturers for guidance once you have attempted to answer the questions on your own. Feedback will be provided prior to the examination. However, it is very important that you answer each of the activity questions.

**ICONES USE IN THIS STUDY GUIDE**

<table>
<thead>
<tr>
<th>Outcomes</th>
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<tbody>
<tr>
<td>Discussion</td>
</tr>
<tr>
<td>Read</td>
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<td>Study</td>
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The study units are as follows:

(a) **Study unit 1**: Sources and history of South African constitutional law and classification of constitutions
(b) **Study unit 2**: Basic concepts of constitutional law and the separation of powers
(c) **Study unit 3**: Separation of powers and the national legislature
(d) **Study unit 4**: Separation of powers and the national legislature: functions of Parliament
(e) **Study unit 5**: Separation of powers and the national executive authority
(f) **Study unit 6**: Separation of powers and judicial authority
(g) **Study unit 7**: Institutions supporting constitutional democracy
(h) **Study unit 8**: Cooperative governance/multilevel government in South Africa: the division of powers between different spheres of government

Just a reminder: **THE WHOLE OF STUDY UNIT 1 IS CONTAINED IN THIS STUDY GUIDE.**
Constitutionalism
Certification of the Constitution, 1996
Entrenched; supreme Constitution

Chapter 9 Institutions
New National Party
Liberal Party v IEC
IEC v Langeberg Municipality
ACDP v IEC

SEPARATION OF POWERS
De Lange v Smuts case
Heath case

Democracy
Richter case
August case

Rule of law

NATIONAL SPHERE
Executive Council of the W Cape case
Mazibuko v City of JHB
denational Treasury v OUTA
Fourie case
Pillay case

Legislature
Pass, amend, repeal laws
Initiate/prepare legislation
Hold executive accountable
Orani-Ambrosini case
National Assembly (400 members, elected by voters)
Murenik “Bridge”
De Lille case

Executive
Formulate policy
Implementation of law
Executive Council of the Western Cape case
Masethla case
President
Deputy President
Cabinet
Appointment and removal of President, etc.
(s 86, 89, 102)

Judiciary
Resolves disputes concerning interpretation and application of the Constitution (for CSL purposes)
SARFU case
Makwanyane; Hugo cases
Constitutional Court
Supreme Court of Appeal

PROVINCIAL SPHERE
Legislature
9 provincial legislatures
Murray and Nijzink
Executive
Premier
Premier of the Western Cape
Minister of Police v Premier of the WC
Judiciary
High Courts

LOCAL SPHERE
Fedsure Life Assurance v JHB Metro Council
Joseph v City of JHB

Magistrates’ Court
(no constitutional jurisdiction)

Robertson; Merolong: City of JHB Metro v Gauteng Development Tribunal
Premier of the Western Cape v Overberg District Municipality

CO-OPERATIVE/ MULTILEVEL GOVERNMENT
Rules for resolving conflicts:
Sch 4 [concurrent competencies]
• national and provincial sphere can pass legislation, validly
If conflict: s 146 invoked and national legislation prevails
Sch 5 [exclusive competencies]
• provincial sphere passes this legislation
If conflict: s 147 invoked, which refers to s 44(2). National legislation prevails
STUDY UNIT 1

Sources and history of South African constitutional law and classification of constitutions

OUTCOMES OF THE STUDY UNIT

After you have studied the material in chapter 1 of the prescribed textbook, you should, with reference to the relevant provisions of the Constitution and case law, be able to do the following:

• define, classify and examine the sources of law
• know where to find the sources of law and how to apply these sources to a concrete situation
• discuss the history of the adoption of the Constitution of the Republic of South Africa, 1996
• discuss the First Certification judgment
• discuss the constitutional principles upon which the Constitution is premised
• explain in what respects the 1993 and 1996 Constitutions represent a radical break with the previous dispensation
• explain the different types of constitutions

PRESCRIBED CHAPTER OF THE TEXTBOOK

• chapter 1 of the prescribed textbook

PRESCRIBED SECTIONS OF THE CONSTITUTION

• sections 1, 2 and 74 of the 1996 Constitution

PRESCRIBED CASES

• Ex Parte Chairperson of the Constitutional Assembly: In re the Certification of the Constitution of the Republic of South Africa, 1996 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) par 45 (pp 21–22 of the textbook and para 151–159 at the end of this study guide)

1.1 OVERVIEW

In this study unit, you will learn about the sources of constitutional law, the historical development of the South African Constitution, and the classification of constitutions. Studying this study unit (and, in particular, sections 1.1 and 1.3–1.4 of the textbook) will make it easier for you to grasp and understand subsequent study units, as well as the chapters in the textbook.
1.2 SOURCES OF CONSTITUTIONAL LAW

"Sources of law" refers to the places where you can find legal rules governing a particular branch of law. In this module, we focus on the rules, principles and values that govern constitutional law. In doing so, one must distinguish between authoritative sources and persuasive sources.

The term “authoritative source” is used to denote the weight or force a particular source of law has. It further denotes “command”. Thus, when one has recourse to these sources, a court will be bound by such sources. Persuasive sources, on the other hand, have no binding or commanding force like authoritative sources. The relevance of these sources lies in the fact that they tend to influence certain matters.

1.2.1 Authoritative sources of South Africa’s constitutional law

(a) **The Constitution**: Section 2 of the Constitution provides that the Constitution is the supreme law of the Republic. “The Constitution” refers to an entire body of written and unwritten rules governing the exercise and distribution of state authority on the one hand and, on the other, to governing relationships between organs of state inter se, and also between organs of state and legal subjects. The Constitution does not prescribe all the rules regulating the relationships mentioned above, but only provides a framework.

(b) **Legislation**: Legislation is written law enacted by an elected body authorised to do so by the Constitution or other legislation. Since the Constitution provides the framework, legislation has to be passed to give effect to the provisions in the Constitution. Some of the most important national laws include the South African Citizenship Act 88 of 1995, the Electoral Act 73 of 1998 as amended, and the Local Government: Municipal Structures Act 117 of 1998. To find legislation, you can consult government gazettes published and printed by the Government Printer; you can buy a loose-leaf legislation book and an annual collection of the statutes, which are published by Butterworths; or you can consult the following websites: [http://www.polity.org.za/legislation](http://www.polity.org.za/legislation) and [http://www.acts.co.za](http://www.acts.co.za).

(c) **Common law**: The common law is the unwritten law of South Africa, in the sense that the common law is not contained in written legislation. In South Africa, “common law” refers to the writings on law by 17th and 18th-century Roman-Dutch jurists. English common law is also recognised in South Africa. In terms of section 39(2) of the Constitution, the courts and other tribunals are required to develop the common law to bring it in line with constitutional precepts.

(d) **Customary law**: Customary law is that system of law which is generally derived from custom. Some authors indicate that, for a custom to have the force of law, it must meet certain requirements. These include the fact that the custom must be reasonable; the custom must have existed for a long time; the custom must be generally recognised and observed by the community; and the contents of the custom, in other words, what the custom involves, must be definite and clear. Although this is debatable, we do not wish to enter into that debate. The fact remains that customary law is a source of law equivalent to the common law. In terms of section 211(3) of the Constitution, the courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law. This goes to show that African indigenous law is recognised and placed on the same footing as common law. This recognition of customary law has been supported by various legislative developments.
These include the Recognition of Customary Marriages Act 120 of 1998, as amended by the Judicial Matters Second Amendment Act 42 of 2001, which recognises customary marriages; the Traditional Leadership and Governance Framework Act 41 of 2003, which recognises the role and institution of traditional leadership in the administration of justice; and the pending Traditional Courts Bill [B 15-2008] published in Government Gazette 30902 of 2008-03-27, which provides for the structure and functioning of traditional courts.

(e) **Case law:** This is an example of the practical application of constitutional principles by our courts. Our courts are subject to a mandate to develop the law. In the past, case law was a limited source of constitutional law because our courts did not have full testing/reviewing powers. Currently, courts have full testing/reviewing powers, thereby making case law an authoritative source of constitutional law. To find cases, you can access the Constitutional Court website (www.constitutionalcourt.org.za); consult the *South African Law Reports* (SALR), which are published monthly by Juta; or refer to the *Butterworths Constitutional Law Reports* (BCLR) or the Southern African Legal Information Institute’s (SAFLII) website (http://www.saflii.org/).

(f) **International law:** In terms of section 39(1) of the Constitution, a court must consider international law when determining constitutional issues. Recourse to international law, which has a wealth of conventions and practices designed to protect and promote human rights, is indispensable to the development of South African constitutional jurisprudence, particularly in the analysis of the Bill of Rights.

### 1.2.2 Persuasive sources of South Africa’s constitutional law

As stated above, persuasive sources are not binding but may influence decisions. These sources of South Africa’s constitutional law include the following:

(a) **Foreign law:** Section 39(1)(c) of the Constitution provides that the courts may consider foreign law. This shows that the consideration of such law is within the court’s discretionary power.

(b) **Academic writings:** These are writings in books and journals. The courts, in particular the Constitutional Court, often refer to academic opinions expressed in books and in articles in journals. For instance, you may consult the *South African Journal on Human Rights* (SAJHR), which is published by Juta; and *Southern African Public Law* (SAPR/PL), which is published by the Centre for Public Law Studies, Unisa.

(c) **Policy documents:** These are documents issued by organs of state involved in the legislation-making process. They include Green Papers, which are consultative documents. The White Paper, which is a final document, is the blueprint for government policy. Policy documents can be found on the following website: [http://www.polity.org.za](http://www.polity.org.za).

(d) **Reports by state institutions supporting constitutional democracy** (Chapter 9 institutions such as the Human Rights Commission, the Public Protector, etc.): The reports of these institutions can be found on [http://www.polity.org.za](http://www.polity.org.za).

Cumulatively, these authoritative and persuasive sources of constitutional law have served to establish how the Constitution is to be interpreted and applied. To a large extent, the way that the Constitution is interpreted is dependent on the classification of the Constitution. For example, the Constitutional Court may interpret a case with reference to the traditional concept of ubuntu, thus indicating that the Constitution is a product of South Africa’s history. The classification of constitutions is thus discussed in the next section.
1.3 CLASSIFICATION OF CONSTITUTIONS
Constitutions are often classified into different types, namely
- flexible constitutions and inflexible constitutions
- supreme constitutions and constitutions that are not supreme
- written constitutions and unwritten constitutions
- autochthonous constitutions (indigenous or home-grown) and allochthonous constitutions (borrowed from other jurisdictions)

The types of constitutions will be briefly elaborated on and compared. We start off by examining these in the order set out above.

1.3.1 Flexible constitutions and inflexible constitutions

In *Ex Parte Chairperson of the Constitutional Assembly: In re the Certification of the Constitution of the Republic of South Africa, 1996*, the Constitutional Court had to rule on the flexibility of the Constitution, and this was dealt with in paragraphs 151 to 159 of the judgment.

The Constitutional Court found that the provisions of the constitutional text regarding constitutional amendment did not comply with the Constitutional Principles. The Court found that section 74 of the new text provided for "special majorities", but not for "special procedures". It therefore did not comply with Constitutional Principle XV. It also found that, since the Bill of Rights was not given more stringent protection than the rest of the Constitution, Constitutional Principle II was not complied with. The amended section 74 in the final text therefore provides for a range of additional safeguards. This argument leads us to state that the 1996 Constitution is an example of an inflexible constitution. Table 1.1 summarises examples of flexible and inflexible constitutions.

### Table 1.1: Summary of examples of flexible and inflexible constitutions

<table>
<thead>
<tr>
<th>FLEXIBLE CONSTITUTIONS</th>
<th>INFLEXIBLE CONSTITUTIONS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Flexible constitutions require no special procedures or majorities for amendment and can be amended in the same manner as any other legislation.</td>
<td>Inflexible constitutions require special amendment procedures and amendment majorities (contained in s 74 of the Constitution) before they can be amended.</td>
</tr>
<tr>
<td>- E.g. the South African Constitution 32 of 1961 (the Republican Constitution) contained a few entrenched provisions which required a certain procedure for amendment; however, it could be amended quiet easily.</td>
<td>- E.g. the Constitution of 1961 (the Republican Constitution) was an example of a flexible constitution. Although it contained a few entrenched provisions which required a certain procedure for amendment, it could be amended quite easily.</td>
</tr>
<tr>
<td>- E.g. the Constitution of 1983 (the “Tricameral” Constitution) was less flexible in that it contained more entrenched clauses, but it could still be classified as a flexible constitution</td>
<td>- The 1996 Constitution is an example of an inflexible constitution. Its amendment requires special procedures and special majorities. Most of its provisions can be amended only by a two-thirds majority of the National Assembly as well as a vote in favour by six out of the nine provinces in the National Council of Provinces. (See s 74.)</td>
</tr>
</tbody>
</table>

Other examples include the Constitutions of Germany, Namibia and the United States of America (USA).
The discussion above begs the question: “Why should constitutions require special procedures for amendment?”

The Constitution is unlike ordinary legislation and therefore needs to be protected against hasty changes. Most constitutions are often the result of lengthy negotiations among different political parties and other role-players, and/or are the result of careful consideration by the peoples’ democratically elected representatives.

A constitution is supposed to be the embodiment of the values and principles to which a nation has committed itself, and contains rights and procedures which must protect individuals and minorities against unfair treatment by the government. If it can be amended too easily, the majority party in Parliament will be tempted to abolish (or at least water down) some of these protections if it is politically convenient to do so, as can be evidenced from South Africa’s pre-democratic constitutions.

Read and then answer the questions posed in the activity below.

**ACTIVITY 1.1**

1. Classify and explain the sources of constitutional law. (5)
2. Does South Africa have a flexible or inflexible constitution? Give reasons for your answer. (3)
   (Examine the characteristics of both flexible and inflexible constitutions and further examine ss 1 and 74 of the Constitution.)
3. Identify the basic criteria for an inflexible constitution which the court in *Ex Parte Chairperson of the Constitutional Assembly* applied, and explain the meaning of constitutional entrenchment as understood by the Court. (10)
   (In order to answer this question, read para 151–159 of the judgment, as well as s 74 and Ch 2 of the 1996 Constitution.)
4. Are all provisions of the Constitution amended with the same majority? Give reasons for your answer. (Read s 74 of the Constitution.) (3)
5. Why is a greater majority required to amend certain provisions of the Constitution, such as section 1? (Examine the relevant constitutional provisions.) (2)
6. What special procedures are in place to prevent Parliament from amending the Constitution without giving the matter due consideration? (5)

In the next section, we will clarify supreme constitutions and constitutions that are not supreme.
1.3.2 Supreme constitutions and constitutions that are not supreme

Refer to Table 1.2 which briefly compares supreme constitutions and constitutions that are not supreme.

**Table 1.2: Comparison of supreme constitutions and constitutions that are not supreme**

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

The distinction between written and unwritten constitutions will be examined next.

1.3.3 Written constitutions and unwritten constitutions

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

The last type of classification of constitutions is the autochthonous constitutions (indigenous/home-grown) and the allochthonous constitutions (borrowed/foreign).

1.3.4 Autochthonous constitutions (indigenous/home-grown) and allochthonous constitutions (borrowed/foreign)

It is very difficult to find a constitution which can be said to be totally autochthonous/indigenous/home-grown. Most of the “modern” constitutions in the world today are based on the government systems of the former colonial powers. Most constitutions are, therefore, allochthonous/borrowed/foreign.

According to JD van der Vyver (“The separation of powers" *SA Public Law/Publiekereg* Vol 8, pp 177–191), there are three kinds of allochthonous/borrowed/foreign constitutions:
• Reactive constitutions: These originated as a result of specific problems in the past and seek to resolve those problems. This type of constitution may therefore be regarded as indigenous (e.g. the German and the South African Constitutions).

• Constitutions intended to maintain continuity with regard to established norms in the legal tradition of the society concerned: These may also be said to be indigenous (e.g. the Constitution of the Netherlands).

• “Superimposed” constitutions: The most distinguishing characteristic of these constitutions is that their contents are largely unrelated to the history of the country concerned. The independent constitutions of former British colonies which were imposed on the colonies by Britain, and which contain very little local content or flavour, are obvious examples.

ACTIVITY 1.2
1. Explain in your own words whether South Africa has a supreme Constitution. (Examine ss 1, 2 and 172(1)(a) of the Constitution.) (3)
2. What is the relationship between constitutional supremacy and the courts’ power to test the constitutionality of legislation? (Examine s 172 of the Constitution.) (2)
3. Are a supreme constitution and an inflexible constitution the same thing? Give reasons for your answer. (5)
4. Distinguish between an allochthonous and an autochthonous constitution. Give an example of each. (5)

The activity above should have helped you to understand the classification of constitutions into different types. In order to give practical effect to the theory above, it is now applied to the South African context, where we consider the most recent election results.

1.4 CONTEXT: INEGALITARIAN SOCIETY AND A ONE-PARTY-DOMINANT DEMOCRACY

Study 1.4.3 of the prescribed textbook. Note that there has been a debate whether South Africa is a dominant-party democracy. This is because the African National Congress (ANC) has enjoyed electoral dominance since 1994 up to the present day. However, this description has been disputed.

Have a look at Table 1.3 below from the national elections held in 2014. Which party received the most votes and what percentage (%) of the votes did the victorious party receive?
Table 1.3: National election results in South Africa (2014)

<table>
<thead>
<tr>
<th>PARTY</th>
<th>VOTES</th>
<th>%</th>
<th>+/-</th>
<th>SEATS</th>
</tr>
</thead>
<tbody>
<tr>
<td>African National Congress (ANC)</td>
<td>11 436 921</td>
<td>62,15</td>
<td>−3,75</td>
<td>249</td>
</tr>
<tr>
<td>Democratic Alliance (DA)</td>
<td>4 091 584</td>
<td>22,23</td>
<td>+4,65</td>
<td>89</td>
</tr>
<tr>
<td>Economic Freedom Fighters (EFF)</td>
<td>1 169 259</td>
<td>6,35</td>
<td>New</td>
<td>25</td>
</tr>
<tr>
<td>Inkatha Freedom Party (IFP)</td>
<td>441 854</td>
<td>2,40</td>
<td>−2,15</td>
<td>10</td>
</tr>
<tr>
<td>National Freedom Party (NFP)</td>
<td>288 742</td>
<td>1,57</td>
<td>New</td>
<td>6</td>
</tr>
<tr>
<td>United Democratic Movement (UDM)</td>
<td>184 636</td>
<td>1,00</td>
<td>+0,16</td>
<td>4</td>
</tr>
<tr>
<td>Freedom Front Plus (FF+)</td>
<td>165 715</td>
<td>0,90</td>
<td>+0,07</td>
<td>4</td>
</tr>
<tr>
<td>Congress of the People (COPE)</td>
<td>123 235</td>
<td>0,67</td>
<td>−6,75</td>
<td>3</td>
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<tr>
<td>African Christian Democratic Party (ACDP)</td>
<td>104 039</td>
<td>0,57</td>
<td>−0,24</td>
<td>3</td>
</tr>
<tr>
<td>African Independent Congress (AIC)</td>
<td>97 642</td>
<td>0,53</td>
<td>New</td>
<td>3</td>
</tr>
<tr>
<td>Agang SA</td>
<td>52 350</td>
<td>0,28</td>
<td>New</td>
<td>2</td>
</tr>
<tr>
<td>Pan Africanist Congress (PAC)</td>
<td>37 784</td>
<td>0,21</td>
<td>−0,07</td>
<td>1</td>
</tr>
<tr>
<td>African People’s Convention (APC)</td>
<td>30 676</td>
<td>0,17</td>
<td>−0,04</td>
<td>1</td>
</tr>
</tbody>
</table>


You should have answered that the ANC won the election by garnering 62,15% of the votes. This table indicates that the ANC has enjoyed electoral dominance in South Africa. One consequence of this “dominant-party democracy” is that it has the tendency to erode the checks on the power of the executive created by a democratic but supreme Constitution.

As you proceed with this course, you will realise that constitutional law is very much concerned with politics – in the form of the political parties that make up the executive branch of the state (the government) and the process of engaging in elections, which is the manifestation of one’s political rights. Even the judiciary has been criticised for being too political, because the President appoints the judges. The President of the Republic of South Africa has also been the president of the ANC, which has been the case since 1994. With this context in mind, we will proceed to discuss the sources of constitutional law in the next study unit.

1.5 CONCLUSION

You will again encounter the basic concepts of this study unit in later sections of the prescribed work. The inflexibility of the 1996 Constitution, for example, becomes important when we study the procedure for the adoption of Bills (Acts) amending the Constitution. The supremacy of the 1996 Constitution becomes important when we study judicial review and the ability of the Constitutional Court to test Acts which conflict with the Constitution. The following study unit focuses on basic concepts of constitutional law.
Basic concepts of constitutional law

OUTCOMES OF THE STUDY UNIT
After you have studied the material in chapters 2 and 3 of the prescribed textbook, you should, with reference to the relevant provisions of the Constitution and case law, be able to do the following:

• know and be able to define and discuss all the concepts included in chapter 2 of the prescribed textbook
• explain what is meant by “constitutionalism”
• discuss the reasons why the doctrine of separation of powers is important
• evaluate whether South Africa adheres to the principle of separation of powers in its system of government
• compare the application of the separation of powers doctrine in indigenous communities with that in modern democracies
• identify and explain the most important checks and balances that are in place
• discuss the principle of judicial review and whether or not it is undemocratic
• distinguish between parliamentary and presidential systems of government
• explain what is meant by “government”, “state” and “sovereignty”

PRESCRIBED CHAPTERS OF THE TEXTBOOK
• chapter 2 of the prescribed textbook
• chapter 3 of the prescribed textbook

PRESCRIBED SECTIONS OF THE CONSTITUTION
• sections 7, 8, 74 and 172(1)(a) of the 1996 Constitution

PRESCRIBED CASES
• Ex Parte Chairperson of the Constitutional Assembly: In re the Certification of the Constitution of the Republic of South Africa, 1996 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC)
• De Lange v Smuts NO and Others 1998 (3) SA 785 (CC)
• Minister of Health and Others v Treatment Action Campaign and Others (No 2) 2002 (5) SA 721 (CC)
• Minister of Home Affairs and Another v Fourie and Another 2006 (3) BCLR 355 (CC)
• Glenister v President of the Republic of South Africa and Others (Glenister II) 2011 (3) SA 347 (CC)
2.1 OVERVIEW

In study unit 1, we dealt with the sources of constitutional law and the history of the new South African constitutional order. This study unit deals with the essential concepts of constitutional law such as constitutionalism, democracy, government, state, the rule of law, the Rechtsstaat principle, separation of powers, and parliamentary and presidential systems of government.

The above-mentioned concepts form the bedrock of constitutional law and are used throughout the study guide and the textbook. We will examine these terms, starting with “constitutionalism”.

2.2 CONSTITUTIONALISM

In basic terms, “constitutionalism” refers to government in accordance with the Constitution. This implies that the government derives its powers from, and is bound by, the Constitution. The government’s powers are thus limited by the Constitution.

Constitutionalism has been described as a “complex” and “rich” theory of political organisation. This description is particularly true of South Africa, where the constitutional order is premised on a number of explicit and implicit features representing the country’s commitment to constitutionalism. Devenish (1998 A commentary on the South African Constitution, p 348) asserts that constitutionalism as the basis of the operation of the 1996 Constitution has a cogent, moral basis. He goes on to state:

This moral basis has its genesis in the ethical content of teachings and principles of the major religious traditions and philosophies of civilisation of both the east and the west, as well as in indigenous values like ubuntu. It does, however, reflect a secular morality that has a strong element of universality about it and therefore can be adhered to by all the disparate communities of the South African nation.

The form which constitutionalism takes in South Africa is primarily autochthonous, having its roots in indigenous ideas, principles and experiences. Such a brand of constitutionalism reflects African concepts like ubuntu, but also includes Western concepts such as the rule of law and the independence of the judiciary. While the Constitution does not refer to a constitutional state, South Africa has incorporated all of the features of constitutionalism in its constitutional system, and the principles of the constitutional-state concept are clearly evident in decisions of the Constitutional Court.

The features of constitutionalism are as follows:

- constitutional supremacy
- the rule of law
- a Bill of Rights
- democracy
- accountability, responsiveness and openness
- separation of powers (and checks and balances)
- an independent judiciary
- cooperative government and devolution of power
Significantly, all of these features are justiciable in that they are enforceable by a court and, therefore, law and conduct inconsistent with them are unconstitutional and invalid. The term “justiciable” (pronounced “just-ish-able”) means “enforceable in a court of law”. These basic features give shape to the Constitution, forming a framework within which the new constitutional order is to operate and thus influence the interpretation of the Constitution and the Bill of Rights.

Constitutionalism is also related to other concepts such as the German concept of Rechtsstaat, which refers to the principle of government by law, and not by force. A distinction is often drawn between the formal and the material Rechtsstaat. The formal Rechtsstaat requires compliance with formal criteria, such as due process, the separation of powers, and legal certainty. The material Rechtsstaat goes further: the state authority is bound to higher legal values, which are embodied in the constitution, and the exercise of state authority must result in a materially just legal condition.

There are essentially three core values which inform modern-day governments premised on notions of constitutionalism, namely

- federalism, which is the spatial division of power (discussed in greater detail in other study units)
- the separation of powers between the different organs of state
- the notion of constitutional rights (which you will learn more about in the module on fundamental rights (FUR2601))

Study section 2.2 – Constitutionalism – in chapter 2 (pp 38–60 of the prescribed textbook).

Activity 3 has as its focus constitutionalism.

**ACTIVITY 2.1**

Study section 2.2 and then answer the following questions:

1. Are the following statements true or false? Give reasons for your answers.
   
   (a) “South African constitutionalism is only descriptive and normative in nature.” (5)
   
   (b) “‘Constitutionalism’ refers to a system of government in which the will of a single person prevails.” (5)
   
   (c) “A supreme constitution is not a prerequisite for constitutionalism.” (5)

2. Study section 2.2.5.2 of the prescribed textbook and then answer the following question:

   Solly, a Grade 8 learner must make an oral presentation at his school on the 1996 Constitution, and specifically the values on which the Constitution is based. He asks you for advice.

   **One of the most important concepts in constitutional law, the separation of powers principle/doctrine, will be considered next.**
2.3 SEPARATION OF POWERS PRINCIPLE

The separation of powers principle is one of the “essential principles” of constitutionalism and democracy. It refers to the division of state authority among the legislative, executive and judicial branches of government. In subsequent chapters, you will learn that state power is also divided among the three spheres of government in terms of the principle of cooperative government, that is, among the national, provincial and local spheres. Separation of powers between the two branches of government (the legislature and the executive; not the judiciary) takes place within the framework of the three spheres of government as reflected in, for example, section 44 of the 1996 Constitution and elsewhere.

NOTE that, when we refer to the division of authority between the branches of state, we are referring to the separation of powers doctrine, whereas, when we refer to the division of power among the spheres of government, we are referring to cooperative/multilevel government. DO NOT CONFUSE THE TWO TERMS.

2.3.1 Why separation of powers is fundamental

Some constitutional law commentators confirm that the separation of powers is important to achieve the following objectives:

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

The 1996 Constitution does not contain a single provision which confirms that the South African government endorses the separation-of-powers doctrine within its new constitutional dispensation. However, there are a number of provisions which together confirm that this doctrine is an integral part of our constitutional framework. These include, but are not limited to, sections 43, 44, 85, 125 and 165. We therefore say that the separation of powers is “implicit” and “axiomatic” in our Constitution.

At this point, it is appropriate to move to chapter 3 of the prescribed book to complete the discussion on the separation-of-powers doctrine.

South Africa (like most democratic states) is composed of three principal organs/branches of state; namely

- the legislature
- the executive
- the judiciary
Each of the aforementioned organs/branches of state has a specific function, and this will be elaborated on below:

- **The legislature** is responsible for drafting, amending and repealing laws.

  The national Parliament consists of the National Assembly (NA) and the National Council of Provinces (NCOP). Its members are the people’s representatives. Parliament is the highest law-making authority. Each province also has its own Provincial Legislature to pass laws which regulate the effective functioning of each individual province. The NCOP is when all provinces sit together to debate and discuss matters.

  **The executive** is responsible for implementing and enforcing the laws that have been enacted by Parliament.

  - The national executive consists of the President and the ministers who, together, form the Cabinet. The ministers are the political heads of different government portfolios and perform executive functions. At provincial level, the executive functions are performed by Members of the Executive Council (MECs) and the legislative functions are performed by Members of the Provincial Legislature (MPLs).

  *At the local level, however, the Municipal Council fulfils a dual legislative and executive role. The Municipal Council passes by-laws (legislation) regulating everything that pertains to that municipal area and is also responsible for implementing those by-laws and other policies (these are executive functions).

- **The judiciary** interprets and applies the law in order to resolve disputes between individuals or in order to resolve questions of whether or not any law or conduct is deemed to be unconstitutional and thus invalid.

  The judiciary exercises judicial review of government conduct. Section 165 of the Constitution vests judicial authority in the courts. The courts must be independent and are subject only to the law and the Constitution, which they must apply without fear, favour or prejudice.

  *The analogy that can be made about the courts operating at national, provincial and municipal level, is as follows: At the “national level”, we have the Constitutional Court and the Supreme Court of Appeal. At the “provincial level”, the Superior Courts Act of 2013 stipulates that there is a single High Court of South Africa, with a division in each of the nine provinces. The “local” level would be the Magistrates’ Courts. This ensures that justice is accessible, irrespective of whether you live in a city like Johannesburg or a small rural village like Umbumbulu in KwaZulu-Natal.
We refer to this system of each organ/branch having its own functions and powers as the separation-of-powers doctrine. Significantly, for the separation of powers to work effectively, there needs to be a system of checks and balances in place as well.

One check on power is judicial review by the courts. Courts are entrusted with checking whether the other branches comply with the law and exercise their authority in conformity with the Constitution. Because the Constitution is supreme and binding on all branches of government, and because the courts must interpret and enforce the Constitution, it means that, when the legislature or executive exercises its constitutionally mandated authority, it must act in accordance with, and within the limits of, the Constitution as determined by the courts.

For a proper understanding of the principle of checks and balances, study figure 2.3 on page 61 of the textbook and table 2.2 on page 71 of the textbook.

The cases of *Doctors for Life; Certification of the 1996 Constitution; De Lange v Smuts NO and Others; South African Association of Personal Injury Lawyers v Heath; Glenister I; Minister of Health v Treatment Action Campaign and Others (No 2)*; and *Minister of Home Affairs v Fourie and Another* (all referred to in your table of cases at the end of this study guide and on pp 103–106 of the textbook) are essential to your understanding of the judiciary’s role in upholding the separation of powers. These cases indicate that the courts must remain conscious of the limits on judicial authority and the Constitution’s design, and must leave certain matters to other branches of state, because they have been established precisely to undertake legislative or executive functions (unless to do so would result in a serious violation of the Constitution).

Study section 2.3 and chapter 3 of the prescribed textbook.

- Make sure that you understand, and can explain, the doctrine of separation of powers and its purpose.
- You should also be able to give a brief history of the separation of powers, as well as be able to discuss the separation of powers and the South African experience with particular reference to case law.
- Lastly, make sure that you understand the counter-majoritarian dilemma and are able to explain it with reference to case law in order to illustrate your understanding of why judicial review is not actually undemocratic. We will be analysing the counter-majoritarian dilemma after you have engaged with Activity 4.

**ACTIVITY 2.2**

1. Briefly explain what you understand by the “separation-of-powers principle”. 

2. Study section 2.3.3 and then answer the following question: Briefly discuss the model of separation of powers that the Constitutional Court advanced in the *De Lange* case.

3. Are the following statements true or false? Give reasons for your answers.

   (a) “There is a universal model of separation of powers.”

   (b) “In the case of *In re Certification of the Constitution of the Republic of South Africa, 1996*, the Constitutional Court was satisfied that the
separation of powers was firmly established in the South African Constitution."
(c) “South Africa has an absolute separation of powers.”

4. Study section 2.3.3 and read the following passage, then answer the question that follows:

Parliament passes a law in terms of which President Zuma is authorised to amend and repeal the provisions of certain parliamentary legislation as well as presidential proclamations pursuant to such legislation.

Critically evaluate whether this law is constitutionally valid in the context of the separation of powers principle.

2.3.2 The counter-majoritarian dilemma

Study section 2.3.4 of the prescribed textbook on pages 72 to 77.

Representative democracy is characterised by the fact that the citizens of a state elect the representatives of their choice, and these representatives express the will of the people. Note that a representative democracy is created by the process of elections. These elections should be held at regular intervals, and reasonably frequently. Representation is meant to ensure that the interests of society in general are protected and cared for by elected representatives of that society. Consent is central to the concept of representation. Representation entails government power being exercised by representatives of the people on their behalf, and with their consent. In parliamentary terms, representation refers to the constitutional system for electing members of the legislative body who will work for the interests of those who elect them.

Constitutional checks and guarantees, such as the separation of powers, may prevent any single group or institution from becoming too strong, as well as promoting democratic debate and competition. Some commentators also argue that it is possible to combine representative democracy at the national and provincial level with a more direct, participatory form of democracy at the local-government level.

In addition to being a representative democracy, South Africa is also a constitutional democracy. This means that the people's representatives in Parliament, in the provincial legislatures and in municipal councils are not free to make whatever laws they wish, but are bound to observe the norms and values embodied in the Constitution. Laws that are inconsistent with the Constitution will be declared invalid by a court.

This then raises the question of whether judicial review is undemocratic. It is sometimes argued that such review is undemocratic in that the judiciary (which is not an elected body and is composed of a maximum of 11 people – if the matter is heard in the Constitutional Court) has the power to declare legislation enacted by Parliament (which is an elected body composed of our democratically elected representatives, of which there are 400 in Parliament) invalid.

This dilemma is referred to as the “counter-majoritarian problem”, as judicial review is seemingly in conflict with the wishes of the legislative majority. However, on the other hand, it is suggested that constitutionalism and democracy may complement
each other, and that the existence of a supreme, justiciable Constitution is not necessarily incompatible with democracy. The following arguments can be made to defend judicial review against the charge that it is undemocratic:

1. That South Africa’s Constitution itself was made by the representatives of the people, assembled in the Constitutional Assembly. In fact, the Constitution had to be adopted by a two-thirds majority of the members of the Constitutional Assembly, and was the product of a lengthy process of negotiations and democratic deliberations. This explains, to some extent, why the Constitution enjoys precedence over ordinary legislation.

2. Democracy presupposes a vigorous political debate in which citizens feel free to state their views and to challenge widely accepted beliefs. Judicial review may contribute to this result. For instance, by protecting people’s political rights, or freedom of expression, judges may help to ensure a free and uninhibited public debate.

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

**ACTIVITY 2.3**

1. Critically discuss, with reference to relevant case law, whether the legitimacy of judicial review is jeopardised by its counter-majoritarian features. (10)

2. In a newspaper article in *Business Day*, Professor George Devenish considered the counter-majoritarian dilemma in the South African context. In doing so, he examined the 1996 Constitutional Court judgment in *Executive Council of the Western Cape Legislature v President of the Republic of SA 1995 (4) SA 877 (CC)*, in which the Constitutional Court used its testing right and invalidated a law of the democratic Parliament. According to Devenish:

   The Constitutional Court, headed by Judge Chaskalson, in a carefully worded and judiciously reasoned judgment, invalidated the President’s proclamation and Parliament’s amendment of the Local Government Transition Act.

Devenish continued his analysis by stating that President Mandela responded with characteristic statesmanship in praising the judgment and observing that “this judgment is not the first, nor the last, in which the Constitutional Court assists both the government and society to ensure constitutionality and effective governance”. Devenish says that this case was a victory for constitutional government, “since for the first time the Constitutional Court had invalidated a highly politicised statute, passed by a democratically elected and legitimate Parliament”.

It is accepted that the epitome of constitutional democracy in action is judicial review, despite the fact that it is perceived as being undemocratic. Discuss what is meant by the phrase “counter-majoritarian dilemma” and indicate whether or not it is undemocratic for the courts in South Africa to review action taken by the legislature. (10)

The rule of law will be examined next.
2.4 THE RULE OF LAW

With the adoption of the 1993 and 1996 Constitutions, South Africa, in addition to being a formal *Rechtsstaat*, also became a material *Rechtsstaat*. The new Constitution not only contains a number of formal requirements for the validity of government action, but also provides that the Constitution is a supreme constitution. Furthermore, the Constitution contains a Bill of Rights which gives expression to the values to which the South African political community has committed itself. These values must guide the legislature, the executive and the judiciary in applying the provisions of the Constitution. In the light of the above discussion, it is perhaps a bit curious that the 1996 Constitution refers only to the term “rule of law”, and not, like the 1993 Constitution, to the ideal of a “constitutional state” (*or regstaat*, in the Afrikaans version).

However, it is clear that the framers of the Constitution had in mind a much broader concept of the rule of law than that allowed for in Dicey’s restrictive understanding of the term “rule of law” contained in *Introduction to the study of the law of the constitution* written in 1885. The fact that the Constitution is supreme, contains a justiciable Bill of Rights, spells out the requirements for valid administrative action (see, e.g., s 33 of the Constitution), and requires judges to have regard for constitutional values (see, e.g., ss 1, 36 and 39 of the Constitution) indicates that the reference to the rule of law is meant to be understood in the broadest sense, that is, as a system of government in which the law reigns supreme. In fact, it would appear that the Constitution aims to establish a constitutional state.

South Africa has incorporated the doctrine in section 1 of the Constitution. In the South African context, the rule of law is said to mean that the government must have authority provided by a law for everything it does, regardless of the procedural or substantive qualities of that law. This implies that the branches of the state must obey the law; and the state cannot exercise power over anyone unless the law permits it to do so. It can therefore be said that the primary purpose of the rule of law is to protect basic individual rights, and it is for this reason that it has been stated as part of the founding values in the Constitution.

Study section 2.4 on pages 78 to 85 of the prescribed textbook.

**ACTIVITY 2.4**

1. Are the following statements true or false? Give reasons for your answers.
   (a) “The rule of law is enshrined as a founding value in the Constitution.” (3)
   (b) “In *Fedsure Life Assurance Ltd and Others*, the Court held that the principle of legality as an incidence of the rule of law is not what determines whether public bodies act lawfully or not.” (6)

2. Explain the relationship between constitutionalism and the rule of law. (10)
   (To answer this question, you must define the two concepts and then identify the relationship.)

3. Briefly discuss the importance of the judiciary within a constitutional state premised on the rule of law. (6)

The term “democracy” will now be unpacked.
2.5 DEMOCRACY

“Democracy” is one of the most valued – and often the vaguest – of political concepts. It is used mostly in a political or an ideological context. It is not an easy concept to define, because it has many facets. People are inclined to define democracy in accordance with their own views and ideologies rather than measuring these ideologies against some fixed criterion.

Democracy is one of the core values on which the new constitutional order is based. The words “democracy” and “democratic” feature prominently in the preamble to the Constitution, where it is said that the Constitution aims to:

… establish a society based on democratic values;
Lay the foundations for a democratic and open society in which government is based on the will of the people;
Build a united and democratic South Africa… . (Emphasis added)

Section 1 of the Constitution proclaims that South Africa is a democratic state; section 36 states that the limitation of rights in the Bill of Rights must be “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”; and section 39(1) instructs courts and tribunals to “promote the values that underlie an open and democratic society based on human dignity, equality and freedom”. In terms of section 195(1), the public administration “must be governed by the democratic values and principles in the Constitution”.

The word “democracy” is derived from two ancient Greek words: demos (the people) and kratos (strength). This implies that democracy refers to government by the people. In a democracy, the right to govern does not vest in a single person (a king or queen or other monarch/royalty) or class of persons (e.g. an aristocracy/chiefdoms), but in the people as a whole. Democracy presupposes free political discussion, the toleration of differences between people, and the right of all citizens to participate in political decision-making.

The important distinction between the terms “state” and “government” will be clarified next.

2.6 THE DISTINCTION BETWEEN “STATE” AND “GOVERNMENT”

**State**

The following are generally regarded as requirements for “statehood”:

- a specific, geographically defined territory
- a community of people who live within that territory
- a legal order to which the community is subject
- an organised system of government which is able to uphold the legal order
- a certain measure, at least, of separate political identity, if not sovereign political status (the individual states which form the USA do not qualify as “states” in this sense)
Sovereignty

In constitutional law terms, a “sovereign state” refers to an organised authority of a particular political community which manages the public affairs of that community, both internally and externally. In this sense, “sovereignty” refers to the authority of a state to govern itself independently and autonomously, free of any interference from any other states.

Government

The state is the permanent legal entity while the government is the temporary bearer of state authority. The government represents the state at a particular time. Today, we understand “government” as relating primarily to the executive function and having a particular bearing on the formation and implementation of policy.

ACTIVITY 2.5

Study section 2.5 on pages 85 to 97 of the prescribed textbook and then answer the questions below based on the following scenario:

1. The Republic of Matata has split as a result of years of violence between the major ethnic tribes. The Makali tribe in the south of the Matata Republic has declared itself an independent country called the Republic of No-Nonsense, with a population of 1 000 000 inhabitants. This republic is currently ruled by a military commander, General Talk at Your Own Risk. The inhabitants of the Republic of No-Nonsense are pleased with the governance of General Talk at Your Own Risk and hope he rules forever.

2. The country has a serious water shortage and depends on the surrounding countries for water, and on food subsidies from the neighbouring countries.

1. Do you think that the No-Nonsense Republic is a democratic republic? (10) (Explain the concept of “democracy” and the types of democracy discussed in this chapter.)

2. Your friend Vitumbuwa argues that the people of the No-Nonsense Republic are pleased with the way the government is run by General Talk at Your Own Risk. Vitumbuwa further argues that, since democracy focuses on the interests of the people, the No-Nonsense Republic qualifies as a democratic state. Advise Vitumbuwa on the principles that are indispensable to a democratic country. (5)

3. Distinguish between direct and representative democracy. (4)

4. Does the newly formed Republic of No-Nonsense qualify as a state? (To answer this question, you must list the characteristics of a state.) (5)

The parliamentary and presidential systems of government will now be explained.

2.7 PARLIAMENTARY AND PRESIDENTIAL SYSTEMS OF GOVERNMENT

The relationship between the legislature and the executive determines whether a country has a parliamentary or a presidential system of government. At the risk of oversimplification, the following differences between parliamentary and presidential systems can be identified:
Parliamentary system

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

Presidential system

- The head of government is also the head of state. This is, for instance, the case in the USA.
- The head of government is not a member of the legislature and is not responsible to it. For instance, the American President is not a member of Congress, and neither are the members of his or her Cabinet.
- The head of government (president) is often elected directly by the people. In the USA, for instance, the President is popularly elected and his or her election is independent of the election of the legislature.

Both the 1993 Constitution and the final Constitution are prime examples of constitutions with both presidential and parliamentary features. Presidential features are to be found in the fact that the President is both head of state and head of government/national executive. Parliamentary features are that the President is elected by Parliament, and not directly by the voters, and that he or she must also resign if Parliament adopts a motion of no confidence in him or her. Another feature of a parliamentary system of government is that members of the supreme executive (the Cabinet) must be members of Parliament. In this regard, see the study unit dealing with executive authority.

ACTIVITY 2.6
Distinguish between presidential and parliamentary systems of government.   (6)

2.8 CONCLUSION

This study unit dealt with the basic concepts of constitutional law. Democracy is one of the core values on which the 1996 Constitution is based. The practical implementation of the principles of democracy, as set out in the 1996 Constitution, will be discussed in more detail in the next few study units. Study units 1 and 2 are very important, because the concepts discussed in them will be referred to repeatedly throughout this course.
STUDY UNIT 3

Separation of powers and the national legislature

OUTCOMES OF THE STUDY UNIT
After you have studied the material in the prescribed sections of chapter 4 of the textbook, you should, with reference to the relevant provisions of the Constitution and case law, be able to do the following:

- describe the composition of Parliament and the two houses of Parliament
- discuss the functions of the National Assembly and the National Council of Provinces
- critically evaluate, with reference to case law, the right to vote and in what circumstances citizens may be deprived of this right
- describe and discuss parliamentary privileges
- discuss whether, and in what circumstances, a court may intervene in the legislative process

PRESCRIBED SECTIONS OF THE TEXTBOOK
- section 4.1 to 4.4 of the prescribed textbook

PRESCRIBED SECTIONS OF THE CONSTITUTION
- sections 42 to 46, 55 to 59 and 72 of the 1996 Constitution

PRESCRIBED CASES
- De Lille and Another v Speaker of the National Assembly 1998 (3) SA 430(C)
- Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders (NICRO) and Others 2004 (5) BCLR 445 (CC)
- August v Electoral Commission 1999 (4) BCLR 363 (CC)
- Doctors for Life International v Speaker of the National Assembly and Others 2006 (12) BCLR 1399 (CC)
- Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others 2008 (5) SA 171
- Richter v Minister of Home Affairs and Others (DA and Others Intervening) 2009 (5) BCLR 448 (CC)
- The AParty v Minister of Home Affairs; Moloko v Minister of Home Affairs 2009 (6) BCLR 611 (CC)
- Independent Electoral Commission v Langeberg Municipality 2001 (9) BCLR 883 (CC)
3.1 OVERVIEW

The national legislature (Parliament), aside from its legislative functions such as considering, passing, amending or rejecting legislation, also has the power to check the exercise of power by the national executive and other organs of state to ensure that the national executive and various other organs of state are held accountable. The South African legislature is a bicameral legislature, which means that it is divided into two houses, namely the National Assembly (NA) and the National Council of Provinces (NCOP). These serve as checks on each other and represent the heterogeneous society. Both houses have broad mandates to fulfil their duties, as they are entitled to make rules and orders for their separate and joint functions and have the power to conduct proceedings similar to court proceedings with witnesses and submissions. They are, however, curtailed in their actions in different ways by the Constitution, as discussed in 3.2.1 to 3.2.3 below. These subsections are elaborated on under the umbrella heading, “General rules regarding the operation of Parliament”.

3.2 GENERAL RULES REGARDING THE OPERATION OF PARLIAMENT

3.2.1 Openness and transparency

The NA and NCOP must act in an open and transparent manner. For this reason, all sittings have to be held in public, although right of access may be controlled in appropriate circumstances. The power to control right of access vests in the Speaker, but non-compliance with this rule, for example if the public and the media are excluded, could render any conduct at such a gathering invalid and unconstitutional.

3.2.2 Parliamentary privileges

Members of the two houses and the Cabinet enjoy certain inalienable privileges when appearing before the houses (parliamentary privilege). This is based on the notion that members of Parliament (MPs) must be able to perform their duties in an uninhibited environment. They are guaranteed freedom of speech and are free from civil and criminal proceedings brought regarding anything they produce in the houses. This privilege may be subject to judicial review if exercised in breach of a constitutional provision.

ACTIVITY 3.1

Consider the following scenario:

Loud Speaker is a member of the Talk-a-Lot political party. During one of the parliamentary sessions, she became so enraged with the conduct of members of other political parties that she accused certain members of the Freak-a-Zoid party of being spies and criminals. As a result of her outburst, she was suspended for 15 days by Parliament. Loud Speaker is furious about her suspension and claims that Parliament has violated a number of her fundamental rights.

You have been approached by Loud Speaker to provide a well-reasoned, substantiated and critical evaluation of whether Loud Speaker’s suspension is constitutional or
not. Loud Speaker is seeking specific advice on the extent to which Parliament can regulate its own internal procedures, and whether Parliament acted according to the prescripts of the Constitution or whether it exceeded the powers conferred on it in terms of sections 57 and 58 of the Constitution. Ultimately, Loud Speaker wishes to know whether the courts will interfere with the conduct of Parliament if it is found that Parliament did not act constitutionally. (15)

3.2.3 Public involvement and participation

Both houses are required to facilitate public involvement. The democracy envisaged for the country calls for far more public participation than merely voting in elections. Public participation in all areas of decision-making is the cornerstone of our democracy and is a voluntary act by the public which must be facilitated by the legislature. It is up to the courts to determine whether the actions of the legislature are reasonable or not.

ACTIVITY 3.2

Summarise pages 119 to 122 of the textbook and explain Parliament’s role in providing a forum for the public consideration of issues. (5)

3.3 THE NATIONAL ASSEMBLY

The National Assembly (NA) consists of 400 members elected by means of an electoral system based on a national, common voters’ roll. Voters vote for a party, which elects its members and submits the list of elected members to the Independent Electoral Commission (IEC) before the elections. This closed-list, proportional representation system has its advantages in that it properly represents the voters’ votes and allows greater representation of marginalised or previously disadvantaged groups. The disadvantages of this system are, among others, that it does not create a strong link between voters and their elected representatives, and that it produces a potentially less stable and effective government where a coalition government may be created.

The IEC is responsible for the management of free and fair elections, as prescribed by the Constitution, and for the declaration of the results of elections. Although the IEC is an organ of the state, it functions entirely independently. The courts have extensively contemplated the rights of voters and have decided that the right to vote cannot be arbitrarily removed. In this regard, therefore, prisoners and South Africans living abroad are also entitled to vote.

The members of the NA are elected to serve a term of five years, unless, after three years, there is a majority vote for the dissolution of the NA or there is a vacancy in the office of the President. Any person who is eligible to vote for the members is eligible to be a member, with a few exceptions. The NA has four main tasks: electing the President, serving as a national forum for the public consideration of issues, considering and passing legislation, and holding the executive accountable. The NA has a wide range of powers in carrying out these tasks.
ACTIVITY 3.3

1. Tabulate the advantages and disadvantages of the proportional system of representation. (6)

2. Compare/contrast South African and Westminster constitutionalism based on the following criteria: constitution-making process; and the accountability of the executive to Parliament. (5)

The National Council of Provinces will now be considered.

3.4 THE NATIONAL COUNCIL OF PROVINCES

The National Council of Provinces (NCOP) was created to represent the interests of the provinces. It does this by participating in the national legislative process and by providing a national forum for publicly considering issues affecting the provinces. It is designed as a key institution for ensuring cooperative government and consists of 90 members (nine delegations of ten delegates each for each province). Each delegation is represented proportionally by the various parties in each provincial legislature in accordance with the relevant strength of each party. Because each province votes as one, a majority is achieved when five delegations support a decision. When voting to pass legislation that does not affect the provinces, each of the 90 members has one vote. The Constitution requires that a chairperson and two deputy chairpersons be elected for the NCOP.

3.5 CONCLUSION

This study unit has indicated that South Africa has a bicameral Parliament in which legislative power is distributed between the two houses (NA and NCOP). It further clarified the way in which members of each house are elected or appointed; why the NA is the most dominant and powerful house of the two; and the applicable systems of governance.

In the next study unit, you will learn more about the functions of Parliament in general, and, in particular, about its oversight role over the executive and how it holds the executive accountable to Parliament. You will also learn about the legislative powers of Parliament.
STUDY UNIT 4

Separation of powers and the national legislature: functions of Parliament

OUTCOMES OF THE STUDY UNIT
After you have studied the material in this section of chapter 4 of the prescribed textbook, you should, with reference to the relevant provisions of the Constitution and case law, be able to do the following:

- list and explain the functions of Parliament
- explain the role of Parliament in providing a forum for the public consideration of issues
- explain the role of the National Assembly and the National Council of Provinces in holding the executive accountable to Parliament, and especially the role of the National Assembly in ensuring democratic control over the executive by passing a motion of no confidence in the President
- explain the role of Parliament in maintaining an oversight role over the national executive and other organs of state
- generally discuss Parliament's function of passing legislation, including
  - Parliament's legislative competence
  - the process prescribed for the adoption of Bills amending the Constitution
  - the process for the adoption of ordinary Bills affecting the provinces
  - the classification or tagging of Bills
- explain when the President may
  - refer a Bill back to the National Assembly for reconsideration
  - refer a Bill to the Constitutional Court for a decision on its constitutionality
- critically discuss whether Parliament is permitted to delegate its legislative powers to another body or functionary in the state

PRESCRIBED SECTION OF THE TEXTBOOK
- section 4.5 of the prescribed textbook

PRESCRIBED SECTIONS OF THE CONSTITUTION
- sections 40 and 41, and 42 to 82 of the 1996 Constitution

PRESCRIBED CASES
- Mazibuko v Sisulu and Another 2013(6) SA 249 (CC)
4.1 OVERVIEW
The main function of Parliament is to enact legislation, but the Constitution also bestows various other functions on Parliament. Although all these functions are conferred on both houses of Parliament, the Constitution confers additional powers on the National Assembly in order to allow it to fulfil its special role as a "check" on the executive. Parliament’s functions are listed and explained in detail.

The prescribed textbook categorises the functions of Parliament into four main functions, namely:

- to provide a forum for debate on important issues
- to hold the executive organs of state in the national sphere of government accountable to Parliament
- to exercise an oversight function over the exercise of national executive authority and over other organs of the state
- to pass legislation

It should be noted that these are merely broad categories of the functions of Parliament as an institution and, as you have seen earlier in the previous study unit (paras 4.1–4.4 in the prescribed textbook), Parliament has two houses each with its own functions, and these functions are set out in the provisions of the Constitution. For instance, in terms of the provisions of the Constitution, the core functions of the National Assembly include representing the electorate in the decision-making processes in the national sphere of government, thus articulating the interests of the electorate and serving as a communication channel between the electorate and the national government for full discussion and ventilation of matters. Another example includes the role of the National Assembly in the election of the President in terms of section 86 of the Constitution.

Section 42(4) also sets out the functions of the National Council of Provinces, which include representing the provinces in the national sphere of government; participating in the national legislative processes; and publically considering issues affecting the provinces. The point here is that, in addition to the relevant parts of the prescribed textbook, you have to study these provisions of the Constitution as indicated above.

The various roles of Parliament will now be discussed.

4.2 THE VARIOUS ROLES OF PARLIAMENT
As indicated above, Parliament has various roles, including holding the executive accountable and maintaining oversight over the executive and other organs of
state. This means that members of the executive must explain their actions to Parliament and its committees. The oversight mandate requires Parliament to oversee the day-to-day exercise of authority by the executive and other organs of state, and this is done through various parliamentary committees.

**ACTIVITY 4.1**

Study sections 4.5.1 to 4.5.4 of the prescribed textbook and then summarise these sections in your own words. Your summaries must cover

- the broad functions of Parliament as an institution, indicating which of the four broad functions is Parliament’s primary or principal function in accordance with the doctrine of the separation of powers
- Parliament’s role of holding the executive accountable, with particular emphasis on the recent decision of the Constitutional Court in Mazibuko v Sisulu and Another (as discussed in the textbook)
- Parliament’s role of maintaining oversight over the national executive and other organs of state

The passing of legislation will be discussed next.

**4.3 PASSING OF LEGISLATION**

It should be noted that, in accordance with the principle of separation of powers, Parliament’s primary function is to pass legislation. Therefore, its most important function, which distinguishes it from the other two branches of state (the executive and the judiciary), is to debate, amend and approve Bills submitted to it by the executive, committees or individuals. As you will see, the bulk of the work on the functions of Parliament in the prescribed textbook deals with this important role of passing legislation. This is the crux of the discussion on Parliament’s function and we suggest that, before you attempt to study this, you first study sections 73 to 79 of the Constitution. These sections are essential for an understanding of the way in which legislation is passed.

The functions of Parliament should be understood within the context of both the principle of cooperative/multilevel government, in terms of which state authority is distributed among the three spheres of government, namely the national, the provincial and the local spheres of government, and the doctrine of separation of powers, in terms of which state power is distributed among the three branches of state, namely the legislature, the executive and the judiciary. In the national sphere, legislative authority is vested in Parliament; in the provincial sphere, it is vested in the provincial legislatures; and, in the local sphere, it is vested in the municipal councils. It is therefore clear that Parliament shares legislative authority with the other legislatures that have been created and also enjoys certain distinct legislative competencies, which will be elaborated on below.

**4.3.1 Parliament’s legislative competence**

The Constitution gives Parliament four kinds of law-making powers that only it can wield:

- Parliament has exclusive powers to pass, amend and repeal its own laws, including
exclusive powers to make laws relating to those areas that have been expressly assigned to it by the various provisions of the Constitution. (For example, section 33(3), which makes provision for just administrative action, clearly provides that national legislation must be enacted to give effect to the right to just administrative action and to provide for judicial review of administrative action. This principle applies even if the law deals with a matter that falls within the exclusive or concurrent competence of the provinces.)

- In terms of section 74 of the Constitution, Parliament has exclusive competence to amend the Constitution.
- Parliament has residual legislative capacity to make laws relating to those areas that are not enumerated in the Constitution or mentioned in Schedules 4 and 5 of the Constitution. For example, Parliament is entitled to make laws regulating matters such as defence and foreign affairs, and most matters relating to the police force. When Parliament makes laws which fall within its exclusive legislative function, as set out above, it must use the procedure prescribed in section 75 of the Constitution.
- Parliament has concurrent legislative authority with the provincial legislatures to make laws pertaining to matters listed in Schedule 4. This means that both Parliament and the provincial legislatures share the power to make laws on matters that are listed in Schedule 4. When Parliament makes laws which fall within a concurrent legislative function, as set out above, it must use the procedure prescribed in section 76 of the Constitution.
- Should a conflict arise between a national law and a provincial law relating to a concurrent matter, the national law usually prevails over the provincial law, provided that the criteria set out in section 146(2) and (3) are met.

**NB!** Note that Schedule 5 sets out those matters over which the provincial legislatures enjoy exclusive competence, but Parliament has the power to intervene in the exclusive legislative competency of the provinces. This means that only the provincial legislatures may make laws dealing with those matters that are listed in Schedule 5, but, in certain instances, Parliament may intervene, for example when it is necessary to maintain essential national standards (the grounds on which Parliament may intervene are stipulated in s 44 of the Constitution).

**ACTIVITY 4.2**

You are a law student involved in a street-law project. As part of your training, you are required to present lectures to Grade 11 and 12 learners on legislative authority. You must address the learners on the following issues:

(a) In a constitutional state, where do laws originate? (3)
(b) What is the difference between an organ of state and a sphere of government? (4)
(c) What is the meaning of “legislative authority”? (4)
(d) Which body exercises legislative authority in South Africa? (2)
(e) What is the composition of this body? (4)
(f) Why is the composition of this body better than that of a unicameral model? (4)

Your task is to draw up a lesson plan in which you set out the most important and most relevant points pertaining to each of the questions posed above.
Having elaborated on Parliament’s legislative competence, the following question is posed:

“Who is allowed to introduce a Bill in Parliament?”

### 4.3.2 Who is allowed to introduce a Bill in Parliament?

Now that you have a basic idea of what the national legislature – Parliament – can and cannot do, it is important to understand how law comes into existence; that is, to understand the national legislative process. However, before you can grasp the actual parliamentary process, you must demonstrate an understanding of who is empowered to initiate legislation in Parliament. It is imperative that you know the case of Oriani-Ambrosini, MP v Sisulu, Speaker of the National Assembly 2012 (6) SA 588 (CC).

### ACTIVITY 4.3

Study pages 150 to 155 under the heading for section 4.5.5 (“Passing of legislation”) in the textbook. Then, reflect on the following statement and answer the questions that follow:

In accordance with the doctrine of separation of powers, the law-making function in the national sphere of government is vested in Parliament.

1. Is the doctrine of separation of powers absolute? Explain. (5)
2. Who is allowed to introduce a Bill (draft legislation) in Parliament? (3)
3. With reference to the provisions of the Constitution and case law, explain in detail whether an ordinary individual member of the National Assembly who is not a Cabinet member can introduce a Bill in the National Assembly. (10)
4. Does it make any difference whether an ordinary individual member of the National Assembly who is not a Cabinet member is a member of the majority ruling party or a member of an opposition party? Discuss fully. (6)
5. What are the important reasons why legislation is initiated and prepared by the executive (usually a Cabinet member responsible for a particular portfolio, e.g. education, will initiate a Bill on education) rather than by an ordinary individual member of Parliament or a committee of the National Assembly? (8)

The legislative process will now be considered.

### 4.3.3 The legislative process

The legislative process is a series of actions that must take place before a law is formulated and considered, refined and approved by the competent government body in order to be valid and to have the force of law. On pages 155 to 163 of the prescribed textbook, we are concerned with the legislative process that takes place when Parliament decides to enact a piece of legislation which falls within its competence. Under the previous heading in this study guide, we dealt with the matters that fall within Parliament’s competence. Thus, the procedures that have to be followed depend ultimately on the category of laws that Parliament wants to enact or make. This means that Parliament

- will use the form-and-manner provisions that are set out in section 75 if it intends making laws in those areas where it has exclusive competence
• will use the form-and-manner provisions of section 76 if it intends making laws in those areas where it shares legislative competence with the provincial legislatures
• will use a different procedure in terms of section 77 for passing so-called money Bills, that is, Bills dealing with the imposition of taxes, levies, duties and surcharges to raise money for the state, and with the allocation of money raised in this way for a particular purpose, such as spending on health

**ACTIVITY 4.4**

Study sections 74, 75, 76 and 79 of the Constitution and pages 155 to 163 of the prescribed textbook and then answer the following questions:

1. After reading section 74 two or three times, summarise its contents. In your summary, make sure that you discuss the following matters:
   (a) majorities required to amend different parts of the Constitution (s 74(1)–(3) of the Constitution)
   (b) the special procedures required to prevent Parliament from amending the Constitution without careful consideration (s 74(4)–(8) of the Constitution)

2. You are a law student at Unisa. After you graduate, you would like to pursue a career as a legislative drafter (i.e. one who is involved in the creation of laws that regulate people’s conduct). You can begin this training by doing the following:
   (a) explaining what you understand by legislative authority
   (b) distinguishing between the exclusive and concurrent legislative capacity of Parliament
   (c) defining what is meant by “the legislative process”
   (d) describing the general process that takes place before a law is formulated and adopted by the competent legislative authority

The tagging or classification of Bills is elaborated on below.

**4.3.4 Tagging/classification of Bills**

Sections 75 and 76 of the Constitution deal with the adoption of ordinary Bills, that is, Bills that do not amend the Constitution. Section 75 sets out the procedure for adopting ordinary Bills not affecting the provinces, while section 76 deals with ordinary Bills affecting the provinces. It is vitally important that Parliament correctly identifies an ordinary Bill as one that either affects or does not affect the provinces. If a Bill affecting the provinces is passed in accordance with the procedure laid down for the adoption of Bills not affecting the provinces, or vice versa, the adopted Bill is not properly enacted and does not become law. However, it is often difficult to characterise a Bill as either the one or the other. According to Murray and Simeon, “‘Tagging’ bills in Parliament: section 75 or section 76?” 2006 *South African Law Journal* Vol 123: 232–263, at first glance, the scheme that sections 75 and 76 introduces seems clear-cut, but decisions concerning the classification – or “tagging” as it is referred to in Parliament – of Bills have often proved very difficult. Furthermore, the authors indicate that “the language of the Constitution” provides little assistance in classifying such Bills. Section 44(1)(b)(ii) states that “legislation with regard to any matter within the functional area listed in Schedule 4” must follow the section 76 route. This wording is echoed in section 76(3), which states, among other things, that a Bill that “falls within a functional area listed in Schedule 4” follows the section 76 route.
ACTIVITY 4.5

In Ex Parte the President of the RSA: In re Constitutionality of the Liquor Bill 2000 (1) BCLR 1 (CC), paragraph 27, the Constitutional Court stated that “any Bill whose provisions in substantial measure fall within a functional area listed in Schedule 4 [must] be dealt with under section 76”. This was confirmed in Tongoane and Others v National Minister for Agriculture and Land Affairs and Others.

Study Tongoane and Others v National Minister for Agriculture and Land Affairs and Others on pages 157 to 160 of the prescribed textbook and then answer the following questions:

1. Explain the importance of tagging. (5)
2. Explain the distinction between the characterisation of a Bill for the purposes of deciding whether the Bill affects the provinces or not, and its tagging. (5)
3. Explain the test for the tagging of Bills. (10)

What does “assent to Bills” mean? This will be explained next.

4.3.5 Assent to Bills

Section 79 deals with assent to Bills. In terms of subsection (1), the President may refer a Bill back to the NA for reconsideration if the President has reservations about the constitutionality of the Bill. This amounts to a greater power than that under the interim Constitution, in terms of which the President could refer the Bill back to Parliament only if a procedural defect had occurred in the legislative process. Under the final Constitution, the President can also refer the Bill back if he or she believes that it does not meet the substantive requirements of the Constitution (e.g. if it infringes the Bill of Rights). However, the final Constitution does not go as far as the United States (US) Constitution, which gives the President a veto over legislation adopted by Parliament (or “Congress”, as the US Parliament is known). Unlike the President of the USA, his or her South African counterpart does not have the power to refuse to sign a Bill. He or she only has the power to refer it back to the NA or to refer it to the Constitutional Court for a decision on its constitutionality. If the reconsidered Bill fully accommodates the President’s reservations, then he or she must sign it. If not, the President must either assent to and sign the Bill, or refer it to the Constitutional Court for a decision on its constitutionality (s 79(4)). If the Constitutional Court decides that the Bill is constitutional, then the President must assent to and sign it (s 79(5)). In 1999, the President referred the Liquor Bill to the Constitutional Court for a decision on its constitutionality. In Ex Parte the President of the Republic of South Africa: In re Constitutionality of the Liquor Bill 2000 (1) BCLR 1(CC), the Constitutional Court spelt out (1) the circumstances in which the President is allowed to refer a Bill to the Constitutional Court, and (2) the scope of the Court’s power to consider the constitutionality of a Bill.
ACTIVITY 4.6

Study section 79 of the Constitution, pages 162 to 163 of the prescribed textbook, and the Liquor Bill decision and then answer the questions that follow:

1. State the three ways in which the constitutionality of legislation passed by Parliament can come under judicial consideration. (6)
2. What were the three main questions the Court considered in this part of the judgment? (6)
3. Briefly summarise the Court's findings in relation to these three questions. (10)

Delegation of legislative powers to the executive or other legislatures will be now be considered.

4.4 DELEGATION OF LEGISLATIVE POWERS TO THE EXECUTIVE OR OTHER LEGISLATURES

The delegation of legislative authority to other bodies or functionaries is a regular feature of modern states. Parliaments often leave it to provincial legislatures or members of the national executive to “fill in the gaps” in parliamentary legislation by means of proclamations or regulations. However, under the Interim Constitution, the question arose as to whether there are limits to Parliament’s authority to delegate its legislative power. The question is whether Parliament can delegate its legislative authority to (1) other legislatures and (2) to the executive.

ACTIVITY 4.7

Study section 4.5.6 on pages 163 to 167 of the textbook and then answer the questions that follow:

It is universally accepted in modern democracies that Parliament cannot attend to every single task that it is enjoined to perform, particularly when it comes to making laws aimed at regulating the conduct of its subjects. Parliament cannot foresee every single occurrence that may require regulation and usually, therefore, drafts laws in skeletal form. In the light of this statement, briefly discuss, with specific reference to case law, what you understand by the term “delegation of legislative authority”, and discuss whether or not Parliament may delegate its functions to

(a) the executive (10)
(b) a provincial legislature (5)

Consider the following points when answering this question:

- What do you understand by the term “delegation” in the constitutional sense of the word?
- Why do you think delegation is important? What is the case that dealt with delegation?
- What were the facts, issue, finding and reasoning of the Court in that case?

4.5 CONCLUSION

This study unit discussed the role played by Parliament in passing legislation. Legislation is generally initiated by the relevant government department through the Minister, but nothing precludes members of Parliament from initiating legislation. Once legislation is tabled in Parliament, the Bills are discussed in parliamentary committees, and the public can also participate in such debates. Both houses of Parliament must vote on the Bill before it is sent to the President for assent, and then the President either signs the bill or, if he or she has reservations about its constitutionality, refers it back to Parliament. In study unit 5, the separation of powers and the national executive authority will be explored.
STUDY UNIT 5

Separation of powers and the national executive authority

OUTCOMES OF THE STUDY UNIT

After you have studied the material in this study unit, you should be able to do the following:

- state who is responsible for the exercise of executive authority in the national sphere of the state
- discuss the powers and functions of the President
- explain how the President must exercise his or her powers
- discuss the question of whether the President can be ordered to give evidence in a civil matter in relation to the performance of his or her official duties
- explain what is meant by individual and collective ministerial responsibility
- discuss parliamentary, judicial and other forms of control over the executive
- explain when the President will be bound to comply with section 33 (just administrative action) of the Constitution
- distinguish the traditional system of governance from the broader approach of executive authority as envisaged in the Constitution

PRESCRIBED CHAPTER OF THE TEXTBOOK

- chapter 5 of the prescribed textbook

PRESCRIBED SECTIONS OF THE CONSTITUTION

- Summarise and study sections 83 to 97, and 101 to 102 of the 1996 Constitution.

PRESCRIBED CASES

- President of the Republic of South Africa v South African Rugby Football Union 1999 (SARFU III) (10) BCLR 1059
- President of the Republic of South Africa and Another v Hugo 1997 (4) SA 1
- Masethla v President of the Republic of South Africa and Another 2008 (1) BCLR 1

5.1 OVERVIEW

This study unit explains the national executive authority within the framework of the doctrine of separation of powers. In the context of separation of powers, executive authority is defined as the power to execute, implement or enforce rules
of law on matters that do not fall within the functional areas of other branches of state (legislature and judiciary). Therefore, executive authority is all about the day-to-day running of the country. Although executive authority is also exercised at the provincial and local level, this study unit is only concerned with executive authority at the national level. The study unit is divided into broad sections dealing with the President (election and term of office) as the head of state and as the head of the national executive, the Deputy President and the rest of the Cabinet.

**ACTIVITY 5.1**

Study section 5.1 on pages 171 to 173 of the textbook and then answer the following questions:

1. Explain the doctrine of separation of powers and the related checks and balances. (5)
2. Distinguish between the executive authority and public administration. (5)

## 5.2 THE PRESIDENT

### 5.2.1 Election and term of office

You will notice that the executive authority of the Republic is exercised by, and is vested in, various executive bodies such as the President, ministers and public officials. These functionaries are required to execute legal rules within the different spheres of state administration (national, provincial and local spheres). The Constitution provides that the national executive authority is vested in the President in terms of section 85 of the Constitution. The President is the head of state and of the national executive (s 83). The President has only those powers entrusted to him or her by law and may not exercise the powers that have been conferred (given or granted to) on Cabinet ministers or government officials (s 84).

The election of the President, his/her term of office, and the circumstances in which he/she can be removed are of paramount importance. Section 86 of the Constitution provides for the election of the President by the National Assembly from among its members. Part A of Schedule 3 sets out the procedure to be followed during such an election, while section 87 governs the assumption of office by the President by affirming faithfulness to the Constitution in accordance with Schedule 2 of the Constitution.

In addition, section 88 deals with the term of office of the President and stipulates that he or she may not hold office for more than two terms. Section 89 makes provision for the removal of the President by the National Assembly by way of a resolution adopted with a supporting vote of at least two-thirds (66.6% or 267 out of 400 members) of its members on the following grounds:

- a serious violation of the Constitution or the law
- serious misconduct
- inability to perform the functions of office

This is known as the impeachment of the President. However, it is difficult to effect the removal of the President in this way, because it will not be easy to obtain the required 66.6% supporting vote and prove one of the grounds (unless there is a court order declaring that a serious violation of the Constitution or of the law has taken place or serious misconduct has been proven to have occurred).
April 2016, consequent upon the Constitutional Court’s decision concerning the Public Protector’s report on non-security upgrades to Nkandla, the Democratic Alliance introduced a motion to impeach President Jacob Zuma. The outcome of the vote was that 143 members of Parliament voted for the President to be removed, and 233 members voted against the President being removed.

Section 102(2) also makes provision for the National Assembly to remove the President from office by passing a motion of no confidence in the President. All that is required to remove the President in this manner is a simple majority (51% or 201 out of 400 members) of the members of the National Assembly voting in favour of removal. This will only be possible where the President has lost the support of his party (which is very unlikely in South Africa). This was what was attempted by the Democratic Alliance (DA) in the case of Mazibuko v Sisulu and Another 2013 (6) SA 249 (CC). Agang also tried this in January 2015, but withdrew it. Therefore, this section has been invoked by the opposition at least twice.

**ACTIVITY 5.2**

Study section 5.2.1 of the prescribed textbook and sections 86 to 90 and 102(2) of the Constitution and then answer the questions that follow:

1. Who elects the President in South Africa? (5)
2. When is the President elected? (2)
3. Who presides over the election of the President and what is the impact of this on the separation of powers? (5)
4. Explain who is empowered to remove the President and in what circumstances the President may be removed from office. (10)
5. Can a ruling political party constitutionally remove or “recall” the President? (6)
6. Who may act as President, and in what circumstances? (5)

**5.2.2 Powers and functions of the President**

Having read section 84(1), one could say that the President has the following powers:

- powers entrusted by the Constitution
- powers entrusted by other legislation
- implied powers, that is, powers necessary for the exercise of powers expressly conferred by the Constitution or other legislation

This is not an exhaustive list of what the President is required to do, as other powers and functions may be prescribed by legislation. The powers vested in the President enable him or her to act in order to fulfil his or her constitutional responsibilities, which are intertwined with the duties to refrain from acting in a way that may undermine the state itself and the rule of law. Therefore, the President has certain powers and functions which are envisaged in section 84 as constitutionally entrusted duties.

Currie and De Waal (2001) (at p 236) contend that the interpretation of section 84 precludes the argument that the President may derive his or her powers from the common law (prerogative). They substantiate their argument by relying on the judgment of the Constitutional Court in President of the Republic of South Africa v Hugo 1997 (4) SA 1 (CC), at paragraph 8, where it was held that “there are no
powers derived from the royal prerogative which are conferred on the President other than those enumerated in the Constitution”.

Rautenbach and Malherbe (2004) (at pp 191–192) argue that the common law powers which have not been written into the Constitution or legislation, and which may still exist, are those powers in relation to acts of state. They hold that the President, for example, no longer retains the prerogative powers to issue passports and to perform acts of state. The authority to issue passports is now regulated by the South African Passports and Travel Documents Act 4 of 1994. This Act provides that the powers and duties in respect of passports, which vested in the State President prior to the coming into operation of the 1993 Constitution, are now vested in the government of the Republic. The power to issue and control passports is therefore no longer a prerogative power, but a statutory power.

The exercise of these constitutional powers is, moreover, subject to constitutional review. This follows from the fact that the Constitution is supreme (s 2), and that all branches of state, including the executive, are bound by the Constitution [s 8(1)]. The Constitutional Court in the case of In re: Certification of the Constitution of the Republic of South Africa 1996 (10) BCLR 1253 (CC), 1996 4 SA 744 (CC), at paragraph 116, endorsed the review of constitutional powers, as it held that the President derives this power not from antiquity but from the Constitution itself that proclaims its own supremacy. Should the exercise of the power in any particular instance be such as to undermine it, that conduct would be reviewable.

It is important to note that the President exercises powers that may include
- the rules in respect of the powers that the President exercises as head of the national executive
- the rules in respect of the powers that the President does not exercise in that capacity
- the meaning of certain expressions which are used to describe the requirements for the exercise of certain powers of the President

5.2.2.1 Four categories of constitutional requirements relating to the manner in which the President exercises his or her functions

(a) Firstly, the President is required to exercise certain powers “together with” the other members of the Cabinet in terms of section 85(2).

This raises two questions:

Question 1: When does the President exercise executive authority?

Question 2: What does it mean to act “together with the other members of the Cabinet”?

The answer to Question 1: It is clear from the Constitution that not all the President’s powers involve the exercise of executive authority. For instance, sections 83(a) and 84(1) distinguish between powers exercised by the President as head of state and those exercised by the President as head of the national executive, while section 85(2) mentions some of the President’s functions in exercising executive authority.

The answer to Question 2: Rautenbach and Malherbe (at p 189) hold that the expression “together with the other members of the Cabinet” indicates that
decisions on the powers and functions of the President as head of the national executive are normally taken at Cabinet meetings. The degree of consent needed from other members of the Cabinet depends on the decision-making procedures followed by the Cabinet.

The President’s powers as head of the national executive authority may concern the making of appointments, which includes the power to appoint

- judges [s 174(3)]
- the National Director of Public Prosecutions [s 179(1)(a)]
- the National Commissioner of the South African Police Service [s 207(1)]
- the head of an intelligence service [s 209(2)]
- an inspector monitoring the intelligence service (s 210)
- members of the Financial and Fiscal Commission [s 221(1)]

This role requires the President to be sensitive not only to the members of the Cabinet who have elected him or her, but also to the general public who voted for the political party that won the elections and who have thus voted it into Parliament.

(b) Secondly, the President is required to exercise his or her powers “after consultation with” other functionaries or bodies.

For instance, section 174(3) requires the President to appoint the Chief Justice and his or her deputy of the Constitutional Court, and the President and his or her deputy of the Supreme Court of Appeal, after consulting the Judicial Service Commission (see the discussion on the role and function of the Judicial Service Commission in study unit 6 on judicial authority). In this regard, the President exercises his or her powers as head of the national executive authority. This requires him or her to consult the relevant functionary or institution, but he or she is not bound by any recommendation. The appointment of the Chief Justice of the Constitutional Court, Ngcobo CJ, in 1999 created a lot of controversy, as he was nominated by the President long before the Judicial Service Commission could finalise its interviews and provide the President with recommendations for his consideration.

(c) Thirdly, the President is required to exercise his or her powers on the “recommendations or advice” provided in the execution of his or her duties.

There are instances where the President is bound to follow the advice provided or to act in accordance with the recommendations received. Rautenbach and Malherbe (at p 191) mention the following examples of situations where the President is bound to follow the advice or recommendation provided:

- A declaration of a state of national defence must be approved by Parliament [s 203(3)].
- Except in certain circumstances, the President appoints all judges on the advice of the Judicial Service Commission [s 174(6)].
- The President appoints acting judges on the recommendation of the Minister of Justice [s 175(1)], and the Public Protector, the Auditor-General, and members of the Human Rights Commission, of the Commission for Gender Equality and of the Electoral Commission on the recommendations of the National Assembly [s 193(4)].
• The President removes a judge from office if the Judicial Service Commission has made a finding of gross misconduct and if the National Assembly calls for that judge to be removed by a majority of at least two-thirds of its members [s 177(2)].

• The President appoints some of the members of the Financial and Fiscal Commission as nominated by the executive councils of the provinces and by organised local government [s 221(1)(b) and (c)].

These provisions contain specific duties which the President must exercise with regard to the advice provided by the various constitutional bodies entrusted with the responsibility of promoting the rule of law.

The President is also not bound to follow the recommendations provided by the commissions of inquiry established by him or her in terms of section 84(2) of the Constitution. For instance, the former President, Mr Thabo Mbeki, established a commission of inquiry in terms of section 84(2)(f), led by Khumalo J, on 1 April 2005. The purpose of the commission was to investigate and review the mandate of the Directorate of Special Operations (known as ‘the Scorpions’) as an investigative arm in the fight against special crimes. After the commission had fulfilled its mandate and submitted its report to the President recommending that the Scorpions should remain within the National Prosecuting Authority, but with reporting obligations to the Minister of Safety and Security (who was then Mr Charles Nqakula), President Mbeki, instead of taking into account the recommendations made by the commission, decided to disband the crime-fighting unit. The disbanding of the Scorpions was received with mixed reaction by the general public and various political parties and became the subject of litigation in the “Glenister” case.

(d) Fourthly, the decision taken by the President must be in writing if it is taken in terms of legislation or has legal consequences.

If the decision concerns a function assigned to a member of the Cabinet, that member of the Cabinet must countersign the decision. This also does not mean that the powers entrusted to the President may be transferred or redirected to the Cabinet member. For example, section 84(2)(j) gives powers to the President to pardon or reprieve offenders and to remit any fines, penalties or forfeitures.

The judgment of the Constitutional Court in Minister of Justice and Constitutional Development v Chonco (CCT 42/09) [2009] endorsed the contention that presidential powers may not be transferred to a Cabinet member. The Court, in this case, had to deal with the relationship between the powers and functions of the President as head of state and those that are entrusted to the national executive/Cabinet member (Minister of Justice), as well as with the obligations that accrue to each (see para 16). The Court held (at para 19) that:

it cannot be correct to divide the exercise of the constitutional power to pardon into two, that being the preparatory preliminary stage and the making of the decision which is entrusted to the President. This would have the effect of shifting elements of the President’s exclusive Head of State power to the Minister, in her capacity as a member of the national executive. Moreover, it would result in uncertainty as to what constitutional obligation is imposed upon whom and when it is so imposed.
The President is further required to take personal responsibility for the powers conferred upon him or her. It is a well-established legal principle that a functionary entrusted with a particular power must exercise that power personally, unless there has been a valid assignment of the power in question as envisaged in section 91(2) (see also Chonco at para 36). The Constitutional Court considered the applicability of this principle to the President’s constitutional powers in President of the Republic of South Africa v South African Rugby Football Union. In this case, the constitutional validity of the appointment of a commission of inquiry into the administration of rugby was in issue (see para 1, 2, 24, and 33–41). It was found in the Court a quo that the President had abdicated his responsibility to appoint a commission of inquiry in terms of section 84(2)(f) of the Constitution, and that the decision to appoint such a commission was taken by the Minister of Sport. The President merely rubber-stamped the minister’s decision. The appointment of the commission was therefore found to be invalid. The Constitutional Court agreed that the President had to exercise the power personally, since both the Constitution and the Commissions Act 8 of 1947, as amended by the General Law Amendment Act 49 of 1996, confer the power to appoint commissions on the President alone. However, that is not to say that it is inappropriate for the President to act on the advice of the Cabinet and advisors. “What is important is that the President should take the final decision” (South African Rugby Football Union at para 41).

**ACTIVITY 5.3**

Study section 5.2.3 on the limits on the exercise of presidential powers and make a comprehensive summary of these limits. Pay particular attention to cases discussed in this section.

In addition, study the judgment in President of the Republic of South Africa v South African Rugby Football Union (SARFU) 1999 (10) BCLR 1059 and then answer the following questions:

1. Explain the principle that the President is required to take personal responsibility for the powers conferred upon him/her and whether he/she can abdicate his/her responsibility in this regard. (5)

2. Explain whether, in the SARFU case, the President was held to have abdicated his responsibility. (6)

3. At paragraph 352 in the SARFU case, Moseneke indicates the importance of the President’s presence in court, stating that it was

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

   In the light of this, explain whether (and, if so, the circumstances in which) the President can be ordered to give evidence in a civil matter in relation to the performance of his/her official duties. (8)

The powers of the Deputy President and the rest of the Cabinet members will be examined next.
5.3 THE DEPUTY PRESIDENT AND THE REST OF CABINET

* Study pages 194 to 200 together with sections 92, 95 to 97, and 101 to 102 of the Constitution.

Make sure that you understand the issues relating to the appointment and removal of members of the Cabinet, including the Deputy President and the rest of the Cabinet members, and that you understand the powers of the Deputy President and the rest of the Cabinet members. Most importantly, ensure that you understand the principles of the individual and collective accountability of Cabinet members.

Section 92(1) stipulates that the Deputy President and Ministers are responsible for the powers and functions of the executive assigned to them by the President. Section 92(2) provides that members of the Cabinet are accountable, individually and collectively, to Parliament for the exercise of their powers and the performance of their functions. The notions of individual and collective ministerial responsibility first developed in British constitutional law.

Collective responsibility signifies that the members of the Cabinet “act in unison to the outside world and carry joint responsibility before Parliament for the way in which each member exercises and performs powers and functions” (Rautenbach & Malherbe at p 179). Ministers who disagree with a particular Cabinet decision must either support it in public or resign. The principle of collective responsibility for all national powers and functions does have an important effect on the functioning of the Cabinet. Any member of the Cabinet may request that any matter within his or her individual area of responsibility be dealt with by the Cabinet.

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

- to explain to Parliament what happens in his or her department (study s 92(3), which places Cabinet members under an obligation to provide Parliament with full and regular reports concerning matters under their control)
- to acknowledge that something has gone wrong in the department and ensure it is rectified
- to resign if the situation is sufficiently serious

Section 96 deals with the ethical conduct of Cabinet members and deputy ministers. This provision requires Cabinet members to conduct themselves according to the highest ethical standards both in their professional and individual capacities in order to protect the integrity of Parliament.

5.4 CONCLUSION

This study unit has indicated who comprises the national executive; how they are elected or appointed; as well as how the executive can be removed from office. Further, it has been indicated how powers of the President and his/her Cabinet are constrained, as such powers should always conform to the requirements of the Constitution and legislation. Therefore, the power of both the President and the Cabinet can be checked by the judiciary, which is discussed in the next study unit.
Separation of powers and judicial authority

OUTCOMES OF THE STUDY UNIT
After you have studied the material in this study unit, you should be able to do the following:

• define “judicial authority”
• sketch the history of the judicial system in South Africa
• illustrate why judicial independence is indispensable to a constitutional state
• define, explain, apply, contrast and evaluate the hierarchy of the courts and the composition, powers, responsibilities and limits of the Constitutional Court, the Supreme Court of Appeal, the High Courts and the Magistrates’ Courts with regard to constitutional jurisdiction
• understand and explain the selection and appointment of members of the judiciary with specific knowledge of the mandate of the Judicial Service Commission
• explain issues relating to the judiciary and the separation of powers together with the threats to judicial independence, including control over the judiciary
• recognise that, while the National Prosecuting Authority is not part of the judiciary, it plays an important role in ensuring the integrity of the judiciary and supporting the effective functioning of the judiciary

PRESCRIBED CHAPTER OF THE TEXTBOOK
• chapter 6 of the prescribed textbook

PRESCRIBED SECTIONS OF THE CONSTITUTION
• sections 165 to 180 of the 1996 Constitution

PRESCRIBED CASES
• South African Association of Personal Injury Lawyers v Heath 2001 (1) BCLR 77 (CC)
• Langa and Others v Hlophe 2009 (8) BCLR 823 (SCA)
• Premier of the Western Cape Province v Acting Chairperson: Judicial Service Commission and Others 2010 (8) BCLR 823 (WCC)
• Acting Chairperson: Judicial Service Commission and Others v Premier of the Western Cape Province 2011 (3) SA 538 (SCA)
• Freedom Under Law v Acting Chairperson: Judicial Service Commission and Others 2011 (3) SA 549 (SCA)
6.1 OVERVIEW

This study unit concerns judicial authority in South Africa, that is, the courts operating in South Africa and the persons appointed to sit as judges and magistrates in these courts. The judiciary is arguably the most important branch of state in a constitutional democracy. It has a duty to enforce the provisions of the Constitution and the law, and to check the exercise of power by the legislature, the executive and the other role-players. This study unit will explore the structure of the judiciary under the 1996 Constitution; the constitutional jurisdiction of various courts in South Africa; and the independence of the judiciary. The study unit places particular emphasis on two bodies: on the Judicial Service Commission (JSC), which was established to ensure the independence of the judiciary, and on the National Prosecuting Authority (NPA). It is very important that you recognise that neither the JSC nor the NPA form part of the judiciary as a branch of the state, but that they are both responsible for ensuring the effective functioning of the judiciary.

6.1.1 The impact of parliamentary sovereignty and apartheid on the judiciary

Section 6.1 of the textbook discusses the impact of parliamentary sovereignty and apartheid on the judiciary. As indicated in chapter 1 of the textbook, the most significant feature of the pre-democratic era was parliamentary sovereignty, which constrained the power of the judges, as the legislature prescribed the (discriminatory and oppressive) law, which was then largely diligently enforced by the judiciary, with very few judges attempting to interpret and apply the law so as to limit its harsh effects. Even when anti-apartheid lawyers were victorious in court, the Appellate Division, which was deeply politicised given the way in which judges were appointed, overturned many of the judgments and eroded any legitimacy which the judiciary may have had at that time.

In the democratic era, however, the judiciary reinforces the system of separation of powers and checks and balances by enforcing the provisions of the Constitution in a restrained and principled manner. The judiciary referees/reviews the democratic process and checks whether the legislature and the executive act within the boundaries laid down by the Constitution and legislation. Should a court find that any law passed by Parliament or the conduct of the executive is unconstitutional, it must declare it invalid. This situation is often described as the counter-majoritarian dilemma. However, the judiciary actually upholds democracy when it undertakes a judicial review, as it is constitutionally obliged to do so. Notwithstanding the power of the judiciary, however, an independent and impartial judiciary that has the esteem and respect of the wider society is most effective when it does not intrude unnecessarily into the domain of the legislature and the executive.

6.2 THE JUDICIARY UNDER THE 1996 CONSTITUTION

6.2.1 Constitutional jurisdiction

“Jurisdiction” means the power or competence of a court to adjudicate on, determine or dispose of a dispute. The question of constitutional jurisdiction is of vital importance because jurisdictional issues are inextricably linked to questions about what remedy is being sought in a particular constitutional matter, such as
whether a particular law or certain conduct is unconstitutional and invalid and should thus be set aside by a court.

In the context of the separation-of-powers doctrine, the judiciary is acutely aware of the limits of its powers and is therefore slow to intervene in the domain of the legislature or the executive. However, it was held in the (first) *Glenister* case, that it is a necessary component of the doctrine of the separation of powers that courts have a constitutional obligation to ensure that the exercise of power by other branches of government occurs within constitutional bounds (para 33). [However] it should not be assumed that the Parliament will not correct the potentially unconstitutional provisions … the court may intervene in the legislative process only if no effective remedy would be available to the applicant once the law is passed and the harm would be material and irreversible … . But even in these circumstances, courts must observe the limits of their powers (para 43).

**ACTIVITY 6.1**

Is the following statement true or false? Irrespective of whether the answer is true or false, you are required to provide a brief explanation for your answer, using appropriate authority where necessary:

“South Africa has a very fixed or rigid separation of powers.”

Given that the High Courts, the Supreme Court of Appeal and the Constitutional Court all have the jurisdiction to declare any law or any conduct unconstitutional, the *Glenister* case (as well as many others) highlights not only the structure of the judiciary, but also the jurisdiction of the courts in South Africa and illustrates the effective functioning of the separation of powers in the particular context of South Africa.

**6.2.2 The structure of the judiciary and the jurisdiction of the respective courts**

As section 6.2 of the textbook indicates, section 166 of the Constitution governs the hierarchical structure of the courts. These courts are as follows:

- **Constitutional Court**
- **Supreme Court of Appeal**
- **High Courts, including any High Courts of appeal that may be established by an Act of Parliament to hear appeals from High Courts**
- **Magistrates’ Courts**
- **Any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Courts or the Magistrates’ Courts**

The aforementioned types of courts will be discussed below.

**(a) Constitutional Court**

In terms of the Constitution Seventeenth Amendment Act of 2012, the Constitutional Court is the highest court of the Republic. It may decide constitutional matters
and any other matter if it grants leave to appeal on the grounds that the matter concerned raises an arguable point of law of general public importance which ought to be considered by it (although it may not hear cases that concern purely factual disputes). The Court has the discretion to decide whether or not it will hear a case. The “test” it uses is whether it is in the public interest for the Court to hear the case.

The Court has concurrent jurisdiction with the High Courts and the Supreme Court of Appeal in respect of direct challenges to the constitutionality of all forms of legislation, as well as in respect of issues concerning the interpretation and application of legislation, common law or customary law. In addition, it is obliged to confirm any orders of invalidity by a lower court before the decisions become final. The Court also has exclusive jurisdiction which “draws on the Court’s political legitimacy” as per section 167(4) of the Constitution.

ACTIVITY 6.2

Is the following statement true or false? Irrespective of whether the answer is true or false, you are required to provide a brief explanation for your answer, using appropriate authority where necessary:

“The Constitutional Court is the apex court in South Africa.”

The Constitutional Court is headed by the Chief Justice (who is also the head of the judiciary) and is assisted by the Deputy Chief Justice. Together, the Chief Justice and the Deputy Chief Justice are the most senior judges in the judicial arm of state, and their distinctive manner of appointment reflects the fact that they may be called upon to liaise and interact with the executive and legislature on behalf of the judiciary.

(b) Supreme Court of Appeal

In the past, this court was a division of the then Supreme Court, but now it is a fully fledged constitutional entity headed by the President of the Supreme Court of Appeal, assisted by a Deputy President. As the name suggests, this court only has jurisdiction to hear appeals from the High Courts.

(c) High Courts, including any High Courts of appeal that may be established by an Act of Parliament to hear appeals from High Courts

The High Court consists of divisions determined by an Act of Parliament, has a geographically limited jurisdiction (according to the nine provinces), and consists of a Judge President and one or more Deputy Judge Presidents. These courts function as superior courts and act both as courts of first instance and as courts hearing appeals from lower courts.

All of the courts mentioned above have constitutional jurisdiction, thereby allowing them to declare law or conduct unconstitutional.
(d) Magistrates’ Courts

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

(e) Any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Courts or the Magistrates’ Courts

The jurisdiction of the respective courts will be discussed next.

6.2.2.1 Constitutional jurisdiction of the various courts

In terms of section 172 of the Constitution, judges are given extensive powers, including the power to declare invalid Acts of the democratically elected Parliament and acts of the executive, including acts of the President. This means that the decisions of judges will often have political consequences. However, in order to preserve the integrity of the separation of powers doctrine, courts must ensure that they do not intrude into the domain of the executive or the legislature when handing down their judgments and orders for the rectification of the conduct or law.

**ACTIVITY 6.3**

Assume that the South African Parliament has recently adopted a new law, referred to as the Prohibition of Racial Classification Act 102 of 2016. Section 2 of this new law reads as follows:

> Effective 1 January 2017, the state shall be prohibited from classifying any individual by race. For purposes of this section, “classifying” by race shall be defined as the act of separating, sorting or organising by race, and includes profiling, or collecting such data on government forms.

In passing this law, Parliament affirms that this policy will bring a definitive end to the legacy of apartheid which was primarily based on a system of racial classification that has no place in 21st-century South Africa; will liberate all South Africans from the confining labels which the government currently imposes; and will signal South Africa’s first step towards a truly colour-blind society.

Many interest groups are outraged by the law and argue that the government’s inability to collect and organise data on racial lines will have a detrimental effect on the provision of socio-economic entitlements, especially for minority groups, because these groups suffer disproportionately from poverty, illiteracy, unemployment and ill health. It is argued that the inability of government to track these disparities will prevent government from addressing them with additional resources or targeted outreach within these communities. This is especially true in the context of education, where the majority of learners in rural areas are impoverished black Africans.

One of the interest groups opposed to this new law is Social Upliftment Network (SUN). SUN works closely with rural schools and has become aware that the funding that was originally allocated to the rural schools has been cut dramatically since this new law was passed. The result is that there is no longer funding to provide for the subsidised school fees and the school feeding scheme, as well as the school uniforms that had been provided up until 30 November 2016. Consequently, Sibusiso Zulu, one of the learners at a rural school, has had to drop out of school, as his parents cannot afford the school fees. Furthermore, since Sibusiso no longer receives a
balanced meal at school, he suffers from serious malnourishment and his parents have had to incur medical expenses for his treatment. Unfortunately, Sibusiso is not the only learner who has been affected in this way. In light of the above, answer the following questions:

1. Discuss which court(s) would have jurisdiction to hear this matter. Discuss the jurisdiction of this/these court(s) and explain which court would be the court a quo and which court(s) would have appellate jurisdiction should the decision of the court a quo be appealed. (5)

2. In your opinion, what should the courts do to remedy the situation? Use case law to support your answer and give reasons for your answers (referring to relevant law). (5)

The independence of the judiciary will be explored next.

6.3 THE INDEPENDENCE OF THE JUDICIARY

Section 6.3 (pp 224–245) of the textbook deals with the independence of the judiciary. An independent judiciary is a distinctive feature of a constitutional democracy. It is predicated on judges being able to interpret and enforce the law impartially and without bias (thus having an open mind, and without taking into account their own personal views, ideological commitments or party-political beliefs when making decisions).

Structural safeguards must be put in place to ensure that judges are protected from the influence of, and interference by, other branches of government or state actors. The judiciary is therefore characterised by functional independence and structural independence.


> the degree to which the judicial institution has a distinct and discrete role, detached from the interests of the political system, the concerns of the powerful social groups or the desires of the general public, to regulate the legality of state acts, enact justice and determine general and constitutional and legal values.

Structural independence is protected by such measures as the manner of appointment of judges; the taking of the judicial oath of office; security of tenure; financial security; and the limitation of civil liability. The Constitution seeks to safeguard the structural independence of the judiciary in the following five ways:

1. The Judicial Service Commission (JSC) plays an important role in the appointment of judges. The involvement of the JSC makes it more difficult for the executive merely to appoint its own loyal supporters. The JSC is discussed in detail below.

2. The judicial oath of office. Before a South African judge takes office, he or she swears or affirms to “be faithful to the Republic of South Africa, uphold and protect the Constitution and the human rights entrenched in it, and administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law”.

3. Security of tenure. Section 176 of the Constitution provides that judges of the Constitutional Court are appointed for a non-renewable term of 12 years.
(However, they must retire at the age of 70.) Other judges may hold office until the age of 75, or until they are discharged from active service in terms of an Act of Parliament. This means that judges enjoy security of tenure, so that there is no need for them to seek the favour of politicians to make sure that they keep their jobs.

(4) Section 176(3) of the Constitution provides that the salaries, allowances and other benefits of judicial officers may not be reduced. Salaries of judges are prescribed in the Judges’ Remuneration and Conditions of Employment Act 47 of 2001.

(5) The Constitution makes it difficult for the executive to dismiss judges. Section 177 clearly stipulates the circumstances in which a judicial officer may be compelled to vacate his or her position before the termination of his or her term of office. The President may remove a judge from office only if the JSC finds that he or she suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct, and if the National Assembly has called for his or her removal by a resolution adopted with the support of at least two-thirds of its members.

The appointment of judges is considered next.

6.3.1 Appointment of judges (s 6.3.2, pp 229–238)

Owing to the fact that judges’ decisions have far-reaching political consequences, the appointment of the judiciary cannot be entirely insulated from the political process. The danger of a politicised judiciary, however, is that it would be reluctant to strike down legislation and the acts of members of the executive. As a compromise, therefore, the Constitution created the JSC, which is involved in the appointment of superior court judges.

The JSC generally consists of 23 members who are drawn from the judiciary, two branches of the legal profession (attorneys and advocates), the two houses of the national legislature, the executive, civil society and academia. The chair is taken by the Chief Justice. Of the 23 members, 15 represent political interests. These 15 members comprise the Minister of Justice, six members of the National Assembly (with three of these members coming from minority/opposition parties), four members of the National Council of Provinces and four presidential nominees.

The JSC was placed in sharp focus in the recent Hlophe cases (*Langa v Hlophe*), which resulted in the cases of *Premier of the Western Cape Province v Acting Chairperson: Judicial Service Commission and Others* and *Freedom Under Law v Acting Chairperson: Judicial Service Commission and Others*, as well as the subsequent appeals in these cases, namely *Hlophe v Premier of the Western Cape Province* and *Hlophe v Freedom Under Law and Others*. See Activity 6.5 below for further detail.

When members of the JSC discuss matters relating to a specific High Court, the Premier of that province, together with the Judge President of that province, also sits on the commission. It was confirmed in the case of *Acting Chairperson: Judicial Service Commission and Others v Premier of the Western Cape Province (SCA)* that, if the Premier of the province is absent when the JSC makes a decision regarding either the appointment or the disciplining of a judge serving in that province, the decision of the JSC will be invalid, as it is contrary to the rule
of law, because section 178(1)(k) of the Constitution is clear that the Premier of a province must participate in any decision concerning a judge of that province.

When vacancies occur in a court, the Chief Justice, in his capacity as chairperson of the JSC, calls for nominations, after which shortlisted candidates are publicly interviewed. Thereafter, the JSC makes non-binding recommendations to the President. The role of the JSC in the appointment of judges differs depending on the nature of the appointment to be made. The President, as head of the national executive, has relatively wide discretion when he or she appoints the Chief Justice and the Deputy Chief Justice. The President appoints the person of his or her choice after consulting the JSC and the leaders of the parties represented in the National Assembly. This consultation must take place before deciding on a candidate for appointment, but the decisions remain the President’s alone. The case of *Ex Parte: Freedom Under Law, In re: The Appointment of the Chief Justice* created a lot of controversy, because former Chief Justice Sandile Ngcobo was nominated by President Zuma long before the JSC could finalise its interviews and provide the President with recommendations for his consideration. *Ex post facto* consultation is therefore not acceptable.

When appointing the President and the Deputy President of the Supreme Court of Appeal (SCA), the President, as head of the national executive, appoints the person of his or her choice after consulting the JSC (but there is no requirement to consult the leaders of the parties represented in the National Assembly). Although the Constitution does not define the notion of consultation, it has been argued that “at least it must entail the good faith exchange of views, which must be taken seriously”. It does not, however, mean that the President has to follow the advice of those consulted.

**ACTIVITY 6.4**

Is the following statement true or false? Irrespective of your answer, you must provide authority and reasons for your opinion.

“There are no restrictions on eligibility for the appointment of judges to the Constitutional Court”.

The President, as head of the national executive, appoints the other judges of the Constitutional Court after consulting the Chief Justice and the leaders of parties represented in the National Assembly. While the JSC plays a more important role in these appointments, the President retains the decisive role. The JSC’s role is to prepare a list of nominees containing three names more than the number of appointments to be made and to submit the list to the President. The President may make appointments from the list, but can also initially refuse to appoint someone from the list. If the President refuses, he or she must provide the JSC with reasons for the decision. If this happens, the JSC is required to supplement the list with further nominees and the President must make the remaining appointments from the supplemented list.

When it comes to the appointment of all other judges to the Supreme Court of Appeal (SCA), the High Courts and other specialised courts, the President has no discretion and is required to appoint the candidates selected by the JSC. The criteria for the selection of judges for appointment can be gleaned from section
174(1) of the Constitution, which stipulates that a person must be “appropriately qualified” and “a fit and proper person” to be appointed as a judge. A further criterion in respect of a Constitutional Court judge is that the appointee must be a South African citizen. Section 174(2) of the Constitution goes on to state that there is “the need to transform the judiciary better to reflect the racial and gender composition of South Africa”. The JSC itself has developed a set of additional criteria that it takes into account when considering appointments to the judiciary (discussed on pp 232–234 of the textbook).

ACTIVITY 6.5

Read the scenario presented below and consider it in the context of the cases of Premier of the Western Cape Province v Acting Chairperson: Judicial Service Commission and Others; Acting Chairperson: Judicial Service Commission and Others v Premier of the Western Cape Province; and Freedom Under Law v Acting Chairperson: Judicial Service Commission and Others discussed on pages 230 to 243 of the textbook, as well as in the light of sections 165, 174 and 178 of the Constitution. Then answer the questions which follow.

In April 2008, it was alleged that the Judge President of the Cape High Court, Judge John Hlophe, had approached some of the judges of the Constitutional Court in an improper attempt to influence this Court’s pending judgment in favour of Mr Zuma in the Zuma/Thint matter by stating: “You are our last hope; you must find in favour of our comrade.” The judges of the Constitutional Court consequently lodged a complaint with the Judicial Service Commission against Judge President Hlophe.

At the time that the complaint was lodged, the commission did not have the jurisdiction to hear a matter where a judge was accused of conduct not amounting to gross misconduct, as the provisions of the Judicial Service Commission Amendment Act, whose object, inter alia, is to allow for inquiries into and sanctions for alleged misconduct by judges that does not constitute gross misconduct leading to the removal of the judge from office, were yet to come into effect.

On 15 August 2009, after considering the matter and taking into account the limits of its powers, the commission, by a majority, reached the conclusion that the evidence in respect of the complaint did not justify a finding that Hlophe JP was guilty of gross misconduct and should accordingly be removed from office.

In the light of what you have read above, answer the following questions:

1. Explain fully what is meant by the phrase “independence of the judiciary” and elaborate on the qualities required of a judge. (10)
2. Explain fully how judges of the Constitutional Court are appointed. (8)
3. Discuss the mandate of the JSC (with brief reference to the Judicial Service Commission Amendment Act). In your answer, briefly critique the composition of the JSC, making specific reference to the composition of the JSC at the time that the decision not to proceed with the inquiry against Hlophe JP was taken in August 2009. (15)
4. Comment on the significance of the rule of law and the principle of legality and rationality within the remit of the role of the JSC, providing a substantiated opinion on whether you believe the JSC arrived at the correct decision when it declared that it had no jurisdiction to pursue the matter and that there was insufficient evidence to warrant continuing with the inquiry. (10)
The independence of the lower courts and of the traditional courts will now be discussed.

6.4 INDEPENDENCE OF THE LOWER COURTS AND OF THE TRADITIONAL COURTS

6.4.1 Independence of the lower courts

Section 165 of the Constitution includes all courts – even the lower courts – within its remit. Thus all courts must be independent and impartial. Section 174(7) governs the appointment of magistrates. The Magistrates Act 90 of 1993 supplements the Constitution by dictating that the appointment, promotion, transfer or dismissal of, or disciplinary steps against, these judicial officers must take place without favour or prejudice. In 1996, the composition of the Magistrates Commission was changed to align it more closely with that of the JSC. Accordingly, the Magistrate’s Commission is transformative, in that its composition is now more representative of South African society. It should also be noted that the same commission that determines the salaries of judges also determines the remuneration of magistrates.

6.4.2 Independence of traditional courts

Chiefs’ Courts administer justice on the basis of customary law and on the basis of several apartheid-era laws (which are still operative, although generally only parts of these laws are still in existence), such as the Black Administration Act. Chiefs are not elected but succeed to their positions on a hereditary basis. It is sections 12 and 20 of this Act, read with Chapter 12 of Schedule 6 of the Constitution, which grant the traditional courts their authority. Accordingly, the Minister of Justice confers civil and criminal jurisdiction on chiefs, headmen or chiefs’ deputies.

ACTIVITY 6.6

It has been argued by TW Bennett (1995 Human rights and African customary law) that traditional courts should retain their civil jurisdiction, but not be awarded jurisdiction to try criminal matters. This, states Bennett, would ensure access to justice while simultaneously guaranteeing the independence of traditional courts, the argument being that, unlike civil matters, criminal matters could be presided over by one who is complainant, prosecutor and judge.

Do you agree with Bennett’s argument? Can you think of any safeguards in place that could ensure the independence of traditional courts? (5)

6.5 THE NATIONAL PROSECUTING AUTHORITY (S 6.5, PP 249–255)

From the outset it is essential to comprehend that the National Prosecuting Authority (NPA) is not part of the judiciary. Nor is it part of the legislature or the executive. In fact, the NPA and the office of the National Director of Public Prosecutions are sui generis. Fundamentally, the NPA is intended to play a pivotal role in the effective and impartial functioning of the criminal justice system.
Section 179 of the Constitution, read with the National Prosecuting Authority Act 32 of 1998 (and its amendment), establishes the framework within which the NPA should operate.

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

The constitutional framework provides for a National Director of Public Prosecutions (NDPP) to head the prosecuting authority. The NDPP is appointed by the President in his or her capacity as head of the national executive. Such appointment is not unfettered, however, as it must comply with the objective criteria set out in the NPA Act, that is, the person so appointed must be “fit and proper” (referring to the incumbent’s moral and ethical fitness to hold the position).

This was the principal issue in the case of Democratic Alliance v President of South Africa and Others where the Democratic Alliance argued that the appointment of Menzi Simelane as the NDPP was fatally flawed, because Mr Simelane had been appointed notwithstanding the fact that he could not be described as a conscientious person of integrity and honesty, which is the minimum character trait of a person holding the office of the NDPP.

**ACTIVITY 6.7**

In March 2011, the Constitutional Court ruled that the Hawks (the corruption-busting unit of the South African Police Service) lacked sufficient operational and structural independence to enable them to properly fight corruption. The Court therefore declared the National Prosecuting Authority Amendment Act and the South African Police Service Amendment Act – which disbanded the Scorpions and which were passed by Parliament and signed into law by former President Kgalema Motlanthe in January 2009 – unconstitutional. Parliament was given until September 2012 to remedy this.

Provide an opinion on the implications of the Constitutional Court’s decision. In particular, critically discuss whether the decision gives rise to the counter-majoritarian dilemma. Your answer must include the following:

(a) A discussion of the place of the NPA within the framework of the separation of powers doctrine. In other words, does it fall within the legislative, executive or judicial branches? Explain your answer. (5)

(b) Based on your understanding of the Glenister case, explain why Glenister felt compelled to go to court to challenge the enactment of the National Prosecuting Authority Amendment Act and the South African Police Service Amendment Act. (5)

(c) A critical assessment as to whether or not the Court’s decision undermines democracy. (Your answer must refer specifically to the operation of the separation of powers doctrine in South Africa.) (6)
6.6 CONCLUSION

This study unit has indicated that the judiciary is the most independent branch of government within the separation of powers doctrine, as it is tasked with interpreting and enforcing the Constitution. As a result, more is done to ensure that the judiciary is independent. The study unit has also indicated how this independence is guaranteed by different mechanisms, including the appointment of judges by the JSC, the administration of the oath, security of tenure, financial security, and limiting the civil liability of judges. The next study unit will focus on the institutions supporting constitutional democracy.
Institutions supporting constitutional democracy

OUTCOMES OF THE STUDY UNIT
After you have studied the relevant parts of chapter 7 of the prescribed textbook, you should be able to do the following:

• know which institutions have been established to contribute to accountable government and to contribute to the transformation of South Africa into a society in which justice prevails
• know how they assist the various organs of state to adhere to the values and principles of the new constitutional dispensation
• be able to explain, with reference to relevant examples, the mandate and powers of the Public Protector and the Independent Electoral Commission

PRESCRIBED CHAPTER OF THE TEXTBOOK
• chapter 7, sections 7.1 to 7.3 of the prescribed textbook

PRESCRIBED SECTIONS OF THE CONSTITUTION
• sections 181 to 183 of the 1996 Constitution

PRESCRIBED CASES
• Independent Electoral Commission v Langeberg Municipality 2001 (3) SA 925 (CC)
• New National Party v Government of the Republic of South Africa and Others 1999 (3) SA 191

REPORTS OF THE PUBLIC PROTECTOR
• “Secure in comfort”: The Public Protector’s report on security upgrades at Nkandla
• “Against the rules”: The Public Protector’s report on the conduct by the Department of Public Works and the South African Police Service relating to the leasing of office space in Pretoria

7.1 OVERVIEW
The “Chapter 9 institutions” established to support South Africa’s constitutional democracy are independent, non-judicial institutions. They do not play the same
role as the judiciary in enforcing the Constitution, but are accountable to the National Assembly. The primary role of these institutions is to act as watchdogs to prevent the abuse of power (often by state entities). There are six Chapter 9 institutions, as provided for in section 181(1) of the Constitution.

7.1.1 Independence of Chapter 9 institutions
Chapter 9 institutions can perform well if they enjoy independence from both the executive and the legislative branches. The Constitution guarantees such independence from government. Further, independence relates to financial and administrative independence.

The case of Independent Electoral Commission v Langeberg Municipality is important in view of the fact that, in this case, it was held that the Chapter 9 institutions perform their functions in terms of national legislation, but are not subject to national executive control. As such, these institutions need to "manifestly be seen to be outside government". In the case of New National Party v Government of the Republic of South Africa and Others, the Constitutional Court affirmed the principle that these institutions must have financial independence in order to function independently and to be able to exercise their duties without fear, favour or prejudice. For this to be achieved, Parliament must provide a reasonable amount of money that will enable the institutions to fulfil their constitutional and legal mandates. In addition, these institutions require administrative independence.

These institutions have the power to investigate and make findings and recommendations for remedial action, although these recommendations are not legally binding.

The Independent Electoral Commission and the Office of the Public Protector will now be considered briefly.

7.1.2 The Independent Electoral Commission
According to section 3 of the Electoral Commission Act 51 of 1996, the Electoral Commission is independent and subject only to the Constitution and the law and shall be impartial and shall exercise its powers and perform its functions without fear, favour or prejudice.

7.1.3 The Public Protector
The Office of the Public Protector was established in terms of section 182 of the Constitution. The Public Protector investigates any conduct by the government or administration that is alleged or suspected to be improper or to result in any impropriety or prejudice. One example of the significant role that the institution plays in curbing the abuse of state authority is the Public Protector's investigation into complaints and allegations of maladministration, and improper and unlawful conduct, by the Department of Public Works and the South African Police Service relating to the leasing of office accommodation in Pretoria.
ACTIVITY 7.1

Read the scenario below and then answer the questions which follow:

The ANC currently holds 249 seats in the National Assembly. The DA holds 89 seats, the EFF holds 25 seats, and the other ten parties share 37 seats. At first glance, these numbers may not appear particularly significant when one considers that the essential role of the National Assembly, as laid down by section 55 of the Constitution, is to “legislate”, “maintain oversight” and “ensure all executive organs of state in the national sphere of government are accountable to it”. However, in the context of decision-making structures and oversight authorities, the ANC is firmly of the view that “we have more rights here because we are a majority. You have fewer rights because you are a minority” (which is a statement made by President Jacob Zuma during an exchange on labour tensions before the Marikana killings by the police in 2013).

Against this backdrop must be juxtaposed section 57 of the Constitution, which states that the rules and orders of the National Assembly “must provide for the participation … of minority parties … in a manner consistent with democracy”. The DA has sought legal advice from you because it is of the view that, despite the Public Protector’s report, “Secure in comfort”, in which she investigated the security upgrades at Nkandla and recommended that a portion of the money be repaid by President Zuma, the Nkandla saga was laundered in various parliamentary processes to absolve the President and anyone in his Cabinet from accountability, as public works officials and the presidential architect were blamed.

In the light of the general sentiment expressed above, which is that it is the legislature’s duty to enact laws, maintain oversight and ensure that national-sphere executive organs remain accountable to it, you are required to draft a well-substantiated legal opinion (beginning with an introduction, then setting out the issues to be discussed, the relevant law, and the application of the law to the facts, and, finally, reaching a defensible, sound conclusion) in which you address the following:

1. Examine the relationship between the National Assembly and the national executive in the context of South Africa’s constitutional democracy. You should indicate whether Parliament was correct in referring the Nkandla matter to various parliamentary committees (in an effort to exonerate the President of any wrongdoing) instead of simply adopting the Public Protector’s report and implementing it. Your answer must specifically address the status of the findings (recommendations) by the Public Protector. Substantiate your answer with reference to case law and relevant constitutional provisions. (30)

2. Explain, with reference to relevant examples, the mandate and powers of the Public Protector and the Independent Electoral Commission. (10)

7.2 CONCLUSION

It is clear from this study unit that Chapter 9 institutions act as watchdogs to prevent the abuse of power, acting in a fair and impartial manner. Though Chapter 9 institutions are required to work with the legislature, executive and other organs of state, such organs of state (including the executive and the legislature) cannot interfere in the day-to-day running of Chapter 9 institutions.

Study unit 8 will investigate cooperative governance/multilevel government in South Africa (division of powers between different spheres of government).
Cooperative governance/multilevel government in South Africa: the division of powers between different spheres of government

OVERVIEW
Study unit 8 is based on chapter 8 of the textbook.

Note the following: To simplify this study unit, it is divided into three separate sections, namely SECTION A, SECTION B and SECTION C, each with its own learning outcomes, prescribed reading material (relevant sections of the prescribed textbook, sections of the Constitution and case law), and activities relevant to each section. All in all, study unit 8 focuses on the division of power horizontally, that is, among the national, provincial and local spheres of government, thereby affirming the principle set out in section 40(1) of the Constitution.

SECTION A

8.1 DIVISION OF POWERS AMONG SPHERES OF GOVERNMENT: GENERAL PRINCIPLES

OUTCOMES FOR SECTION 8.1 OF THE STUDY UNIT
After you have studied the material in the relevant sections of chapter 8 of the prescribed textbook, you should, with reference to the relevant provisions of the Constitution and case law, be able to do the following:

- define and discuss the term “cooperative/multilevel government” and explain it in detail
- distinguish between and characterise the forms of government
- discuss the principles of cooperative/multilevel government
- discuss the executive and legislative powers of the national sphere of government
- discuss the executive and legislative powers of the provincial sphere of government
- discuss the executive and legislative powers of the local sphere of government
- explain which constitutional provisions deal with conflicts between the different spheres of government
This study unit, as the name suggests, investigates the cooperative or multilevel system of government in South Africa. The horizontal and vertical separation of powers in the South African system renders it an integrated quasi-federal government. You must be able to distinguish between a divided model of federalism (which is a strict division between the spheres of government in respect of policy or law-making) and an integrated model (where the subjects run concurrently between the different spheres, such as is the case in South Africa).

The principles of cooperative government regulate the overlap between various spheres of government. To fully understand this, you must know the basic division of powers in the government, such as which powers lie solely within the provincial or national spheres and when (and to what extent) these powers run concurrently. To manage any potential conflicts where these powers may run concurrently, an intergovernmental coordination system is instituted. This is mostly enshrined in Chapter 3 of the Constitution.

South Africa is divided into nine provinces whose governance is regulated by the Constitution. Each province is permitted to have its own constitution, in so far as such constitution is not repugnant (inconsistent) with or does not confer more powers than the national Constitution. Therefore, such constitution may not bestow substantially more powers on a province or deviate from the basic structure of governance of the province as set out in the national Constitution, as the provinces remain creatures of the national Constitution and thus cannot alter their character or their relationship with the other spheres of government.

The National Council of Provinces (NCOP) is the body which regulates the legislative activities of each of the provinces. Executive activities are regulated by bodies established by the Intergovernmental Relations Framework Act.
The election of the members of the provincial legislature mirrors that of the National Assembly, including the requirements for loss of membership. The premier is then elected by the provincial legislature and removed by invoking either section 130(3) or 141 of the Constitution. Any concern regarding the administrative capacity of a province must be referred to the NCOP within 30 days of referral to the Executive Council.

Conflict of laws

There is also the possibility that there may be a conflict between the exercise of legislative powers by the provincial and the national legislature. Where the competences are concurrent (as per Schedule 4 of the Constitution), the provincial legislature will prevail unless one or more requirements of section 146 of the Constitution are met, in which case the national legislation will prevail. In certain cases (as per s 146(2) and 146(3)), the provincial legislation in question will be suspended until the conflict has been resolved. Where the provincial legislature has exclusive competence (as per Schedule 5 of the Constitution), the national legislature may only intervene in cases set out in section 44(2) of the Constitution, and may then only resolve the matter concerned as set out in section 147(2) of the Constitution.

In deciding whether legislation may be enacted by the national or provincial legislature, the Constitutional Court has ruled that the main substance and character of the legislation will determine the field of competence. The Constitutional Court has further held that substance and character are determined by considering two important factors: firstly, that the substance of the law depends on the true purpose, effect and essence of what the law is about, and, secondly, that neither the provincial nor national legislative competencies are watertight, and therefore the substance of the legislation must be determined.

ACTIVITY 8.1

The Cape Town Municipality recently passed a by-law to the effect that refuse removal will take place once a month, as opposed to the current once-a-week removal. The municipality stated that the reason for this was the rising fuel price and other pressures on the budget that had not been factored in. Refuse removal is a functional area listed in Part B of Schedule 5 of the Constitution.

Residents in the areas affected are upset, since the long period between removal days is causing a huge build-up of refuse. The build-up attracts maggots, flies and other undesirable insects, thus creating an unhygienic environment with the potential of spreading diseases.

The national executive is alarmed at the passing of this by-law, as it believes that refuse removal at longer than weekly intervals creates serious health risks for the public and that it amounts to a violation of the right to a clean environment. The Cabinet therefore drafts a Bill which is passed by Parliament in terms of section 76(1) of the Constitution. This Act provides for refuse to be removed once a week, notwithstanding the provisions of any by-laws. The Cape Town Municipality wishes to challenge the legislation on the basis that it is unconstitutional.

Provide a fully reasoned opinion in which you advise the Cape Town Municipality on the likelihood of its challenge being successful. (15)
Local government also has legislative competence. The objectives of local government are set out in sections 152(1) and 153 of the Constitution. Section 155 of the Constitution also defines three categories of municipalities (i.e. categories A, B and C) and sets out the parameters of executive and legislative competences for each category. The Municipal Structures Act further expounds on this matter. This Act establishes and distinguishes between three executive systems (i.e. the collective, mayoral and plenary executive systems) and two participatory systems (i.e. the subcouncil and ward participatory systems). The Act also distinguishes which council (metropolitan, local or district) must employ which systems.

The municipal powers of local government are conferred by section 156 of the Constitution. This section distinguishes between original powers and assigned powers. Original powers are derived directly from the Constitution and can only be altered by amending the Constitution. Assigned municipal powers are conferred by national or provincial legislation. There is also a category called "incidental municipal powers" which provides the municipality with the right to exercise any powers which are reasonably necessary to perform its functions, as per section 156(5) of the Constitution.

Where municipal legislative competences are in conflict with those of the national or provincial legislature, they are invalid (s 156(3) of the Constitution). The exercise of legislative and executive powers by local government must be supervised by national and provincial spheres, which must monitor (s 155(6)), support (s 154(1)), regulate (s 155(7)) and intervene (s 139(1)) in local government.

**ACTIVITY 8.2**

Read sections 8.1 to 8.3 in the prescribed book and then answer the following questions:

1. What do you understand by the term “cooperative/multilevel government” in the constitutional sense? (5)
2. Why is the state categorised into different spheres? (4)
3. What is the basis for such a distinction? (4)
4. What are the methods that assist in identifying the systems that distribute government power? (6)
5. Explain in detail the benefits associated with the principles of cooperative governance. (8)
6. The Minister of Transport adopts a policy on the regulation of the transport system in South Africa which gives the national department sole discretion to ensure its implementation. This is done without consulting the other two spheres of government and the taxi industry which is directly affected by the policy. With reference to the above:
   (a) Discuss the importance of intergovernmental relations in the execution of state authority. (5)
   (b) Explain the role of public participation in the development of substantive principles of public governance. (8)
   (c) Analyse the importance of accountability in public governance. (6)
   (d) Examine the significance of the “reasonable principle” in fostering friendly relations among the three spheres of governance and its potential for the development of substantive principles of public administration. (6)
SECTION B

8.2 PROVINCIAL GOVERNMENT

OUTCOMES FOR SECTION 8.2 OF THE STUDY UNIT

After you have studied the material in this section, you should be able to do the following:

• discuss whether, and to what extent, the Constitution recognises provincial autonomy
• discuss the legislative authority of the provinces
• discuss the executive authority of the provinces, and the ways in which the provincial executive can be held accountable
• discuss the power of the provinces to adopt provincial constitutions
• explain when Parliament can adopt legislation dealing with a Schedule 5 matter
• explain what happens in the case of a conflict between national and provincial legislation
• familiarise yourself with the preconditions required for the national Parliament to intervene in the exclusive competences of the provincial legislatures
• develop your understanding of the rules and principles relating to conflict of laws

PRESCRIBED SECTION OF THE TEXTBOOK

• section 8.2 of the prescribed textbook

PRESCRIBED SECTIONS OF THE CONSTITUTION

• sections 44(2); 99 to 100; 104; 125 to 127; 130(3); 132 to 143; 146; Schedule 4 and Schedule 5 of the 1996 Constitution

PRESCRIBED CASES

• Premier: Limpopo Province v Speaker of the Limpopo Provincial Legislature and Others 2011 (11) BCLR 1181 (CC)
• Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill 2000 (1) BCLR 1 (CC)
• Abahlali Basemjondolo Movement SA and Another v Premier of the Province of KwaZulu-Natal and Others 2010 (2) BCLR 99 (CC)
• Mashavha v President of the Republic of South Africa and Others 2004 (12) BCLR 1243 (CC)

8.2.1 Introduction

A multisphere system of government operates in South Africa in the light of the fact that legislative and executive authority is divided among the three spheres of government. Interaction occurs predominantly between the national and provincial spheres and, for this reason, it is important to understand the objectives and structure of provincial government. Chapter 6 of the Constitution sets out the structure, powers and functions of the provincial legislatures, as well as of the provincial executive authorities. Provinces are required to fulfil at least three important interrelated, but distinct functions:

(1) Provinces provide a close link between voters and their government to ensure that the government addresses the particular concerns and unique challenges and needs of discrete geographical areas.
(2) Provinces are required to implement national policies and plans relating to important service-delivery areas such as housing, health care, policing and education.

(3) Provinces must oversee the smooth running of the local sphere of government within the boundaries of the province.

8.2.2 The legislative authority of a province

The legislative authority of each province is vested in its provincial legislature. The size of each of the legislatures is determined in terms of a formula prescribed by national legislation relating to the population size of that province, but it cannot be smaller than 30 or larger than 80 members, bearing in mind that a province’s permanent delegates to the National Council of Provinces (NCOP) are not members of the provincial legislature.

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

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

Provincial legislatures have limited legislative powers, as is evidenced by the case of Premier: Limpopo Province v Speaker of the Limpopo Provincial Legislature and Others in which the Financial Management of the Limpopo Provincial Legislature Bill, 2009, was considered. The Premier had reservations about the constitutionality of this Bill and refused to assent to it because the financial management of a provincial legislature is not listed as a functional area in either Schedule 4 or Schedule 5 of the Constitution. However, the provincial legislature argued that financial management had been “expressly assigned” to the provinces by the Financial Management of Parliament Act 10 of 2009 and was “envisaged” by sections 195, 215 and 216 of the Constitution. The Constitutional Court concluded that the Bill was invalid and unconstitutional because it did not fall into the legislative competence of the Limpopo legislature.

With regard to the legislative competence of the national Parliament in relation to the provincial legislatures, two distinct issues are at play:

- Firstly, when dealing with concurrent competences listed in Schedule 4, both the national legislature and the provincial legislatures are empowered to pass legislation on a particular topic and that legislation will have been validly passed. However, where there is a direct conflict between the two, the provisions of the provincial legislation will prevail unless one or more of the requirements of section 146 of the Constitution is met, in which case the national legislation will prevail.
- Secondly, usually only provincial legislatures can pass legislation dealing with one or more of the exclusive competences listed in Schedule 5. However, in cases set out in section 44(2) of the Constitution, the national Parliament may intervene and pass legislation listed in Schedule 5.
Any questions regarding the competence of a legislature to pass legislation on a specific topic are dealt with as follows:

- Firstly, it must be decided whether the impugned legislation deals with a topic listed in Schedule 4 or Schedule 5. Our courts have developed the “pith and substance” test to determine whether the subject matter of a Bill falls within Schedule 4 or Schedule 5. According to this test, those provisions of a Bill that fall outside its substance are treated as incidental. However, the more the Bill affects the interests, concerns and capacities of the provinces, the more say the provinces should have on its content. The substance and character are determined by considering two important factors: firstly, that the substance of the law depends on the true purpose, effect and essence of what the law is about, and, secondly, that neither the provincial nor the national legislative competencies are watertight, and therefore the substance of the legislation must be determined.

- Secondly, once we have determined whether the legislation falls within Schedule 4 or 5, we must ask whether the relevant legislature was authorised to pass the legislation as a matter of course or in terms of section 44(2) or section 146 of the Constitution.

### ACTIVITY 8.3

Study section 104 of the Constitution and then answer the following questions:

(a) In which body is the legislative authority of a province vested? (1)
(b) Discuss the legislative powers of the provincial legislatures. (In other words, in respect of which matters may the provincial legislatures pass legislation?) (6)
(c) Mention two functional areas in which a provincial legislature has exclusive legislative authority, and two areas in which it shares concurrent legislative authority with Parliament. (4)

### Guidelines for answering these questions:

To answer (a), you need to refer to and know section 104(1) of the Constitution. To answer (b), you have to refer to and know section 104(1)(a) and (b) of the Constitution. To answer (c), you have to refer to and consult Schedule 4 and Schedule 5 of the Constitution.

The functional areas in respect of which provinces share legislative authority with Parliament are listed in Schedule 4, while the functional areas in respect of which the provinces enjoy exclusive legislative authority are listed in Schedule 5.

### 8.2.3 The executive authority of a province

The executive authority of a province is vested in the Premier of that province, whose role mirrors that of the President at national level, except for the head-of-state powers bestowed on the President by section 84 of the Constitution. The Premier exercises executive authority by

- implementing provincial legislation in the province
- implementing all national legislation in the functional areas listed in Schedule 4 or 5, except where the Constitution or an Act of Parliament provides otherwise, but “only to the extent that the province has the administrative capacity to assume effective responsibility” (with any dispute concerning the administrative
capacity of a province being referred to the NCOP for resolution within 30 days of the date of the referral to the Executive Council)
• developing and implementing provincial policy
• coordinating the functions of the provincial administration and its departments
• preparing and initiating provincial legislation
• administering, in the province, national legislation outside the functional areas listed in Schedules 4 and 5, the administration of which has been assigned to the provincial executive in terms of an Act of Parliament
• performing any other function assigned to the provincial executive in terms of the Constitution or an Act of Parliament

An interesting matter concerning the relationship between the national and provincial executive arose in the recent case of Minister of Police and Others v Premier of the Western Cape and Others. The facts are as follows: in November 2011, the Premier of the Western Cape received complaints of serious allegations of police inefficiency, of a “breakdown of the rule of law” and of a breakdown in relations between the community and police in Khayelitsha. The Premier submitted this information, as well as a request to provide details on the proposed method for dealing with the issues raised, to the provincial police commissioner. After having received no substantive response from the provincial police commissioner for approximately nine months, the Premier approached the provincial Cabinet, which approved the proposed appointment of a commission of inquiry. On 22 August 2012, the Premier conveyed to the public her decision to appoint a commission of inquiry.

On 24 August 2012, the Premier appointed a commission of inquiry in terms of section 206(3) and (5) read with section 127(2)(e) of the Constitution and section 1(1) of the Western Cape Provincial Commissions Act 10 of 1998. Significantly, Part A of Schedule 4 of the Constitution provides for concurrent national and provincial legislative competence over the policing function and the provincial executive is thus entrusted with the policing function (albeit that the province’s power in this regard is diminished and is now limited to monitoring, overseeing and liaising functions).

The Minister of Police then sought an order from the Western Cape High Court directing the commission to suspend its activities pending a decision on the final review application to set aside the Premier’s decision to appoint the commission. The appointment was challenged on the basis that it was inconsistent with the Constitution, invalid, irrational or unlawful. The Court found that the appointment of the commission of inquiry was constitutional and valid.

An application was made by the Minister of Police to the Constitutional Court to appeal the High Court’s decision. The Constitutional Court refused leave to appeal and dismissed the application to declare that the decision of the Premier of the Western Cape of 24 August 2012 to establish a commission of inquiry was inconsistent with the Constitution and invalid.

8.2.3.1 Premiers of provinces

Premiers of the various provinces are elected by the provincial legislature, and the Premier may be removed in two ways:

• Firstly, they can be impeached in terms of section 130(3) of the Constitution for a serious violation of the Constitution or the law, for serious misconduct, or for inability to perform the functions of office.
• Secondly, in terms of section 141 of the Constitution, a provincial legislature may remove a Premier for purely political reasons by introducing a motion of no confidence in the Premier.

8.2.3.2 Dispute mechanism to facilitate cooperative government

With respect to any disputes, the case of *Uthukela District Municipality v President of RSA* is authority for the fact that a dispute mechanism exists. In this case, the Court held that, apart from the general duty to avoid legal proceedings against one another, section 41(3) of the Constitution requires organs of state to make every reasonable effort to settle disputes through the existing mechanisms and procedures, and to exhaust other remedies before resorting to litigation. As such, in the event of disputes arising such as happened in the Limpopo province and the Western Cape province cases discussed above, due recognition should be given to the separation of powers, with no entity intruding into the domain of another unnecessarily, and if, or when, any dispute arises, litigation should be a last resort.

SECTION C

8.3 LOCAL GOVERNMENT

OUTCOMES FOR SECTION 8.3 OF THE STUDY UNIT

After you have studied the material in this section, you should be able to do the following:

• discuss the reason behind the creation of local government as an “autonomous” sphere of government
• illustrate the effect of Chapter 7 of the Constitution on the legal status of local government
• compare the term “sphere” with the term “level” of government and explain the connotation of each term in constitutional law
• discuss whether local government is nothing more than an administrative “handmaiden” to national government
• discuss the role, composition, functioning and powers of the local sphere of government

PRESCRIBED SECTION OF THE TEXTBOOK

• section 8.3 of the prescribed textbook

PRESCRIBED SECTIONS OF THE CONSTITUTION

• sections 151 to 164 of the 1996 Constitution

PRESCRIBED CASES

• *The City of Cape Town and Another v Robertson and Another* 2005 (2) SA 323 (CC)
• *Uthukela District Municipality and Others v President of the Republic of South Africa* and Others 2002 (11) BCLR 1220
• *Matatiele Municipality and Others v President of the Republic of South Africa* 2006 (5) BCLR 622
8.3.1 Introduction

According to the case of Joseph and Others v City of Johannesburg and Others, because local government is “closer to the citizens”, one of its most important objectives is to meet the basic needs of all the inhabitants of South Africa. In order for it to do so, certain powers must be conferred on the municipal council to enable it to perform the tasks entrusted to it.

A provincial legislature may assign any of its legislative powers to a municipal council in a particular province. In addition, a member of the executive council of a province may assign any power or function that is to be exercised or performed in terms of an Act of Parliament or a provincial Act, to a municipal council. Such an assignment must be in terms of an agreement between the relevant executive council member and the municipal council and must be consistent with the Act in terms of which the relevant power or function is exercised or performed. This type of assignment takes effect once a proclamation has been made by the Premier of a province.

While municipalities derive their original and constitutionally entrenched powers, functions, rights and duties from the Constitution, the Local Government: Municipal Systems Act 32 of 2000 imposes an obligation on municipalities to provide basic municipal services for their inhabitants. This is largely consistent with the principle of subsidiarity, which requires that the exercise of public power take place at a level as close as possible to the citizenry.

The manner in which local government exercises its legislative and executive powers is important, because any exercise of legislative competence that is in conflict with the national or provincial legislative powers is invalid according to section 156(3) of the Constitution.

Accordingly, local government must be supervised by the national and provincial spheres of government in terms of the following categories:

- the power to monitor local government (in terms of s 155(6))
- the power to support local government (in terms of s 154(1))
- the power to regulate local government (in terms of s 155(7))
- the power to intervene in local government (such as through issuing a directive, assuming responsibility, and dissolving a municipal council) (in terms of s 139(1))

8.3.2 The objectives of local government

Section 152(1) of the Constitution sets out the objectives of local government as follows:

- to provide democratic and accountable local government for local communities
- to ensure the provision of services for communities in a sustainable manner
- to promote social and economic development
- to promote a safe and healthy environment
- to encourage involvement of communities/community organisations in local government
In turn, a municipality’s functions are regulated by section 153 of the Constitution:

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

The Municipal Structures Act 117 of 1998, as read with section 155 of the Constitution, distinguishes between three different categories of municipalities, namely category A (metropolitan), B (local) and C (district) municipalities. The Municipal Demarcation Board determines whether an area satisfies the criteria to be classified as metropolitan, local or district; as well as the powers and functions, and the procedures a municipality must follow when it exercises its powers in terms of the Local Government: Municipal Demarcation Act 27 of 1998.

With respect to the separation of powers, a category A municipality has exclusive municipal, executive and legislative authority in its area. A metropolitan municipality is any area which can reasonably be regarded as a conurbation featuring areas of high population density, intense movement of people, goods and services, extensive development, multiple business districts, and a number of industrial areas.

The purpose behind section 155 of the Constitution (and particularly s 155(3)(b)) is to guard against political interference in the process of creating new municipalities, which was the issue in the case of Matatiele Municipality and Others v President of the Republic of South Africa and Others.

The type of municipality is important for determining three issues:

- Firstly, the institutional relationship between the municipality’s executive and legislative functions
- Secondly, whether a metropolitan or local municipality is permitted to establish ward committees
- Thirdly, whether a metropolitan municipality is permitted to establish subcouncils that exercise delegated powers for parts of the municipality

The executive and legislative powers of a municipality are set out in section 156 of the Constitution. This section provides that a municipality has executive authority in respect of, and the right to administer,

- the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5
- any other matter assigned to it by national or provincial legislation

The case of City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others serves to clarify what should be done in the event of a dispute over a municipality’s competence. The Court held that “where two or more matters appear to overlap with each other, they should be interpreted in a bottom-up manner, which is one in which the more specific matter is defined first and all residual areas are left for the much broader matter”. Accordingly, the power to approve applications for the rezoning of land and the establishment of townships did, therefore, fall into the area of municipal planning listed in Schedule 4B.
Section 156 also provides that a municipality may make and administer by-laws for the effective administration of the matters that it has the right to administer. Moreover, a municipality has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions. Given that the executive and legislative powers provided for in section 156 of the Constitution can only be altered or withdrawn if the Constitution itself is amended, they form the most significant source of municipal powers and are a fundamental feature of local government’s institutional integrity.

**ACTIVITY 8.4**

As an African philosophy of life, ubuntu in its most fundamental sense represents personhood, humanity, humanness and morality. It is a metaphor that describes group solidarity where such group solidarity is central to the survival of society in a context of scarce resources. From this perspective, ubuntu finds its cardinal embodiment in the Zulu expression *umuntu ngumuntu ngabantu*, which, literally translated, means a person can only be a person through others.

Former Constitutional Court Justice Yvonne Mokgoro articulated ubuntu in the following terms:

Group solidarity, compassion, respect, human dignity, humanistic orientation and collective unity have, among others, been defined as key social values of Ubuntu. Because of the expansive nature of the concept, its social value will always depend on the approach and the purpose for which it is depended on. Thus its value has also been viewed as a basis for a morality of cooperation, compassion, communalism and concern for the interests of the collective, respect for the dignity of personhood, all the time emphasising the virtues of that dignity in social relationships and practices. For purposes of an ordered society, Ubuntu was a prized value, an ideal to which age-old traditional African societies found no particular difficulty striving for.

In ubuntu-governed societies, therefore, there is greater emphasis on duties, although rights are always implied. The ubuntu philosophy is premised on an acknowledgement that humans are social beings. A society governed by ubuntu also emphasises that everyone should participate in society and not disappear in the whole. A tradition of consultation and decision-making by ordinary members of society is also embodied in ubuntu. The consultation that precedes decision-making in societies that acknowledge ubuntu is derived from an age-old pre-colonial African ethos that, arguably, permeated all pre-colonial African societies. The consultation preceding decision-making in most pre-colonial African societies has led scholars to conclude that most African societies were inherently democratic, even though the word “democracy” may not have been in use then.

With reference to the concept of ubuntu, prepare an essay in which you highlight the similarities and differences between the objectives of constitutional law and ubuntu using relevant case law, the provisions of the Constitution, and the fundamental principles and concepts underpinning constitutional law, in order to reach a legally sound and compelling conclusion.

(20)

Legislative competence in terms of Schedule 4B and Schedule 5B has also been conferred on the national and provincial governments, but the latter’s authority is limited by section 155(6)(a) of the Constitution, which provides that “each provincial government … by legislative and other measures, must provide for the monitoring and support of local government in the province”. Section 155(7) provides: “The national government, subject to section 44, and the provincial governments have the legislative and executive authority to see to the effective
performance by municipalities of their functions in respect of matters listed in Schedule 4 and 5, by regulating the exercise by municipalities of their executive authority referred to in section 156(1)."

The legislative and executive authority of a municipality is vested in its municipal council. Local government is thus a deliberative assembly with legislative and executive powers recognised in the Constitution itself, which affords it an opportunity to achieve its full potential. As such, a municipal council is entitled to raise taxes (such as rates) as it deems fit in the light of the fact that it is exercising a power that, under our Constitution, is a power peculiar to elected legislative bodies. It is a power that is exercised by democratically elected representatives after due deliberation.

An important consequence of section 155(7) of the Constitution is that neither the national nor the provincial spheres of government can, by legislation, give themselves the power to exercise executive municipal powers or the right to administer municipal affairs. The municipalities themselves must therefore exercise the power to administer or implement laws relevant/applicable to municipalities.

Both the national and provincial governments may increase the legislative powers of municipalities by assigning any of their legislative powers to a municipality. Likewise, a national or provincial minister may increase the executive powers of municipalities by assigning his or her executive powers to the municipal council of that municipality (this is a discretionary power).

In addition, the national and provincial government is mandated to assign the administration of a matter listed in Part A of Schedule 4 or Schedule 5 to a municipal council if certain conditions are met:

- firstly, if the matter necessarily relates to local government
- secondly, if the matter would most effectively be administered locally
- thirdly, if the municipality has the capacity to administer the matter
- fourthly, if the municipal council agrees to the assignment

ACTIVITY 8.5
Summarise, in your own words, what the Constitutional Court stated in Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council 1999 (1) SA 374 (CC).

Conflicts between national and provincial laws and municipal laws are resolved in terms of section 156(3) of the Constitution. This section simply provides that, subject to section 151(4), a by-law that conflicts with national or provincial legislation is invalid. Consequently, a municipality must exercise its legislative and executive authority within the parameters set by national or provincial legislation. In the absence of any national or provincial law regulating a local-government matter, however, a municipality is free to determine the contents of its legislative and executive decisions.

ACTIVITY 8.6
Two ratepayers, Daniel and Pumi, live in the Sandton area. They approach you with the following problem: Parliament has enacted section 21 of the Local Government Amendment Act which has a direct impact on the general valuation of property in the
Sandton area, and the rates based on those valuations. Daniel and Pumi indicate that they had no knowledge that such an enactment had been proposed nor were they given an opportunity to express their views on this Act prior to it coming into operation.

You are required to advise Daniel and Pumi on whether they can challenge the constitutionality of the Act, and, if so, on what basis such a challenge can be brought. To answer this question, you have to determine whether Parliament is sovereign under the new dispensation. If Parliament is not sovereign, then you must determine the status of the local sphere of government under the 1996 Constitution. You also need to determine the mechanisms that are in place to assist the local sphere of government in achieving its full potential. It is imperative that you refer to the Robertson case in your answer.

Guidelines for answering the question:

It is imperative that you emphasise, *inter alia*, that, in the Robertson case, it was held that local government is “interdependent, inviolable and possesses the constitutional latitude within which to define and express its unique character”.

8.4 CONCLUSION

This study unit laid the foundation of the principle of cooperative/multilevel governance, which requires that different spheres of government should work together with the National Council of Provinces in coordinating the legislative activities of the three spheres of government. The study unit also indicated that the provincial legislature uses the same principles as the national legislature. The last part of the study unit focused on the role played by local government, and discussed how to resolve conflicts should they arise between the national, provincial and local government.

You have now reached the end of the study guide.

You should have mastered the following components as indicated at the beginning of the study guide. Thus you should, by now,

- have acquired sufficient knowledge, skills, aptitudes and competencies to analyse and critically evaluate legal material pertaining to constitutional law (the Constitution, legislation, case law and academic opinion)
- understand the institutional framework within which state power is created, organised and exercised/applied
- understand the relationship between the different institutions or structures that exercise state power (i.e. the rules relating to the distribution and exercise of state authority), as well as
  - the interrelationship between state institutions and other organisations
  - the limitations that are imposed on the exercise of this power
- be able to formulate legal arguments and to apply knowledge to practical problems that may arise in a constitutional state.

We wish you all the very best for the examination and for your further studies.

We hope that you enjoyed this module and that you found it rewarding.
**GLOSSARY OF TERMS USED IN THIS STUDY GUIDE**

**Hint:** We suggest that, if you do not understand a word, that you log on to the internet and use “Google translate” to translate the word into your first language (if it is not English). If you are familiar with English and there are still difficult words that you do not understand the meaning of, then use a thesaurus for an explanation of these words.

**Hint:** As a lifelong learner, the following is a good practice to get into in order to learn the meanings of new words and terms. You can add to the list below as you revise the study guide again.

<table>
<thead>
<tr>
<th>LEGAL/LATIN</th>
<th>ENGLISH</th>
<th>ZULU</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>Iustitia</em></td>
<td>Justiciable – enforceable in a court of law</td>
<td>Egunyazwe ngokomthetho wenkantolo</td>
</tr>
<tr>
<td>Justifiable</td>
<td>Legally (or morally) capable of being justified</td>
<td>Ngokomthetho (noma ngokokuziphatha) olukwazi sesilungisisiwe</td>
</tr>
<tr>
<td><em>Ex parte</em></td>
<td>With respect to, or in the interests of, one side only</td>
<td>Ebonelela uhlangothi lunye</td>
</tr>
<tr>
<td><em>Inter se</em></td>
<td>Between or among themselves</td>
<td>Phakathi kwabo</td>
</tr>
<tr>
<td><em>Rechtsstaat</em></td>
<td>The principle of government by law, and not by force</td>
<td>Umgomo kahulumeni wokuphata ngokomthetho hhayi ngokuphoqelela</td>
</tr>
<tr>
<td>principle</td>
<td></td>
<td></td>
</tr>
<tr>
<td><em>Ubuntu</em></td>
<td>A person can only be a person through others</td>
<td>Umuntu ngumuntu ngabantu (which, literally translated, means a person through other persons)</td>
</tr>
<tr>
<td>Autochthonous</td>
<td>indigenous/home-grown</td>
<td>Imithetho yesintu/ Yendabuko/okoMdabu/ Kwasekhaya</td>
</tr>
<tr>
<td>Allochthonous</td>
<td>borrowed/foreign</td>
<td>Okutshelekiwe/ kwangaphandle</td>
</tr>
<tr>
<td><em>A quo</em></td>
<td>From which (e.g. “court a quo” means the court from which a matter comes). Court of first instance.</td>
<td>Okokuqala/okungezansi</td>
</tr>
</tbody>
</table>
SOURCES REFERRED TO IN THIS STUDY GUIDE

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Currie I & De Waal J with De Vos P, Govender K & Klug H 2001 The new constitutional and administrative law volume 1, Juta, chapter 5, 226–266
Devenish G 1998 Commentary on the South African Constitution, Butterworths
Dicey AV 1885 Introduction to the study of the law of the constitution
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Van der Vyver JD “The separation of powers” SA Public Law/Publiekereg, Vol 8: 177–191

TABLE OF CASES

Acting Chairperson: Judicial Service Commission and Others v Premier of the Western Cape Province 2011 (3) SA 538 (SCA)
  – The Premier of a province must participate in the appointment and removal of a judge in that province in terms of section 178(1)(k) of the Constitution.

African Christian Democratic Party v The Electoral Commission and Others 2006 (5) BCLR 579 (CC)
  – Participation in elections must not be frivolous.

August v Electoral Commission 1999 (4) SA BCLR 363 (CC)
  – The right to vote is significant for democracy.

City of Cape Town and Others v Robertson and Another 2005 (2) SA 323 (CC)
  – The local sphere of government is interdependent, inviolable and possesses the constitutional latitude within which to define and express its unique character, subject to the constraints permissible under our Constitution.

City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others 2010 (6) SA 182 (CC)
  – Neither the national nor the provincial spheres of government can, by legislation, give themselves the power to exercise executive municipal powers or the right to administer municipal affairs.
“Where two or more matters appear to overlap with each other, they should be interpreted in a bottom-up manner, which is one in which the more specific matter is defined first and all residual areas are left for the much broader matter.”

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

- Over time, our courts will develop a distinctively South African model of separation of powers, one that fits the particular system of government provided for in the Constitution and that reflects a delicate balancing, informed both by South Africa’s history and its new dispensation, between the need, on the one hand, to control government by separating powers and enforcing checks and balances and, on the other, to avoid diffusing power so completely that the government is unable to take timely measures in the public interest.

*De Lille and Another v Speaker of the National Assembly* 1998 (3) SA 430 (C)

- This case highlights the importance of ensuring that the citizenry is properly represented in the working of the National Assembly. In this matter, the Court was required to decide on the constitutionality of a decision of the ad hoc committee of the National Assembly to suspend a member of the National Assembly as a form of punishment for statements she had made before it.
- [para 27]: In answering the question in the negative, the Court recognised the National Assembly’s constitutional powers to regulate its own affairs. However, the Court held that such powers did not include the power to suspend a member for contempt as a form of punishment. Such action, if permitted, would be inconsistent with the requirements of representative democracy.

*Democratic Alliance v President of the Republic of South Africa* 2012 (12) BCLR 1297 (CC)

- The Democratic Alliance argued that the appointment of Menzi Simelane as the National Director of Public Prosecutions was fatally flawed because Mr Simelane had been appointed notwithstanding the fact that he could not be described as a conscientious person of integrity and honesty, which is the minimum character trait of a person holding the office of the National Director of Public Prosecutions.
- The court affirmed that the principle of legality has become possibly the most important and often invoked principle of the rule of law in South Africa.

*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* 2000 (1) SA 661 (CC)

- [para 123–124]: Apart from being allowed to introduce legislation in the National Assembly, members of the executive are given the power to develop and implement policy, as well as to prepare and initiate legislation. In addition, the executive enjoys limited law-making powers, in that it is empowered to make subordinate legislation, a power conferred on the executive in the empowering legislation.

*Executive Council, Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 877 (CC)
– Confine yourself to delegation of authority; invalidation of legislation (and proclamations) of the democratic Parliament; and the separation of powers.

Ex Parte Chairperson of the Constitutional Assembly: In re: Certification of the Constitution of the Republic of South Africa 1996 (4) SA 744 (CC)

– Certification that the text of the final Constitution complied with the 34 Constitutional Principles developed during CODESA and the MPNF:

– [para 45]: Summary of Constitutional Principles:

– [para 116]: “The President derives this power not from antiquity but from the Constitution itself that proclaims its own supremacy. Should the exercise of the power in any particular instance be such as to undermine it, that conduct would be reviewable.”

– [para 151–159]: Flexibility of the Constitution:

E. AMENDING THE CONSTITUTION (footnotes omitted)

– [151] Two related objections were lodged with regard to the entrenchment of the provisions of the New Text (NT). The first relates to procedures for the amendment of the NT as prescribed in NT 74 and the second concerns the entrenchment of the Bill of Rights in the NT.

– Amendment of Constitutional Provisions: NT 74

– [152] The issue is whether the provisions of NT 74 comply with the requirements of CP XV, which prescribes “special procedures involving special majorities” for amendments to the NT. The objection is that NT 74 provides for “special majorities” but not for “special procedures”. It therefore becomes necessary to determine what is meant by “special procedures involving special majorities”.

– [153] It is clear that CP XV makes a distinction between procedures and majorities involved in amendments to ordinary legislation, on the one hand, and to constitutional provisions, on the other. Its purpose is obviously to secure the NT, the “supreme law of the land”, against political agendas of ordinary majorities in the national Parliament. It is appropriate that the provisions of the document which are foundational to the new constitutional state should be less vulnerable to amendment than ordinary legislation. The requirement of “special procedures involving special majorities” must therefore necessarily mean the provision of more stringent procedures as well as higher majorities when compared with those which are required for other legislation.

– [154] NT 74 must be contrasted with NT 53(1), which makes provision for amendments to ordinary legislation. The amendment of a constitutional provision requires the passing of a bill by a two-thirds majority of all the members of the NA.110 NT 53(1) deals with amendments to ordinary legislation (other than money bills). It requires that “a majority of the members of the National Assembly must be present before a vote may be taken on a bill or an amendment to a bill” and that before a vote may be taken on any other question before the NA, at least one-third of the members must be present. Finally, it provides that all questions before the NA are decided by a majority of the votes cast.

– [155] There is another form of entrenchment with regard to NT 1 and NT 74(2), where the amending provision must be supported by a majority of 75 per cent of the members of the NA. Special procedures are invoked where an amendment affects the NCOP, provincial boundaries, powers, functions or institutions or deals with a provincial matter. Then the amendment must,
in addition to the two-thirds majority of the members of the NA, be approved by the NCOP, supported by a vote of at least six of the provinces. Where the bill concerns only a specific province or provinces, the NCOP may not pass it unless it has been approved by the relevant provincial legislature or legislatures.

[156] The two-thirds majority of all members of the NA which is prescribed for the amendment of an ordinary constitutional provision is therefore a supermajority which involves a higher quorum. No special formalities are prescribed. We are of the view that, in the context of the CPs, the higher quorum is an aspect of the “special majorities” requirement and cannot be regarded as part of “special procedures”. It is of course not our function to decide what is an appropriate procedure, but it is to be noted that only the NA and no other House is involved in the amendment of the ordinary provisions of the NT; no special period of notice is required; constitutional amendments could be introduced as part of other draft legislation; and no extra time for reflection is required. We consider that the absence of some such procedure amounts to a failure to comply with CP XV.

Entrenchment of the Bill of Rights

[157] CP II requires that “all universally accepted rights, freedoms and civil liberties … shall be provided for and protected by entrenched and justiciable provisions in the Constitution”. The complaint is that the provisions of the Bill of Rights contained in NT ch 2 do not enjoy the protection and entrenchment required by CP II. In particular there is nothing in the NT which elevates the level of protection of the Bill of Rights above that afforded the general provisions of the NT.

[158] In defence of the NT it was argued that the relevant provisions enjoy the requisite protection and entrenchment and that CP II is satisfied once those rights, freedoms and civil liberties are placed beyond the reach of ordinary legislative procedures and majorities, as has been done in the NT.

[159] We do not agree that CP II requires no more than that the NT should ensure that the rights are included in a constitution, the provisions of which enjoy more protection than ordinary legislation. We regard the notion of entrenchment “in the Constitution” as requiring a more stringent protection than that which is accorded to the ordinary provisions of the NT. The objection of non-compliance with CP II in this respect therefore succeeds. In using the word “entrenched”, the drafters of CP II required that the provisions of the Bill of Rights, given their vital nature and purpose, be safeguarded by special amendment procedures against easy abridgement. A two-thirds majority of one House does not provide the bulwark envisaged by CP II. That CP does not require that the Bill of Rights should be immune from amendment or practically unamendable. What it requires is some “entrenching” mechanism.

Ex Parte President of the Republic of South Africa: In re: Constitutionality of the Liquor Bill 2000 (1) BCLR 1 (CC)

The Court spelt out: (1) the circumstances in which the President is allowed to refer a Bill to the Constitutional Court; and (2) the scope of the Court’s power to consider the constitutionality of a Bill.

[para 11]: “Section 79(5) requires a decision from this Court as to whether ‘the Bill is constitutional’. In terms of section 167(4)(b), only the Constitutional Court may decide on the constitutionality of any Parliamentary Bill, but may do so only in the circumstances anticipated in section 79. The general powers
of the courts in dealing with constitutional matters are set out in section 172. That section requires that a Court when deciding a constitutional matter within its power ‘must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency’. Since the Bill has not yet been enacted, it is clearly not a ‘law’ as envisaged by section 172(1). Moreover, since the Bill as yet lacks legal force, the remedy section 172 envisages – a declaration of invalidity – is plainly inappropriate. It follows that the provisions of section 172 are not directly helpful in guiding the Court as to its role in the section 79 referral procedure.”

– [para 27]; “Any Bill whose provisions in substantial measure fall within a functional area listed in Schedule 4 must be dealt with under section 76.”

Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others 1999 (1) SA 374 (CC)

– Powers exercised by local government are subject to the Constitution and the exercise of such powers is constrained by the rule of law. The principle of legality – an incidence of the rule of law – is what determines whether public bodies act lawfully or not. The Constitutional Court looked at the rule of law to assess the constitutional validity of legislation. The Court stated that the rule of law, to the extent that it expressed the principles of legality, was fundamental to constitutional law, since the rule of law includes at a minimum the principle of legality. The Court held that section 24 of the interim Constitution relating to administrative action did not apply to legislation made by local government, as [its] power to make laws [was] constrained by other provisions in the Constitution. The principle of legality requires that not only must the state not act ultra vires, but [also] that the state must derive its power from the law. Accordingly, the principle of legality prevents organs of state from using their power without being authorised to do so by the law. The underlying rationale is that, whenever an organ of state exercises its power, it must be authorised by the Constitution or other laws. This prevents organs of state from using their power without authority. The Constitutional Court made it clear that the rule of law applies to organs of state, including everyone within that organ.

Freedom Under Law v Acting Chairperson: Judicial Service Commission and Others 2011 3 SA 549 (SCA)

– Focus on the imperative of the rule of law and irrationality of the decision.

Glenister v President of the Republic of South Africa and Others (Glenister I) 2009 (1) SA 287 (CC)

– Separation of powers is “axiomatic” in the Constitution (albeit not expressly stated).
– It is a necessary component of the doctrine of the separation of powers that courts have a constitutional obligation to ensure that the exercise of power by other branches of government occurs within constitutional bounds. [However] it should not be assumed that the Parliament will not correct the potentially unconstitutional provisions … the court may intervene in the legislative process only if no effective remedy would be available to the applicant once the law is passed and the harm would be material and irreversible … . But even in these circumstances, courts must observe the limits of their powers.
Glenister v President of the Republic of South Africa and Others (Glenister II) 2011 (3) SA 347 (CC)

- Illustration of the limits of a court’s powers within the paradigm of the separation of powers doctrine.


- The Judicial Service Commission interviewed Advocate Jeremy Gauntlett to fill a vacancy in the Constitutional Court. Gauntlett is known as a great legal mind, with extensive experience, albeit that he is “acerbic”. Notwithstanding the fact that section 174(1) of the Constitution merely mentions that the candidate must be suitably qualified and fit and proper, it appeared as though the only reason why Jeremy Gauntlett’s name was not submitted to the President as a nominee for the Constitutional Court bench is because he is a white male. As the Helen Suzman Foundation put it, “there is a growing perception that talented candidates for judicial appointment and advancement are being overlooked for reasons that are not clear or explicit”.

Independent Electoral Commission v Langeberg Municipality 2001 (9) BCLR 883 (CC)

- Although the Electoral Commission is an organ of state as defined in section 239 of the Constitution, the requirement that it be independent from the government means that it cannot be said to be a department or an administration within the national sphere of government over which Cabinet exercises authority.

International Trade Administration Commission v SCAW of South Africa (Pty) Ltd 2010 (4) SA 618 (CC)

- The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of state, but rather to ensure that the concerned branches of state exercise their authority within the bounds of the Constitution.

Joseph and Others v City of Johannesburg and Others 2010 (3) BCLR 212 (CC)

- One of the most important objectives of local government is to meet the basic needs of all of the inhabitants of South Africa in light of the fact that local government is “closer to the people”. In order for it to do so, powers must be conferred on the municipal council enabling it to perform the tasks entrusted to it.

Judge President Hlophe v Premier, Western Cape; Judge President Hlophe v Freedom Under Law and Other 2012 (6) 13 (CC)

- Judge President John Hlophe counterclaimed against the misconduct allegations that had been levelled against him by the Justices of the Constitutional Court.

Judicial Service Commission & Another v Cape Bar Council & Another 2012 (11) BCLR 1239 (SCA)

- Decisions of the JSC (including [those] about appointment or non-appointment) are reviewable by a court, based on the principles of legality and rationality.
Justice Alliance of South Africa v President of the Republic of South Africa and Others 2011
- The Constitutional Court confirmed the view that Parliament cannot delegate its plenary law-making power to the President.

Justice Alliance of South Africa v President of Republic of South Africa and Others, Freedom Under Law v President of Republic of South Africa and Others, Centre for Applied Legal Studies and Another v President of Republic of South Africa and Others 2011 (5) SA 388 (CC); 2011 (10) BCLR 1017 (CC)
- President Zuma attempted to renew the tenure of Chief Justice Sandile Ngcobo without having regard to the fact that the Judicial Service Commission had not yet finalised its interviews and provide the President with recommendations for his consideration. Ex post facto consultation is not acceptable when making decisions concerning the appointment of the Chief Justice.

Liberal Party v The Electoral Commission and Others 2004 (8) BCLR 810 (CC)
- [The] Electoral Commission may not accept late submission of candidate lists by parties.

Masethla v President of the Republic of South Africa and Another 2008 (1) BCLR 1 (CC)
- Executive power of the President to appoint and dismiss the head of the NIA.

Matatiele Municipality and Others v President of the Republic of South Africa and Others 2007 (1) BCLR 47 (CC)
- Parliament must take reasonable steps to facilitate public involvement in the law-making process. Failure to do so would mean that any law enacted in such a procedurally flawed way would then be null and void.

Mazibuko v City of Johannesburg 2010 (2) SA 1 (CC)
- It is institutionally inappropriate for a court to determine what achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right. This is a matter for the legislature and executive … it is desirable as a matter of democratic accountability that they should do so, for it is their programmes and promises that are subjected to democratic popular choice.

Mazibuko v Sisulu and Another 2013 (6) SA 249 (CC)
- “[You must] operate within a constitutionally compatible framework; give content to section 102 of the Constitution; you cannot subvert this expressly formulated idea of a motion of no confidence. However, how you allow that right to be vindicated is for you to do, not for the courts to determine.”
- [para 31]: The Constitutional Court affirmed its reluctance to interfere in the power of the National Assembly to determine its own internal arrangements, proceedings and procedures, and to make rules and orders concerning its business (this is referred to as judicial deference and illustrates that the courts respect the exclusive domain of the executive and the legislature and do not unnecessarily or arbitrarily interfere in those domains).
MEC for Education, KwaZulu-Natal v Pillay 2008 (1) SA 474 (CC)

- Courts recognise the need for judicial deference in reviewing the decisions of an administrative [executive] nature where the decision-maker is, by virtue of his or her expertise, especially well qualified to decide. It is true that courts must respect the opinion of experts … who are particularly knowledgeable in their area.

MEC for Health, KwaZulu-Natal v Premier of KwaZulu-Natal: In re Minister of Health v Treatment Action Campaign 2002 (10) BCLR 1028-1031 (CC)

- Practical application of the separation of powers in South Africa. The executive was ordered to provide nevirapine to all HIV-positive pregnant women, despite the fact that decisions which affect the budget of the Department of Health are to be made by the executive, not the judiciary. However, the executive had failed to comply with its constitutional obligations, so the judiciary intervened.

Merafong Demarcation Forum and Others v President of the Republic South Africa and Others 2008 (10) BCLR 968 (CC)

- [para 133–140]: Public participation in the legislative process must not be a sham or a farce. Building up to the decision to relocate the municipality and subsequent to it, the community had vociferously made their disaffection with regard to relocation known. They had done this through public meetings, written submissions, mass public protests, marches and ultimately widespread civic disobedience characterised by public violence and the destruction of private and public property. Parts of Merafong, particularly the township of Khutsong, had become “ungovernable” and resembled a war zone as residents refused to accept the decision to relocate the municipality.

Minister of Home Affairs and Another v Fourie and Another 2006 (3) BCLR 355 (CC)

- [The] Constitutional Court held that same-sex marriages should be recognised and registered. Parliament was ordered to enact the Civil Unions Act to facilitate this.
- This case confirms the court’s respect for the [separation-of-powers] principle and its understanding of the limits of its jurisdiction/powers.

Minister of Police and Others v Premier of the Western Cape and Others 2013 (12) BCLR 1365 (CC)

- The Premier of the Western Cape appointed a Commission of Inquiry to establish the truth about the serious allegations of police inefficiency, of a “breakdown of the rule of law” and of a breakdown in relations between the community and police in Khayelitsha. Part A of Schedule 4 of the Constitution provides for concurrent national and provincial legislative competence over the policing function and the provincial executive is thus entrusted with the policing function. The Constitutional Court found that the appointment of the Commission was constitutional and valid.

National Treasurer & Others v Opposition to Urban Tolling Alliance & Others 2012 (6) SA 223 (CC)

- The ordering of public resources inevitably calls for policy-laden and polycentric decision-making. The judiciary is not well suited to make decisions of that order, as it falls within the domain of the executive.
New National Party v Government of the Republic of South Africa and Others
1999 (3) SA 191

- The Independent Electoral Commission must have the ability to access funds reasonably required to enable the Commission to discharge the functions it is obliged to perform under the Constitution and the Electoral Commission Act.

Oriani-Ambrosini, MP v Sisulu, MP Speaker of the National Assembly 2012 (6) SA 588 (CC)

- The Constitutional Court invalidated the Rules of the National Assembly which required a member of the National Assembly to obtain permission from the National Assembly to initiate and introduce Bills (because in practice members of the opposition could never introduce any Bills in the National Assembly unless they were given permission by the majority party to do so, notwithstanding the provisions of section 73(2) of the Constitution which allows any member of the National Assembly to introduce a Bill). The Court stated that South Africa’s constitutional democracy “is designed to ensure that the voiceless are heard”, and is one in which the “views of the marginalised or the powerless minorities cannot be suppressed”.

Premier: Limpopo Province v Speaker of the Limpopo Provincial Legislature and Others 2011 (6) SA 396 (CC) (Limpopo II)

- The Premier of Limpopo province had reservations about the constitutionality of the Financial Management of the Limpopo Provincial Legislature Bill, 2009, and refused to assent to it because the financial management of a provincial legislature is not listed as a functional area in either Schedule 4 or 5 of the Constitution.

- This case raises the question of the court’s duty (on the basis of the supremacy of the Constitution and the rule of law as well as the Court’s duty to uphold and protect the Constitution) to determine the constitutionality of five pieces of legislation that authorise certain provincial legislatures to manage their own financial affairs. The legislative powers of the provinces are circumscribed and are set out in section 104 of the Constitution. A provincial legislature may therefore be competent to legislate on its own financial management only if this is a matter that has been “expressly assigned” to it by national legislation or is a matter for which a provision of the Constitution “envisages” the enactment of provincial legislation in terms of sections 195, 215 and 216 of the Constitution. The legislation was declared invalid because it did not fall into the legislative competence of the Limpopo provincial legislature. Justice and equity warranted the suspension of the order of invalidity for 18 months. Important factors informed this conclusion: a legislative lacuna would result from an immediate invalidation and this would have a negative impact on the interests of good government.

Premier of the Western Cape and Others v Overberg District Municipality and Others 2011 (4) SA 441 (SCA)

- If a municipality does not fulfil an obligation in terms of the Constitution or legislation to approve a budget or any revenue-raising measures necessary to give effect to the budget, the national or relevant provincial executive must intervene by taking any appropriate steps to ensure that the budget or those revenue-raising measures are approved. The appropriate steps which the national or provincial executive may take include measures such...
as the mandatory dissolution of the municipal council and the adoption of a temporary budget or revenue-raising measures.

Premier of the Western Cape Province v Acting Chairperson: Judicial Service Commission and Others 2009

- Adherence to the rule of law is imperative! The fact that the Premier of the Western Cape (Helen Zille) was not invited to participate in the disciplinary hearing brought against Judge John Hlophe before the Judicial Service Commission, in contravention of section 178(1)(k) of the Constitution, was fatal.

President of Republic of South Africa v South African Rugby Football Union 1999 (10) BCLR 1059

- This case considers important questions of legal principle concerning the basis on which courts may review the exercise of presidential powers. It also touches on the circumstances in which the President can be called upon to testify in a court of law. [Paragraph 352]: "The President’s presence in court is a symbolic and important act because it underscores the rule of law and the principle that we are all equal before the law and it is the Constitution that requires us to obey, respect and support the Courts not because the judges are important or entitled to special deference but because the institution they serve has been chosen by us collectively in order to protect the very vital interests of all and in particular of those who are likely to fall foul of wielders of public or private power."

President of the Republic of South Africa v Hugo 1997 (4) SA 1 (CC)

- [para 8]: "There are no powers derived from the royal prerogative which are conferred on the President other than those enumerated in the Constitution."

Richter v Minister for Home Affairs and Others 2009 (3) SA 615 (CC)

- [para 52]: "The right to vote, and the exercise of it, is a crucial working part of our democracy. Without voters who want to vote, who will take the trouble to register, and to stand in queues, as millions patiently and unforgottably did in April 1994, democracy itself will be imperilled. Each vote strengthens and invigorates our democracy. In marking their ballots, citizens remind those elected that their position is based on the will of the people and will remain subject to that will. The moment of voting reminds us that both electors and the elected bear civic responsibilities arising out of our democratic Constitution and its values."

South African Association of Personal Injury Lawyers v Heath and Others 2001 (1) BCLR 77 (CC)

- Even though the separation of powers is not explicitly mentioned in the Constitution, it is implicit in the Constitution and is of equal force as an express constitutional provision.

- It is inappropriate for a sitting judge to be appointed to chair a Commission of Inquiry because this blurs the distinction between the judicial and the executive roles: [Paragraph 26]: “The separation of powers required by the Constitution between the legislature and the executive on the one hand and the courts on the other, must be upheld, otherwise the role of the courts as an independent arbiter of issue involving the division of powers between various spheres of government, and the legality of legislative and
executive action measures against the Bill of Rights and other provisions of the Constitution will be undermined.”

*S v Makwanyane and Another* 1995 (6) BCLR 665 (CC)
- Public opinion is not considered when judicial decisions are made.

*The AParty and Another v Minister for Home Affairs and Others* (06/09) ZACC 4 (12 March 2009)
- South Africans living abroad have the right to vote if they are registered.

*Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* 2010 (6) SA 214 (CC)
- The Court upheld the substantial-measure test and went on to reject the “pith and substance” test applied by Parliament.

*United Democratic Movement v President of the RSA (1)* 2002 (11) BCLR 1179 (CC)
- [para 26]: “A multiparty democracy contemplates a political order in which it is permissible for different political groups to organise, promote their views through public debate and participate in free and fair elections. These activities may be subjected to reasonable regulation compatible with an open and democratic society. Laws which go beyond that, and which undermine multiparty democracy, will be invalid.”

*Uthukela District Municipality v President of the Republic of South Africa* 2002 (11) BCLR 1220 (CC)
- The spheres of government must exhaust all other (political) remedies before approaching Court. The potential for the development of substantive principles of public administration through such friendly relations will ensure that section 195 of the Constitution is realised, because this section declares that the principles governing the public administration are, inter alia, an efficient, economic and effective use of resources; it must be development-oriented and must be accountable. Time-consuming and resource-draining litigation between organs of state will defeat the very objectives to which the public administration aspires; thus friendly relations are an imperative among the three spheres of governance.

OTHER RECOMMENDED ACADEMIC RESOURCES

- Choudhry argues that South Africa is effectively a dominant-party democracy: “One of the pathologies of a dominant party democracy is the colonization of independent institutions meant to check the exercise of political power by the dominant party, enmeshing them in webs of patronage.” He states that [in the cases of UDM, Merafong, Poverty Alleviation Network and Glenister] “the Court dismissed the relevance of ANC domination due to the fact that the Court has an inadequate understanding of the concept of a dominant party democracy, its pathologies, the pressure it puts on what is otherwise a formally liberal democratic system because of the lack of alternation of power between political parties, and how this pressure is generating constitutional challenges”. The position is therefore that the Constitutional Court has
never emphatically stated that the manifestations of the dominant-party democracy constitute a violation of the separation-of-powers doctrine, so we do not have something solid to rely on, but it is becoming more and more clear that there is a distinct blurring of the distinction between the executive and the legislature in South Africa. An example of this blurring of the distinction is evident when one views the circumstances which arose during President Zuma’s State of the Nation Address which took place on 12 February 2015. In response to the EFF’s chanting that President Zuma must “pay back the money”, the Speaker of Parliament, Baleka Mbete, instructed the police (which fall within the executive branch of the state) to remove those members of Parliament (who constitute the legislative branch of the state). In a constitutional democracy it is unacceptable that the executive can intrude into the domain of the legislature as happened. The issue that this highlights is that, even though Mbete is supposed to be impartial, she acted in a manner that illustrated her political allegiance because she was prepared to resort to any measure necessary to protect Zuma.

Choudhry’s article is also relevant for purposes of understanding the imperative of an independent judiciary in South Africa. In this article, Choudhry highlights the incident which took place in April 2008 when the Judge President of the Western Cape High Court, Judge John Hlophe, approached Justices Bess Nkabinde and Chris Jafta of the Constitutional Court and uttered the words: “You are our last hope; you must find in favour of our comrade.” It is widely believed that these words related to the case that was soon to be heard by the Constitutional Court concerning allegations of corruption against President Jacob Zuma in the Thint matter. A number of court cases emanated from this incident (which is discussed more fully in study unit 6 on the separation of powers and the independence of the judiciary).

Interestingly, the matter concerning Judge Hlope has still not been settled and he remains in his position notwithstanding the fact that it appears that he directly and intentionally violated section 165(2) and (3) of the Constitution which provides: “(2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.”; and “(3) No person or organ of state may interfere with the functioning of the courts.” This is a good illustration of how the Judicial Service Commission operates (in theory and practice)


Mureinik relies on the metaphor of a bridge that was introduced in the post-amble to the interim Constitution. The post-amble provided, in part: What the Constitution expressly aspires to do is to provide a transition from these grossly unacceptable features of the past to a conspicuously contrasting “future founded on the recognition of human rights, democracy and peaceful coexistence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex”.

Murray, C and Nijzink, L Building representative democracy: South Africa’s legislatures and the Constitution (2002)

South Africa’s ten legislatures were designed as the centrepieces of South Africa’s new system of representative democracy. They were to be dynamic and proactive institutions that would help build a democratic culture in South Africa. What has been created is a complex interlocking
system of consultation, debate, mandates and legislation. But we face huge challenges as we consolidate democracy, including improving mechanisms for ensuring competent oversight and trustworthy accountability.


- Sensitivity by the judiciary to the other arms of government does not render the executive and legislature immune from constitutional challenges based on fundamental constitutional rights.