CONSTITUTIONAL LAW SUMMARY

SOURCES AND DEFINITIONS

Binding sources
1. The constitution
2. Legislation
3. Common law
4. Case law
5. International law

Constitutionalism: a government in accordance with the constitution, the government gets its power from and is bound by the constitution

Constitutional law: is the sum total of binding rules relating to the distribution and exercise of state authority. The rules of constitutional law define the relationship between organs of state and between organs of state and individuals

The dividing line between public and private law has become blurred:
1. The state has become involved in private relationships – employer and employee, landlord and tenant and husband and wife.
2. The constitution states that private relationships are often unequal – bill of rights apply to private relationships
3. Public functions have become increasingly privatized – Telkom and Transnet

What makes our government different from the previous dispensation is:
• The fact that we have an inflexible constitution
• Our constitution is supreme
• We apply certain aspects of the rule of law
• We are both a formal and material rechstaat
• We are a democratic state
• Constitutional democracy
• Separation of powers limits the power of government

| Flexible constitution: enjoys the same status as the other laws of the country and requires no special procedure for amendment e.g. SA constitution of 1961 | Inflexible constitution: enjoys superior status to the ordinary laws of the land and require a special amendment procedure. E.g. SA 1996 constitution S74: |
Supreme constitution
Ranks above all other laws in a state = Any law which is inconsistent with it will be declared invalid
E.g. SA 1996 constitution

Not supreme:
Doesn’t enjoy any special status
The legislature can pass laws, which are inconsistent with the constitution. The courts can’t question the validity of such laws, provided the correct procedure has been complied with
E.g. Britain

Autochthonous and allochthonous constitutions
Autochthonous: are said to be indigenous and allochthonous are borrowed constitutions.

Van der Vyver said there are 3 kinds of constitutions:
1. Reactive constitution: which was the result of specific problems in the past and which seeks to resolve those problems = indigenous
2. There are constitutions which are intended to maintain the continuity with established norms in legal tradition of the society concerned – indigenous
3. Superimposed constitutions: the contents of the constitution are unrelated to the history of the country concerned

State:
1. Geographically defines territory
2. Community of people who live on the territory
3. A legal order
4. An organized system of government to uphold legal order
5. Separate political identity

The rule of law
1. The absence of arbitrary power: no one is above the law and no one is punishable except for a distinct breach of the law
2. Equality before the law: every individual is subject to the ordinary law and the jurisdiction of the ordinary courts.
3. A judge made constitution
**The Rechstaat principle**
Refers to a government by law and not by force.

<table>
<thead>
<tr>
<th>Formal rechstaat: requires compliance with:</th>
<th>Material Rechstaat: the state authority is bound by higher legal values, which are embodied in the constitution.</th>
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<tbody>
<tr>
<td>1. Due process</td>
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<td>2. Separation of powers</td>
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<td>3. Legal certainty</td>
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**Constitutional mechanisms to limit the powers of the government:**
1. Bill of rights
2. The constitution is subject to judicial review
3. Democratic elections of representatives to parliament
4. Collective and individual responsibility of cabinet to parliament
5. Separation of powers between the legislature, executive and judiciary
6. An independent judiciary
7. The demarcation between the national and provincial spheres of government

**DEMOCRACY:**
S1 of the constitution proclaims that SA is a democratic state

**GOVERNMENT BY THE PEOPLE**
Democracy is derives from ancient Greek words demos (the people) and Kratos (strength) – this implies that a democracy is a government by the people.

| Direct democracy: Means that all the major political decisions are made by the people themselves – may work in a small community where the people can meet on a regular basis and decide matters | Representative democracy: the citizens of the state elect a representative and then the representative exercises their wishes. All the inhabitants of the state should via direct representation have a say in which the state is governed – usually be being represented in the legislature. It’s created by elections, which need to be held at regular intervals. |

**Criticisms of direct democracy:**
- The people can’t be said to govern in any real sense if they go to the polls once every 4 or 5 years to elect representatives who are free to govern as they see fit
On the other hand it’s stated that it’s the only workable form of democracy in modern times

Features:
1. Free and regular elections (4 or 5 years)
2. Multi party system
3. Universal adult suffrage
4. The protection of minorities
5. Mechanisms to ensure the accountability of government to the electorate

**Constitutional democracy:**
In addition to being a representative democracy SA is also a constitutional democracy. This means that the people’s representatives in parliament, in the provincial legislatures and in municipal councils aren’t free to make whatever laws they wish, but are bound to observe the values in the constitution. Laws that are inconsistent with the constitution will be declared invalid.

**Parliamentary and presidential systems of government:**

<table>
<thead>
<tr>
<th>Presidential system</th>
<th>Parliamentary system</th>
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</thead>
<tbody>
<tr>
<td>1. The head of government is also head of state (SA)</td>
<td>1. The head of state and head of government are 2 different people</td>
</tr>
<tr>
<td>2. The head of government isn’t a member of the legislature and isn’t responsible to it</td>
<td>2. The head of government and his cabinet are members of the legislature and are responsible to it</td>
</tr>
<tr>
<td>3. The head of government is elected directly by the people</td>
<td>3. The head of government is the leader of the party with a clear majority in parliament (SA)</td>
</tr>
</tbody>
</table>
SEPARATION OF POWERS:
Montesquieu is regarded as the father of the doctrine of separation of powers (Trias politica), according to the traditional view, the doctrine separated executive, legislature and judiciary. According to him there can be no political freedom in a country where one person makes the law, enforces the law and provides sanctions when the law is contravened.

Carpenter states that the doctrine implies the following:
1. The formal division of state authority into the legislature, executive and judiciary
2. Separation of personnel so that one person shouldn’t simultaneously perform in more than one branch of government = Certification Case: it was argued that the new constitutional text didn’t comply with one of the constitutional principles, cabinet members remain members of parliament. The overlap between the legislative and executive in the new constitution serves an NB check and balance = it ensures accountability of the executive towards the voters.
3. Separation of function: so that one branch cant usurp on the powers and functions of the other branches
   - Legislature: make and amend law
   - Executive: enforce and execute
   - Judiciary: Interpret and apply
   Executive Council of Western Cape: an Act had a provision, which allowed the president to amend or repeal provisions of the legislation. The court held that this was invalid and amounted to a usurpation of power
4. Checks and balances: with each branch of government given specific powers to restrain other branches and therefore achieve equilibrium among the 3 components of government authority. SA constitution provides for checks and balances. The most NB is judicial review, which allows legislative or administrative action to be tested for validity in court. The judiciary must ensure government acts comply with procedural and substantive requirements of the constitution.
   Minister of Health v TAC: the court said that the executive didn’t address the need for nevirapine and stated it violated rights in the BOR. The executive said that the power to make such policy is a perogative of the executive and not the court. It was held that the court is the most NB check and balance

Glenister:
S85: vests the executive authority with the president and his cabinet and have the constitutional power to prepare and initiate legislation.
S73 (2): gives cabinet members the authority to introduce Bills into the NA.
The court is deemed to be the guardian of the constitution and only have the right to intervene to prevent a violation of the constitution. The courts constitutional obligation is to ensure that the exercise of power by the other branches of government occurs within constitutional bounds.

Doctors for Life: the courts must observe their constitutional limits and a decision on whether the judiciary should intervene are determined by the limits of the separation of powers.

In this case there was a challenge against the decision of cabinet to initiate legislation dissolving the Directorate of Special Operations (Scorpions). The question was whether in terms of the separation of powers: the circumstances permitted the court to consider the validity of the decision taken by cabinet, while the Bills were still before parliament and the legislative process was still underway. The argument was that the decision of Cabinet had caused mass resignation within the Scorpions, bringing about its dissolution and depriving SA from an effective crime-fighting unit even before the legislation had been made. An application was made for the court to intervene.

The Minister of Safety and Security opposed this stating that there were no grounds for judicial intervention. Cabinet had carried out its constitutionally mandated task of initiating and preparing legislation (under S85) and the draft legislation was before parliament.

The application for leave to appeal and direct access to the court for intervention was therefore dismissed.

The court does NOT have the powers to decree which policies the executive should implement, looking at the separation of powers and the rule of law.

In 2010: the constitutionality of the legislation creating the Hawks and disbanding the scorpions was declared unconstitutional, in that the court found that the Hawks did not meet the constitutional requirement of adequate independence as they were still under the political influence of the executive. The declaration of invalidity was suspended for 18 months and sent to parliament for amendment.
The counter majoritarian debate

Arguments to defend judicial review:

1. SA constitution was made by the representatives of the people in the constitutional assembly. It had to be adopted by 2/3 majority of the CA and it came from lengthily negotiations and democratic deliberation.

2. Democracy presupposed political debate, in which citizen’s feel they can state their views and challenge accepted beliefs. Judicial review may contribute to this.

3. Judges may enquire into the constitutionality of legislation, but they don’t substitute their view for those of the legislature. If a judge strikes down a law as unconstitutional she doesn’t make a new law. The legislature any amend the law – the only condition being that it must be constitutional.
LEGISLATIVE AUTHORITY

BICAMERAL Reasons for having 2 houses:
1. Better representation in heterogeneous societies – if the constitution of the 2nd house differs from that of the 1st it could be that interests which aren’t represented adequately in the one house are in the other
2. Parliaments workload is reduced
3. More thorough consideration of matters is promoted
4. Act as a check on one another

<table>
<thead>
<tr>
<th>Functions of the NA</th>
<th>Functions of the NCOP</th>
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<tbody>
<tr>
<td>S42 (3):</td>
<td>S42 (4):</td>
</tr>
<tr>
<td>1. Representation of the electorate</td>
<td>1. Representation of provinces in the national sphere</td>
</tr>
<tr>
<td>2. Election of the president</td>
<td>2. Participation in the national legislative process</td>
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<tr>
<td>3. Public consideration of issues</td>
<td>3. Public consideration of issues effecting provinces</td>
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<tr>
<td>4. Passing legislation</td>
<td></td>
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<tr>
<td>5. Overseeing executive action</td>
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MEMBERSHIP OF NA:
S47 a citizen who is qualified to vote for the NA is eligible to be a member of the NA, but can’t be a member if:
- Permanent delegate of the NCOP
- Member of the provincial legislature/ municipal council
- Unrehabilitated insolvent
- Not of sound mind
- Anyone convicted of an offence and sentence to more than 12 months without the option of a fine

After election – the 1st sitting of the NA must take place within 14 days after the election results are finalized and in this sitting the election of the president takes place from among the members of the NA
ELECTIONS:
POLITICAL RIGHTS
Right to vote of prisoners and SA citizens living abroad

Ramakatsa:
In the decision the CC said that political rights are NB for 2 reasons:
1. They are aimed at preventing a reoccurrence of the denial of political rights that took place during the constitutional era
2. Political rights are aimed at giving effect to a system of representative democracy by emphasizing the role of political parties

S19: guarantees the right of every adult citizen to vote.

August case the issue of the voting of prisoners came before the court.
The 1993 Electoral Act: declared that no person will be entitled to vote who was convicted of murder, rape, robbery with aggravating circumstances or an attempt to commit these crimes

1998 electoral act: the following are disqualified:
1. Persons who applied for registration fraudulently or in a way other than the prescribed manner
2. Persons who aren’t SA citizens
3. Persons declared mentally ill by the high court
4. Persons detained under the Mental Health Act
5. Persons not normally resident in the district where registration was applied for

Prisoners weren’t disqualified = Enfranchisement of prisoners could be achieved by setting up polling stations in prisons or by giving special votes to prisoners

In the New National Party of SA: the issue was that only people with bar coded ID’s were allowed to vote, the majority of the court found the requirement wasn’t unconstitutional

NICRO: Electoral Act was found to be inconsistent with the constitution as it deprived prisoners serving sentences without the option of a fine to register and vote

The right of prisoners to vote has been reinforced in the Electoral Amendment Act 2013, which provides that prisoners in local prisons would be allowed to vote even if their name appear on a voters roll in another voting district to where the prison is situated. Prisoners have the right to vote if they complied with the registration requirement, obliging the Electoral Commission to ensure that arrangements are made to allow prisoners to register
**EX PATS**

**Richter:**

**Electoral Act: registered voters who aren’t in SA on voting day can be granted a special vote**

R was a South African and registered voter – he had a teaching contract in the UK and his intention was to return to SA at the end of the year. He wanted to vote in the elections and launched an urgent challenge in the HC against the Electoral Act, which prevented certain categories of SA citizens who were absent from SA from voting.

The HC declared the provisions of the Act unconstitutional as it infringes the right to equality and right to vote.

The order was referred to the CC for confirmation.

The court order extended the period within which those outside SA on polling day may notify the Chief Electoral Officer of their interest – and give notice of their intention to vote and identify the embassy or consulate where they intended to cast their vote.

The HC order of invalidity was confirmed.

**AParty:** court decided on the application of Aparty for an order declaring S33 of the Act unconstitutional as well as S7, 8, 9 and 60 – it contended that these sections violated the right to vote and equal treatment of SA citizens living abroad. The court said that such people had the right to vote if they registered and that S33 of the Electoral Act unfairly restricted the right to pass special votes, and was declared unconstitutional.

The Electoral Amendment Act 2013: south Africans living abroad are permitted to vote in the NATIONAL elections on condition that they have registered to vote – give notice to the Chief Electoral Officer and identity the embassy or consulate where they intend to apply for the special vote. They can only vote in the national elections and NOT the provincial election.

**Others:**

The Electoral Amendment Act 2013: the electoral system is more inclusive by permitting special votes to those South Africans who can’t vote at their voting stations on account of

- Physical disability or pregnancy
- Being on duty as a member of the special forces
- Absence from the voting district because they are serving as electoral officers

An easy process of applying for a special vote has been introduced = allowing those who qualify to vote a few days before the general election.
**Proportional and territorial representation**

Territorial representation: a person is elected by people in a particular geographical area (constituency) to represent them in parliament

<table>
<thead>
<tr>
<th>Advantages</th>
<th>Disadvantages</th>
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<tbody>
<tr>
<td>1. Simple</td>
<td>1. Incorrectly reflects the strength of the parties</td>
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<tr>
<td>2. Strong and stable government</td>
<td>2. Favors the stronger parties to the detriment of the weaker parties</td>
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<tr>
<td>3. Results in a closer bond</td>
<td>3. Artificial delineation of constituencies can give rise to an imbalance</td>
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<tr>
<td>between the representative and</td>
<td>between constituencies</td>
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<td>the voter</td>
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Proportional representation: all parties participating in the election get representation corresponding with the votes obtained with those parties in the election

<table>
<thead>
<tr>
<th>Advantages</th>
<th>Disadvantages</th>
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</thead>
<tbody>
<tr>
<td>1. Provides for reflection of the</td>
<td>1. May lead to a weak unstable government as it may be impossible for one</td>
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<tr>
<td>voters opinion</td>
<td>party to obtain absolute majority</td>
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<tr>
<td>2. Eliminates problems in respect of</td>
<td>2. No contact between the voter and the representative</td>
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<tr>
<td>delimitation of electoral districts</td>
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<tr>
<td>3. All votes carry the same weight</td>
<td>3. Often complicated</td>
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<tr>
<td>4. Accommodates wider representation</td>
<td>4. Often fails to produce a clear majority</td>
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<tr>
<td>of parties than territorial</td>
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<tr>
<td>representation</td>
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<tr>
<td>5. Minorities can form coalitions</td>
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<td>against the majority parties and</td>
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<td>therefore avoid dominance by the</td>
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<tr>
<td>majority</td>
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**COMMITTEES**

Parliamentary committee is a smaller group of members of parliament designed to perform a specific task and alleviate the workload

- Portfolio committee of the NA
- Select committee of NCOP
- Mediation committee
PARLIAMENTARY PRIVILEGES

- The NA controls its own internal arrangements, proceedings and procedures
- Parliament can summon people to give evidence and submit documents
- They can enforce their own internal disciplinary measures for contempt of parliament
- Members of parliament may not vote on any matter in which they have a financial interest

Privileges are contained in the constitution:
- Guarantee the freedom of speech subject only to their rules and orders
- Member isn’t liable for criminal/civil liability, arrest, imprisonment or damages for anything they said or submitted to the NA/Committee.

These powers don’t prevent the judiciary from enquiring if the procedure or limitations are consistent with the constitution

ARE PARLIAMENTARY PRIVILEGES SUBJECT TO JUDICIAL REVIEW?

De Lille case:
De Lille was suspended from the NA after making allegations that certain ANC officials had been spies for the apartheid regime. NA argued that the assembly had exercised a parliamentary privilege to control its own affairs and that the exercise of the privilege wasn’t subject to the review power of the courts.

The exercises of parliamentary privileges must be consistent with the constitution. It was found that De Lille’s suspension amounted to an unjustified infringement of her constitutional rights to freedom of speech, just administrative action and access to the courts.

A suspension of a member of parliament for contempt isn’t consistent with the requirements of a representative democracy – that would be a punishment which was calculated to penalize not only the member but also his party and members of the electorate who voted for that party and who are entitled to be represented in the assembly.

S58 Constitution: guarantees the freedom of speech in the NA subject only to its own rules and orders, S58 (2): authorizes national legislation, rules have since been amended to give the speaker/deputy speaker authority to suspend members for a period of 5 – 20 parliamentary working days
**TAGGING BILLS AS S75 OR S76**

**Tongoane:**
The court looked at the substantial measures test, which looks at all the provisions of the Bill to determine the extent to which it affects the functional areas listed in schedule 4 and NOT whether the provisions are incidental (as in LIQUOR BILL).

The court held that the SUBSTANTIAL MEASURES TEST applied: while the main provisions of the Bill might not affect the provinces, some of its key provisions may have a SUBSTANTIAL IMPACT on the interests of the provinces and as such must be dealt with using S76.

The court held that parliament followed the incorrect proceedings in enacting the legislation

**WHO INITIATES LEGISLATION:**
There is NO ABSOLUTE separation of the functions of the legislature and executive.
Therefore draft legislation usually originates from the executive and is then tabled and deliberated in parliament (S73).

*Glenister*

**Reasons why legislation is initiated and prepared by the executive rather than by ordinary members of parliament:**
Legislation is usually introduced to give effect to the political programme of action of the majority party which forms government. Voters endorse this programme in an election – the party then has the democratic mandate to implement the policies for which it was elected as the governing party.

The process for the making of law through the initiative of the executive:

1. Policy is formulated through party discussion which result in a draft Bill which is eventually approved by parliament
2. Cabinet ministers responsible for the policy 1st introduces the bill in the NA – 1st reading
3. Bill is referred to the portfolio committee for review and amendment after the facilitation of public involvement (2nd reading)
4. If NA passes the Bill sent to the NCOP for its assent and visa versa
5. Once both houses have passed its presented to the president for assent

**Individual members of the NA can initiate legislation** = called a private members bill.

S73 (2): any member of the NA can introduce a Bill in the NA if that member isn’t a cabinet member and even if that member belongs to an opposition. Until recently the Rules of the NA said that before a member of the NA could initiate or introduce a Bill in the NA only if the majority members gave permission. Members of the opposition
had to submit their proposal to the speaker-, which set out the purpose, particulars, objects and financial implications for the state. The speaker would then refer it to a committee who would then decide to proceed or not. Even if the committee gave permission for the Bill to proceed, the majority of the NA could still not support the initiation of the bill, which means that it wont be passed

_Ambrosini:_ NOW: the constitution states that individual members can initiate or introduce a Bill to the NA = this is done to promote the legislative procedure. Once the proposed legislation has been introduced and tabled – the majority party can still vote against the bill.

**PARLIAMENTS LAW MAKING POWER:**

**EXCLUSIVE:**
- Powers to amend and repeal it own laws
- Make law re those areas expressly assigned to it by the constitution
- Power to amend the constitution in terms of S74

**RESIDUARY POWERS:**
To make laws regarding areas not enumerated in the constitution or mentioned in schedule 4/5 – e.g. regulating matters such as defence and foreign affairs – will be done using S75

**CONCURRENT POWERS:**
parliament has concurrent legislative capacity with the provincial legislature regarding schedule 4 matters (procedure requires S76) – if there is a conflict S146 states that in certain circumstances the national legislation will prevail

Parliament also has the power to intervene in the exclusive legislative competence of a province in terms of Schedule 5 – where it is necessary to maintain national standards etc (S44 (2))
### Making of Legislation

<table>
<thead>
<tr>
<th>S74: Bills amending the constitution</th>
<th>S76: Bills affecting the provinces</th>
<th>S75: Bills not affecting the provinces</th>
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</thead>
<tbody>
<tr>
<td>S1 – may be amended by a bill passed by: The NA with a 75% majority of the members The NCOP – 6/9 provinces supporting the vote</td>
<td>Bill must be referred to the NCOP if introduced by NA and visa versa If both houses agree it’s sent to Pres for assent. If they disagree, its sent to a mediation committee who can: • Use NA version • Use NCOP version • Make own version If there is still a dispute the NA can override it with a 2/3rd majority and send the bill to the pres for assent When the NCOP votes, its one vote per province</td>
<td>If the bill is passed by both houses its sent to the president for assent. There is no mediation committee. The NA may still pass a bill, which has been rejected by the NCOP without co-operation from the NCOP When the NCOP votes in S75 each delegate in a provincial delegation has one vote and the question is decided on the majority of votes passed.</td>
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</tbody>
</table>
**S74 procedure:** 30 days before the Bill amending the constitution is debated – the person/ committee intending to introduce the bill must
- Publish in the government gazette the part of the proposed amendment for public comment
- Submit to the provincial legislatures for their view
- Submit to the NCOP
- Any written comment by the public and provincial legislature must be submitted to the speaker

**When the president may refer a bill to the constitutional court for a decision on its constitutionality: Liquor Bill case:**

S79
The liquor bill was in the NA it passed through the various legislative stages in terms of S76 before parliament approved it. When the bill was sent to the president for assent he declined to approve it, as he had reservations about its constitutionality, so it was referred back to the NA.

1. Must the court only consider the presidents reservations or can it direct wider attention – the court considers only the president reservations
2. Should the court examine every provision to certify that every part accords with the constitution – NO the court must 1st consider the reservations of the president
3. Does the courts finding in respect of the constitutionality of the bill mean that its provisions cant be adjudicated after its enactment – even if the court does decide that the bill is constitutional, supervening constitutional challenges after its enactment aren’t excluded

**Limitations on parliaments power to make laws**
1. Fundamental rights limitations
2. Federalism limitations
3. Separation of powers limitations
4. Delegation limitations
5. Limitation on the power to amend the constitution
6. Procedural limitations
7. Extra parliamentary consultation
DELEGATION OF LEGISLATIVE POWERS

Can parliament delegate their power to MAKE AND AMEND law??

Delegation: parliament often leaves it to the provincial legislature or members of the national executive to fill in the gaps in parliamentary legislation by means of proclamations or regulations.

DELEGATION TO THE EXECUTIVE
MAKE LAW:
Executive Council of Western Cape: The authority of parliament to delegate its law making functions is subject to the constitution. The authority to make subordinate legislation may be exercised by the executive:
- Proclamations by the president
- Regulations by ministers

The court held that there is nothing in the constitution prohibiting parliament from delegating subordinate regulatory authority to another – its necessary for effective law making

AMEND LAW:
Chaskelson
Subordinate legislation: power to make and implement laws for the republic.
Plenary power is the power to amend or repeal legislation. Legislature may delegate subordinate legislation to the executive but not plenary power.

DELEGATION TO THE PROVINCIAL LEGISLATURE:
S44 authorises the NA to assign any of its powers to the provincial legislature, but NOT the power to amend the constitution (S74)
EXECUTIVE AUTHORITY

President:
Elected from the ranks of the NA, must be a SA citizen registered to vote. Once elected ceases to be a member of the NA. Period of service: 5 years and no one can be elected for more than 2 terms

HEAD OF STATE
Powers of the president S84 (2): the president is responsible for:
 a) Assenting to and signing bills
 b) Referring a bill to the NA for reconsideration of constitutionality
 c) Referring a bill to the constitutional court for a decision on its constitutionality
 d) Summoning the NA, NCOP or parliament to an extraordinary sitting to conduct special business

Presidents prerogatives
A perogative is a discretionary power exercised at will – they are common law discretionary powers possessed by the leader of a state by virtue of his pre-eminence over other citizens

Common law prerogatives previously enjoyed by the president
 • Conclude treaties
 • Declare war
 • Make peace
 • Confer honorary titles
 • Pardon offenders
 • Appoint a commission of enquiry

Q: are the powers of the president in terms of S84 subject to constitutional review?
Hugo: the CC considered the question whether the president’s power to pardon offenders is subject to constitutional review. This power, which was a perogative power of the crown, is recognized in the ‘93’ and ‘96’ constitutions. The court was of the opinion that the only perogative, which was still in force, are those in the constitution. The exercise of these powers is subject to constitutional review.
**HEAD OF GOVERNMENT**  
**Explain how the president must conduct himself when:**

<table>
<thead>
<tr>
<th>He acts together with other members of cabinet:</th>
<th>He acts after consulting other functionaries:</th>
<th>He acts on recommendation of or advice of other functionaries:</th>
</tr>
</thead>
</table>
| The functionary who had to be consulted had to concur – in accordance with its decision-making procedures.  
- Appointment of judges  
- Appoint the NDPP  
- Appoint National Commissioner of SAPS  
- Appoint the head of the intelligence service  
- Develop national policy  
- Prepare and initiate legislation  
Here the president is BOUND | after consultation: means that the president must consult the relevant functionary but he isn’t bound by their recommendation.  
E.g. by appointing judges of the constitutional court = NOT BOUND | The constitution stipulates that the president must exercise certain powers “on recommendation of” other functionaries.  
- The president may remove a judge from office if the Judicial Service Commission has made a finding in respect of this and the NA calls for the judge to be removed – president is BOUND to act as advised  
- When appointing the public protector/ electoral commission president acts on the recommendation of the NA  
- When appointing the head of NPA (National Prosecuting Authority (S170: person must be fit and proper/ south African  
The decision of the president must be in writing if it’s taken in terms of legislation or has legal consequences |
DEPUTY PRESIDENT

The president and the NA can remove the deputy president and cabinet members:

- The powers of the president to remove his cabinet is political and will usually be done after consulting the leadership of the majority party
- The NA can in terms of S102 (1): the NA can pass a motion of no confidence with a simple majority vote in cabinet (with the exclusion of the president) after which the president must reconstitute cabinet

MINISTERS

**Individual and collective ministerial responsibility**

<table>
<thead>
<tr>
<th>Collective responsibility: signifies that members of cabinet act in unison with the outside world and carry joint responsibility before parliament for the way in which each member exercises and performs powers and functions</th>
<th>Individual responsibility confers 3 duties on the minister concerned:</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. To explain to parliament what happens in his department</td>
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<tr>
<td>2. To acknowledge that something has gone wrong in the department and rectify the mistake</td>
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<td>3. To resign if the situation is serious enough</td>
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Suggested that ministers are obliged to resign in the following circumstances:

- Where the minister is personally responsible for something that has gone wrong
- Where the minister is vicariously liable for something that gone wrong
- Where the minister is guilty of immoral personal behavior.
- Where the minister is guilty of serious misconduct
- Corruption
- Gross dereliction of duty

BUT parliament can't make them resign, motion of no confidence can't be passed against an individual minister, but they can put moral and political pressure on the minister to resign.

The president would likely dismiss a minister

S96: cabinet members and deputy ministers must act in accordance with a code of ethics prescribed by legislation:

- Cant undertake any other paid work
- Cant act in a way that is inconsistent with their office
- Must not expose themselves to situations which involve a risk of conflict between their office and personal interests
- Enrich themselves or improperly benefit another
HOW PARLIAMENT CONTROLS THE EXECUTIVE:
1. Individual and collective ministerial accountability
2. Question time in parliament
3. Interpellations are used to enter into short debates with ministers on particular aspects of their responsibilities
4. Parliamentary committees
5. Approval by parliament of subordinate legislation
6. Parliament has to authorize the raising of taxes and spending of funds by the executive

THE NA CAN REMOVE THE PRESIDENT IN 2 WAYS:

REMOVAL/ IMPEACHMENT: S89 – removal of the president from office by the NA. Resolution must be adopted by 2/3 majority of members in the NA
   a. It may only occur on grounds of serious violation of the law or the constitution
   b. Serious misconduct
   c. Inability
   It’s based on an objective test.
   Any person who has been removed from office of the president because of a violation of the constitution or the law or for serious misconduct cant get any benefits of that office (including pension) and may not serve in any public office again.
   A president who RESIGNS, loses an election is entitled to such benefits

MOTION OF NO CONFIDENCE: S102 – motions of no confidence in the president, or conduct excluding the president. If the motion is adopted, he must resign with other members of cabinet. If a motion of no confidence in the cabinet, excluding the president is adopted the president must reconstitute cabinet. Here the president can be removed from office for purely political reasons but only if the NA supports it with a majority vote

MAZIBUKO: any member can propose a motion of no confidence
In the president and have it debated in the NA – its unlikely that such a motion will be passed unless the president has lost the support of his party. If members of the majority party in the NA are instructed by party leadership to support a motion of no confidence in the president, they would probably agree to do so as their failure to obey may lead to their removal from the NA and replacement with a member who will obey the order

On removal another will act as president (generally the DP will fill a vacancy) if the president is:
   o Absent from the republic
   o Is unable to perform his duties (illness)
Constitutional Law Summary

- Dies
- Resigns
- Motion of no confidence is passed
- Removed

The DP will act as president until a new president is elected or until the president can resume his duties.

**When the president is bound to comply with S33:**
S33 guarantees the right to just administrative action- it was argued in the SARFU case that the president, in appointing a commission of enquiry into the administration of rugby, didn't act in the manner that was procedurally fair.

Q: whether the president had to comply with S33 when appointing commission of enquiry? It was concluded that the president’s power to appoint a commission of enquiry isn’t administrative action.

The test for determining whether conduct is administrative action: how is the president acting?
- As head of state (don’t have to comply with S33)
- As head of the national executive = comply with S33

**President giving evidence in a civil matter in open court:**

SARFU case:

Why it isn’t desirable in the opinion of the court to compel the president to testify in open court:

- The president isn’t in the same position as other witnesses.
- The doctrine of separation of powers requires the court to protect the status, dignity and efficiency of the office of the president and the president should only be required to give evidence orally in open court in civil matters relating to performance of official duties in exceptional circumstances.

Circumstances where the president can be compelled to testify:
- Where a head of state may be called as a witness special arrangements are made for the way in which evidence is given.

2 conflicting considerations:
- Public interest in ensuring protection of dignity, status and efficiency of the office of president
- Need to ensure the administration of justice isn’t impeded

Therefore careful consideration must be given to a decision compelling the president to give evidence and such order should be made unless administration of justice demands it.
JUDICIAL AUTHORITY
1. Constitutional court
2. Supreme court of appeal
3. High court
4. Magistrate court
5. Courts created by acts of parliament – Labour court

CONSTITUTIONAL COURT
EXCLUSIVE JURISDICTION:
CC: S167 decides constitutional issues:
   - Disputes between organs of state
   - Constitutionality of legislation
   - Amendments to the constitution
   - If parliament or president failed to comply with the constitution
   - Certify a provincial constitution

CONCURRENT JURISDICTION
2012 AMENDMENT ACT: states that the CC is now the court of final instance for all matters of points of legal doctrine.
S167 (3) as amended states: extends the CC jurisdiction and states:
   - The CC can decide constitutional matters
   - Re any other matter, if the CC grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance, which out to be considered by this court

The CC can now hear non-constitutional matters, but can’t hear appeal based on a factual dispute.
When an appeal is lodged with the CC, it has a wide discretion to decide whether or not it will hear the appeal. The court consider 2 things:
1. Appeal on the grounds that the matter raises an arguable point of law
2. The point of law must be of such public importance that its necessary for the CC to hear the matter to give clarity on it

JUDGES:
S174:
1. Any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer. Any person to be appointed to the Constitutional Court must also be a South African citizen.
2. The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.
How the independence of the judiciary is secured through appointment measures in the constitution:
The JSC advised the government on matters in respect of the judiciary, by making recommendations in respect of appointment, removal from office, term of office and tenure of judges. The involvement of the JSC in the appointment of judges was believed to restrict the power of the executive to appoint whomever they wished and thus boost judicial independence.

The JSC is composed of 23 members – 15 represent political interests:
- Minister of Justice
- 6 members of the NA (3 from majority party)
- 4 members of the NCOP (represent the Majority)
- And 4 presidential nominees

The criteria for judges in terms of S174: is that such a person must be:
- Qualified
- Fit and proper
- SA citizen

These are the minimum requirements

The constitution also requires that the judiciary to be independent, protect the constitution and uphold rights. They must apply the law impartially and without fear, favour or prejudice.

The JSC must take into account the need for transformation of the judiciary to better reflect the gender and racial composition in SA S174 (2). This is NB because the judiciary was almost exclusively white males – special measures are required to increase diversity and ensure the judiciary reflects the composition of the SA public, which it serves.

Q: should the consideration of racial and gender trump any other consideration – its appears that the JSC starts the enquiry by the examination of the racial/gender composition of the court.

The selection of judges is subject to JUDICIAL REVIEW. It is required that the JSC acts in a was that is transparent and accountable and are obliged to give reasons for a decision not to appoint a certain judge

Q: has the independence of the judiciary been undermined by the JSC

A complaint was submitted to the JSC by all the judges of the CC in May 2008: alleging that Judge Hope had sought improperly to
persuade them to decide the Zuma case in a manner that was favourable to Zuma.

The JSC role was to ensure independence in the judiciary – they should advise the president on matters relating to the JSC and ensure the effective functioning of the judiciary through stringent appointment and removal processes. There is a legitimate expectation that the JSC uphold judicial independence and not protect questionable conduct by judges – specifically with regards to the fact that’s the JSC has a constitutional duty to exercise its powers and determine that a case of misconduct has been made out.

Even though the complaint against Judge Hope was serious, the JSC abandoned its enquiry into the complaint and decided not to follow up with a formal hearing.

The JSC was later ordered by the court to reconsider the complaint, which today still hasn’t been hear despite the commitment to deliberate on it by the JSC.

**JUDICIAL INDEPENDENCE**

**IMPARTIALITY:** Independent judges must interpret and enforce the law impartially and without bias. Impartiality refers to the ability of the judge to apply the law without fear or favor – the judge must not be influence by political, social and cultural elements.

**INDEPENDENCE:** Test for independence: *Van Rooyen:* judges should be able to hear and decide cases and no outsider should be able to interfere with the way a judge conducts his case or makes his decision = if the court from an objective view of a reasonable informed person has complied with the conditions of independence. The courts can’t be limit due to fear and structures must be put into place to ensure judges are protected against any political or financial pressures.

Functional independence: Judicial officers exercise their power subject only to the law and the constitution and not to public opinion.

Functional independence of the courts in SA have been threatened 1950’s **when parliament tried to set up a high court of parliament** which would have the power to set aside decisions of the appellate division of the Supreme Court. The creation of the high court of parliament was parliaments response to an earlier decision of the AD in Harris case – n which it declared the Separate Representation of Voters Act unconstitutional which aimed to remove colored voters.
from the voters role – the High court of parliament reversed the decision in Harris and upheld the validity of the act.

In the 2nd Harris case it was argued that parliament was assuming the role and functions of the court and was trying to act as judge, jury and executioner.
The act was therefore invalidated

LIMIT ON CIVIL LIABILITY
Another factor, which contributed to the functional independence of the courts, is the fact that judicial officers enjoy immunity against civil actions and the offence of contempt of court.
May v Udwin: public interest in the due administration of justice requires that a judicial officer, in exercising his functions, should be able to speak his mind freely without fear of incurring liability

PERSONAL INDEPENDENCE OF JUDGES

Personal independence is protected in the following ways:

APPOINTMENT:
JSC plays an NB role in the appointment of judges

SECURITY OF TENURE
S176 provides that judges of the constitutional court are appointed for a non-renewable term of 12 years – but they must retire at the age of 70. Other judges may serve office until the age of 75 or until they are discharged from active service in terms of an act of parliament = judges enjoy security of tenure so there is no need for them to seek favor from politicians to make sure that they keep their jobs

REMOVAL OF JUDGES:
The constitution makes it difficult for the executive to dismiss judges – S177: the president may remove a judge from office only if the JSC finds that he suffers from
- An incapacity,
- Is grossly incompetent or
- Is guilty of gross misconduct and if the NA calls for his removal by a resolution adopted with the support of 2/3 of its members
b) S176 provides that the salaries, allowances and other benefits of judicial officers may not be reduced

South African Association of Personal Injury Lawyers v Heath and Others
In this case the court looked at the validity of the provisions of a Special Investigating Unit (headed by a judge, which was set up to investigate malpractices in state institutions and in connection with state assets and public money.
The court held that the appointment of a judge to head the SIU violated the separation of powers required by the Constitution.

Courts must be independent of the legislature and the executive so that they can discharge their duty - this prevents the legislature and the executive from requiring judges to perform non-judicial functions that are incompatible with judicial office and which are not appropriate to the central mission of the judiciary, and prohibits judges from undertaking such functions.

The provision of the Act that requires a judge or acting judge to be appointed as head of the Unit, and the appointment by the President of a judge to this position were accordingly held to be unconstitutional and invalid.

**Circumstances under which direct access to the constitutional court may be sought:**

_Bruce v Peecytext_

S167 (6) of the ‘96’ constitution – national legislation or the rules of the constitutional court must allow a person when its in the interests of justice and with the leave of the constitutional court:

a) To bring the matter directly to the constitutional court or

b) To appeal directly to the constitutional court from any other court

**5 techniques the courts use to avoid or limit the effects of a declaration of invalidity**

S172 a competent court has the power to declare any law or conduct that’s inconsistent with the constitution invalid to the extent of its inconsistency.

<table>
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<tr>
<th>AVOID:</th>
<th>LIMIT:</th>
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<tr>
<td>1. If possible a court should decide a case on grounds other than a constitutional ground</td>
<td>Declare any law/conduct inconsistent with the constitution invalid to the extent of the inconsistency [severance]</td>
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<tr>
<td>2. Where possible courts should interpret a provision in such a way that it doesn’t conflict with the constitution</td>
<td>A court may limit the retrospective effect of a declaration of invalidity</td>
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<td>A court may suspend a declaration of invalidity for any period and on any conditions in order to allow the competent authority the chance to correct</td>
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CONTROL OVER THE JUDICIARY

1. Judicial control: their decisions may be taken on review – this makes them apply their minds to the matter and give reasons for their decisions
2. Appointment: JSC’s involvement in the appointment of judges makes the judicial process more transparent and may instill in judges a greater sense of their accountability
3. Removal from office: judge may be removed from office if he suffers an incapacity or is grossly incompetent or guilty of gross misconduct
4. Public debate and criticism: its hopes that the constitutional guarantees of freedom of speech and freedom of the press will help to create an environment in which judicial decisions are subject to public debate and criticism
5. Civil liability: judicial officers normally enjoy immunity from civil actions arising from their decisions, but a judge who acted mala fide cant escape civil liability

NATIONAL PROSECUTING AUTHORITY
The NPA isn’t a member of the judiciary, legislature or executive its sui generis – it plays a role in the effective and impartial functioning of the criminal justice system

S179 – all powers to initiate, conduct and discontinue criminal proceedings on behalf of the state vest with the NPA – the Minister of justice cant intervene with this process BUT the NPA is legally and constitutionally required to report to the Minister of justice on its activities and decisions

The National Director of Public Prosecutions, heads the NPA and is appointed by the president in his capacity as HOG – the appointment is based on an objective criteria set out in the NPA Act: the person appointed must be fit and proper

Democratic Alliance v President: the DA argued that the appointment of Simelone as NDPP was flawed as he was appointed notwithstanding the fact that he could not be described as a person with integrity and honesty – which is the minimum character trait for a person holding office as NDPP

THE PUBLIC PROTECTOR
Chapter 9: The Public Protector has the power to investigate any conduct of the government or administration that is alleged or
suspected to be improper or to result in any impropriety or prejudice. It also has the power to report on that conduct and to take appropriate remedial action (s 182(1)).

The Public Protector is an independent and impartial institution (S181)

Can’t investigate the judicial functions of the court or the private sector.

Appointed by the president on the recommendation of the NA for a non-renewable term of 7 years.

Removed on the grounds of incompetence, incapacity and gross misconduct
CO-OPERATIVE GOVERNMENT
S40: the government of the Republic is constituted as the national, provincial and local sphere, which are distinctive, interdependent and interrelated.

UNITARY SYSTEM:
It has a unified center of authority – all government bodies are subject to the authority exercised by the national government

Characteristics:
1. Power is concentrated in the hands of the national sphere of the government
2. Greater emphasis is placed on centralization than decentralization.
3. The provinces are subordinate to the national government

FEDERAL SYSTEM

<table>
<thead>
<tr>
<th>Divided model of federalism</th>
<th>Integrated model of federalism</th>
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<tbody>
<tr>
<td>1. Powers and responsibilities of the national and provincial levels of government are clearly divided</td>
<td>1. Few areas in which the national government enjoys exclusive power and many areas in which the national and provinces have shared responsibility</td>
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<tr>
<td>2. Provinces are given independent taxing powers</td>
<td>2. Revenues and taxing powers are shared between the national and provincial governments</td>
</tr>
<tr>
<td>3. Even though mechanisms exist for the co-operation between the national and provincial governments they have no status or constitutional recognition</td>
<td>3. A number of intergovernmental institutions have the responsibility of promoting co-operation between the various levels of government</td>
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<tr>
<td>4. Provincial interests aren’t represented within the national government E.g. Canada</td>
<td>4. Provinces are able to put their interests directly into the national legislative process – NCOP</td>
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Simeon says that SA follows a more integrated form of federalism than a divided one. This is evident from the following:

1. Chapter 3 of the constitution is entitled “Co-operative Government” – S40 states that the government is constituted as the national, provincial and local sphere which are distinctive, interdependent and interrelated.
2. The fact that the constitution refers to spheres and not level creates the impression that the aim is to move away from the hierarchy
3. The constitution has a list of functional areas in which the national, provincial and local areas share legislative functions
4. Provinces have limited powers to raise revenues for themselves and are barred from imposing income, sales or VAT
5. S41 (2): requires an Act of parliament to establish or provide for structures or institutions to promote or facilitate intergovernmental relations and provide for appropriate mechanisms to settle intergovernmental disputes
6. S41 (3): an organ of state involved in an intergovernmental dispute must make every reasonable effort to resolve the dispute by means of mechanisms provided and must exhaust all internal remedies before they approach a court to resolve it.
7. Provincial interest are represented in parliament in the NCOP – which ensures that provincial interests are taken into account on a national sphere

**COOPERATIVE GOVERNMENT IN LIGHT OF THE PREMIER OF WC V PRESIDENT:**
S40 states that the Republic is made up of 3 spheres, the national, provincial and local who are distinctive, interdependent and interrelated. S41 lists a number of guidelines to promote cooperation between the various spheres of government.

In this case parliament had passed an amendment to the Public Service Act, which gave the national and provincial heads of department the same broad functions and responsibilities. The WC province challenged the constitutionality of the amendment on the basis that it violates S41 (1) (g) in 3 respects:

1. It assigned functions to the provincial director general and heads of department in an unacceptable manner
2. It restricted the premiers executive power to establish or abolish department of government
3. It gave the minister the ability to transfer certain powers from the province to the national level

The issue faced by the court was if this encroached on the geographical, functional and institutional integrity of the provincial
sphere of government. The court held that there was no violation in that:

- S41 (2): allows parliament to enact laws to facilitate the process of cooperative government
- The new scheme didn’t restrict the power of the premier to establish and abolish departments – the scheme required the premier to confirm the constitutionality of his decision with the president
- The WC was consulted through the whole process
- The new scheme didn’t limit the powers and function of the premier
- It was not inconsistent with the constitution
PROVINCIAL GOVERNMENT

PROVINCIAL LEGISLATURE:
legislative authority of a province is vested in its provincial legislature.
Powers of the provincial legislature – S104 (1):
1. Pass a constitution for the province
2. Pass legislation for its province with regard to:
   a) Any matter in schedule 4
   b) Any matter listed in schedule 5
   c) Any matter outside those functional areas and that is assigned to the province by national legislation
   d) Any matter for which provision of the constitution envisages
3. To assign any of its legislative powers to the municipal council in the province.

PROVINCIAL CONSTITUTIONS
S142: a provincial legislature may adopt a constitution for the province if it has the agreement of at least 2/3 of its members in favor of it.
This provincial constitution cant be inconsistent with the constitution – it may however provide provincial legislative or executive structures and procedures that differ from those provided in the constitution – it may also provide the institution and authority of traditional leaders – such provisions must be in accordance with S1 and Chapter 3 of the constitution and may not confer greater powers than those given by the constitution.

A provincial constitution must be submitted to the constitutional court for certification.
Only 2 provinces have adopted their own constitutions in SA – KwaZulu Natal and the Western Cape, however the KwaZulu Natal constitution never came into force = that constitution was held by the constitutional court to usurp powers not due to the province and wasn’t certified.
The Western Cape constitution had to be amended but was certified in 1998.
# LEGISLATIVE CONFLICTS

<table>
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<th><strong>Conflict with a schedule 5 matter:</strong></th>
<th><strong>Legislative conflicts in schedule 4 matters</strong></th>
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| normally there wont be conflicts since provinces have the EXCLUSIVE POWER to pass legislation relating to these matters. BUT S44 (2): states that parliament may pass legislation on a matter falling within a functional area listed in schedule 5 when it’s necessary to:  
  • Maintain national security  
  • Maintain economic unity  
  • Maintain essential national standards  
  • Establish minimum standards required for the rendering of services  
  • Prevent unreasonable action taken by a province which is prejudicial to the interests of other provinces or to the country as a whole | S146 (2) national legislation that applies uniformly with regard to the whole country prevails if one of the following conditions is met:  
  1) The national legislation deals with a matter that can’t be regulated effectively by legislation enacted by the provinces individually  
  2) The national legislation deals with a matter that requires uniformity across the nation  
  3) The national legislation is necessary for:  
    • Maintaining national security  
    • Maintaining economic unity  
    • Protection of the common market  
    • The promotion of economic activities across provincial boundaries  
    • The promotion of equal opportunity or equal access to government services  
    • The protection of the environment  
  4) National legislation prevails over provincial legislation if the national legislation is aimed at preventing unreasonable action by a province that:  
    - Is prejudicial to the economic, health or security interests of another province or the country as a whole  
    - Impedes the implementation of national economic policy |
LOCAL GOVERNMENT

PUBLIC PARTICIPATION:
1. It facilitates access to information about local conditions, needs and attitudes, which are NB in terms of adopting informed decisions in the policy management.
2. Participation provides people whose lives will be affected by the proposed policies with the opportunity to express their views and to attempt to influence public officials about the desirability of the proposed policies.
3. It means involving and educating the public.
4. Provides mechanisms for ensuring democratization of the planning process.
5. Participation is a means of balancing the demands of central control against the demands for concern for the unique requirements of local government.
6. Participation plays a watchdog role – this openness and participation tends to reduce the possibility of corruption and may help maintain high standards of behavior.

S59 and S72 (1): requires that the NA and NCOP play a role in public participation:
- They must facilitate public involvement in the legislative process.
- Their business must be conducted in an open manner.
- Sittings must be held in public.
- The public have the right to know what is said and decided in parliament.

This all forms part of a participatory democracy.

Doctors for Life International: said that the constitution calls for an open and transparent government.
The nature and degree of participation depends on:
- The nature and NB of the legislation.
- The impact of the legislation on the public.

The applicant in this case was challenging the constitutional validity of 4 Bills – stating that parliament had failed to fulfil their obligation to facilitate public participation in passing the bills:
- Bills before parliament has concluded deliberation.
- Bills passed but under the consideration of the president.
- After the Bill passed and signed.

The court could only interfere after legislation was passed. In this case parliament failed to allow public involvement and the legislation was declared invalid.
Merafong: the 12th Amendment Act: did away with cross border municipalities and in doing so changed the boundaries between Gauteng and the North West – Merafong City Local Municipality was a cross boundary municipality, ½ was in NW and ½ in Gauteng, the Act relocated Merafong in the NW rather than Gauteng. The process required was done in terms of S74. The application was that parliament had failed to comply with S118 – in which public involvement in the process is required

Rationality is required in that there must be a link between the means adopted by the legislature and a legitimate governmental purpose.

Majority of the court held that the legislature had fulfilled its duties to facilitate public involvement and submissions made by the public were taken into account

AUTONOMOUS GOVERNMENT:

Before SA was characterized by a unitary form of government, in which power was centralized in the hands of the national government and the local government therefore only exercised delegated powers and were not independent.

Now an integrated form of federalism applies, as entrenched by S40, which creates a national, provincial and local government, which are distinctive, interdependent and interrelated.

Chapter 7 of the final constitution: the constitutional recognition of local government and the vesting of powers in local authorities have transformed the legal status of the local government.

Fedsure: constitution – a local government is no longer a public body exercising delegated powers – it’s a legislative assembly with legislative and executive powers recognized by the constitution itself.

Local governments have a place in the constitutional order, have to be established by a competent authority and are entitled to certain powers, including he power to make by laws and impose rates.

Chapter 7 is an extension of the principle of co-operative government – it’s designed to promote intergovernmental relations between he local and provincial government.

S151:

1) The local government consists of municipalities, which must be established for the whole of the Republic
2) The executive and legislative authority of a municipality is vested in its municipal council
3) A municipality has the right to govern, the local government affairs of its community, subject to national and provincial legislation.
S151 has 2 NB implications:
   a) The recognition of the local government as a sphere means that it can't be abolished by the national or provincial governments
   b) Sphere illustrates a shift away from the hierarchal division of government authority
This means that the central government no longer has the power to grant, revoke or limit the powers of the lower spheres and unilaterally overrides local government decisions.

S154:
   1) The national and provincial governments, by legislative and other means must support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions
   2) Draft national or provincial legislation that affects the status, institutions, powers or functions of local government must be published for public comment before it's introduced into parliament or the provincial legislature, in a way that allows an organized local government, municipality or other interested party an opportunity to make representation.

**ADMINISTRATIVE HANDMAIDEN**
The national and provincial government must assign to local government those local government matters that would be most effectively administered locally and where the local government structure has the capacity to administer it. Municipalities have powers reasonably necessary or incidental to the effective performance of their functions.

Pimstone – says that this definition gives the impression that the local government plays a administrative role, which is at odds with the description of local government as a sphere that is autonomous and one that enjoys original powers.

**TRADITIONAL LEADERSHIP**
Before in SA: the institution of traditional leadership was not recognized as a legitimate institution.

Chapter 12 of the constitution recognises the institution of traditional leadership
Now **S212 (1) of the Constitution**: requires that National Legislation be made to give effect to Traditional Leadership.

*The National House of Traditional Leaders Act and The Traditional Leadership and Governance Framework Act* was created to give effect
to traditional leadership: this is a customary institution as recognized in traditional communities and is made up of:

- Kingship
- Senior traditional leadership
- Headmanship

This Act requires the institution of traditional leadership to promote the principles of co-operative government.

**Walker:** the local government is an important tier of public administration.

**S154 of the Constitution:** is reinforced by the recognition of the institution of traditional leadership as a legitimate institution in the regulation of public administration and governance at a local level.

The Act incorporates traditional leadership in line with the principles of a participatory democracy and requires the establishment of Traditional Councils who will:

- Support the municipality in the identification of the needs of the community
- Participate in the development of policy and legislation at a local level
- Promote the idea of a co-operative government

The role that traditional leaders play within a rural community is a useful tool in helping public participation with regards to political affairs.

**SEPERATION OF POWERS AND INDIGENOUS LAW**

In tribes leadership falls to the chief, who together with the headman and family heads exercised legislative, executive and judicial powers = they are the judge, jury and executioner.

Their decisions aren’t subject to the checks of an independent judiciary and are controlled by way of rituals.