1 Separation of powers

Briefly on the history of the doctrine of separation of powers

- John Locke was concerned that absolute monarchical power should not be replaced by absolute parliamentary power.
- Locke warned against the dangers of any one institution, even parliament having too much power.
- French theorist Montesquieu devised the modern concept of separation of powers that envisaged a division of government power into three branches.
- It was against the danger of an overconcentration of power in the hands of the monarch that the need to distribute power became evident.
- The principle seeks to limit the power of each individual branch of government.
- The purpose of the doctrine of separation of power is to ensure that power is not concentrated into one institution.
- This is to prevent abuse of power.
- It is premised on the understanding that the more transparent way to prevent tyranny is by distributing power between different branches of government.

The 4 principles that are generally accepted as the pillars on which the doctrine of separation of powers is based are:

- The division of government power across the three branches (Trias politica).
- Conferring distinct areas of responsibility and authority (functions) on each of the 3 branches.
- Assignment of specific persons who are responsible for the performance of that branch’s function.
- The provision of checks and balances entails that one branch can be held accountable by the other branches to check the exercise of power by that branch.

The South African experience on the separation of powers

- Constitutional principle V1 in the interim constitution required that the final constitution incorporates a system of separation of powers.
- There is no universal model of separation of powers (De Lange v Smuts 1998 (3) SA 785 (CC) para 60).
- There is no separation that is absolute in a democratic system of government.
- Although there is no explicit reference or mention to separation of powers in the constitution it is implicit in the constitution (South African Association of Personal Injury Lawyers v Heath (2001 (1) BCLR) 77).
The structure of the constitution clearly makes provision for separation of powers in terms of its institutional and substantive arrangements (First Certification of the constitution of Sa judgment para 106-1130

Can infer the implicitness of the doctrine in the constitution from the way government power is actual distributed between the legislature, the executive and the judiciary

- Section 43 vests the legislative authority of the Republic in Parliament, provincial legislatures and municipal councils
- Section 85 vests the executive authority to the President - President exercise the authority together with the Cabinet
- Section 165 (1) vests the judicial authority in the courts

The counter-majoritarian dilemma

Considering the separation of powers, the Judiciary is empowered to review and set aside the actions of the other branches of government

- Thus, the judiciary wields enormous power even though its members are not democratically elected
- The system of judicial review permits an unelected judiciary to declare unconstitutional and invalid laws made and actions taken by democratically elected and accountable members of the legislature and executive
- How do we account for the fact that judicial review allows for the invalidation of laws supported by a majority in a constitutional democracy?
- What makes the decision of a few unelected judges carry more weight than the choices of the majority

These questions are commonly referred to as the counter-majoritarian dilemma or difficult

The essence of the dilemma is that judicial review, while recognised as having a legitimate purpose in the main, involves the courts taking undemocratic decisions that often go against the popular will

In US the system of judicial review has been subject of much controversy among US scholars

The main attempts to account suitable for counter majoritarianism have elicited three main types of responses

- Some view judicial review as being severe constraint on the participation of citizens in political decisions affecting them - irreconcilable with the idea of majoritarian democracy
- Others regard encroachments occasioned by judicial review as contributing to the democratic process
- Others attempt to establish a workable interpretative theory in terms of which judicial review can be justified as legitimizing judicial interventions in a manner that contributes to the attainment of substantive democracy
Despite inherent counter-majoritarian concerns, there are several good arguments or justifications in support of judicial review

2 The Rule of Law

The early formulation of the concept of the rule of law put forward by Dicey comprises three main principles

- Since the law is supreme, public power can only be exercised in terms of the authority conferred by law
- Everyone is equal before the law- the law should be applied equally
- The courts enforce the law in a manner that protects the basic rights of all

The rule of law is recognised as an enforceable principle on which the exercise of public power and legislative power can be challenged

The rule of law in this sense represent a formalistic understanding of the importance of law.

The substantive understanding of the rule of law also concerns itself with the content of the laws

An element feature of the SA constitution is the principle of respect for the rule of law

The rule of law is a founding value in the SA constitution (section1 of the constitution)

The rule of law under the 1996 Constitution

The rule of law alongside the supremacy of the constitution is enshrined as a founding value of the constitution (S1 (C))

The courts have invoked the rule of law as a mechanism primed to limit, regulate as well as give more precise meaning to how government power is exercised

It has been invoked before court to;

- ensure that the exercise of state power confirms to the basic minimum criteria
- has been raised as the basis of a constitutional challenge against acts of Parliament or Executive
  - Fed sure Life Assurance v Greater Johannesburg Transitional Council 1998 BCLR 1458. The power exercised by local government remains subject to the constitution and the exercise of such powers was constrained by the rule of law
  - Affordable Medicines Trust v Minister of Health 2005 (6) BCLR 529 (CC)---- the exercise of public power must comply with the doctrine of legality which is an incident of the rule of law
✓ Pharmaceutical Manufacturers Association of South Africa: in re Exparte President of the Republic of South Africa 2000 (2) SA 674---- The constitution requires that the public power vested in the executive should be exercised in an objectively rational manner
✓ Democratic Alliance v Minister of International relations and Co-operations (In Tutorial letter 102) --- Procedural rationality of the notice of withdrawal from ICC= the requirement for rationality entails that government actions must be rationally connected to legitimate purpose
✓ Democratic Alliance v President of the Republic of South Africa (in tutorial letter 102) The President’s exercise of executive power must be rational and therefore subject to judicial review

STUDY UNIT 3: SEPARATION OF POWERS AND THE NATIONAL LEGISLATURE

General rule regarding the operation of Parliament
NA and NCOP have power to determine and control their own internal arrangements
Their rules must comply with the provisions of the constitution

Openness and Transparency in Parliament
Both the NA and NCOP to conduct their business in an open manner and hold their sittings in public
Prohibited from excluding public from sitting of a committee unless it is reasonable and justifiable to do so

Powers and privileges of Members of Parliament
Ministers and Deputy ministers of NA and members of NCOP enjoy privileges
Guaranteed freedom of speech in both NA and NCOP
Members not liable for civil or criminal proceedings, arrest, imprisonment or damages for anything that they have said or submitted in Parliament
The judiciary has the authority to enquire whether the procedure adopted by Parliament in limiting the members privileges comply with the constitution (Speaker of the National Assembly v De Lille MP [1999]4 ALL SA 241 (A)

Public involvement in the legislative process of the NA and NCOP
The constitution establishes a democratic system of government with both representative and participatory democracy
Participatory democracy, means that individuals or institutions must be given opportunity to take part in the making of decisions that affect them
The NA and NCOP should facilitate public involvement in the legislative and other processes (Sections 59 (1) and 72 (1) (a) of the constitution)

Parliament cannot pass legislation without considering the need to facilitate some form of public participation

*Doctors for Life International V Speaker of the NA 2006 (6) 416 (CC)-*representative and participatory democracy are supportive of each other

- The democratic government envisaged in the constitution is one which makes provision for the public to participate in the law-making process

**The National Assembly**

Right to vote

Section 19 (3) guarantees the right of every citizen to vote

The right to vote is unqualified

*August v Electoral Commission 1999 (4) BCLR 363-* the right to vote cannot be taken away from any citizen arbitrarily or in a way that is not reasonable or justifiable in an open and democratic society

*Minister of Home Affairs v National Institute for Crime Prevention in the Re: Integration of Offenders 2005 (3) SA 280 (CC)-* the judgment affirmed that while there may conceivably situations in which a person could be deprived of his/her right to vote, such limitations would have to be justified by the state

*Richter v The Minister for Home Affairs 2009 (3) SA 615 (CC)-* South Africans living abroad have the right to vote if there are registered

**Eligibility for election to the NA**

Section 47 (1)- people who are not eligible to become or remain members of NA

**Duration of the NA, sittings and its dissolution**

-NA is elected for a term of 5 years

The President must dissolve the NA if the NA has adopted a resolution to dissolve with a supporting vote of most of its members; and 3 years have passed since it was elected- election must be held within 90 days

**Powers and functioning of the NA**

Section 42 (3) provides:

- The NA serves as a national forum for consideration of issues
- It considers and passes legislation (along with the NCOP)
- It scrutinizes and oversees executive action, holding the executive accountable
STUDY UNIT 4: SEPARATION OF POWERS AND THE NATIONAL LEGISLATURE: FUNCTIONS OF PARLIAMENT

- National forum for public involvement
  See previous discussion
- Holding the executive accountable to parliament
  ✓ Members of Cabinet are accountable and must report to parliament
  ✓ It entails powers of parliament to call members of the executive to account to it
  ✓ It includes the power of parliament to take remedial action against the executive
  ✓ Section 102 (2) the NA may pass motion of no confidence in the president
  ✓ Mazibuko v Sisulu 2013 (6) SA 249 (CC)- the motion of no confidence affords the NA a vital power and duty to scrutinise and oversee executive action- it’s the most important mechanism that may be employed by parliament to hold the executive to account and to interrogate the executive
  ✓ Section 89 (1) allows the NA to impeach the President by adopting a resolution with a supporting vote of at least two thirds of its members on the grounds of serious violation of the constitution, or law, serious misconduct or inability to perform the function of the office
  ✓ *Economic Freedom Fighters v Speaker of the National Assembly’ Democratic Alliance v Speaker of the National Assembly In the case of Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly*, 2016 (3) SA 580 (CC) The Constitutional Court found that in disregarding the remedial action taken by the Public Protector against him, the President failed to uphold and defend the Constitution as the supreme law of the land. It was found that the conduct of the NA of passing a resolution purportedly nullifying the findings and remedial action taken by the Public Protector and replacing them with their own findings offended the rule of law. In fact, it was another way of taking the law into their own hands.

- Passing of legislation
  ✓ Because of the political influence of the executive in our system of government, draft legislation usually originates in the executive
  ✓ However individual members of the NA may initiate legislation (private members Bill)
  ✓ *Oriani-Ambrosin, MP v Sisulu MP Speaker of the National Assembly* 2012 (6) SA 588 (CC)- the Constitutional Court invalidated Rules of the NA which required a member of the NA to obtain permission from the NA to initiate and introduce Bills
✓ Despite the Oriani-Ambrosini judgment, most Bills are still initiated and introduced by Cabinet members who are tasked with leading the legislative agenda.

The normal way in which laws are passed

- Policy is formulated via various channels, including through Nedlac, internal party discussion and Cabinet discussions.
- After Cabinet has approved the Bill, the cabinet minister responsible for the Policy first introduces the Bill in the NA or in some case the NCOP (first reading of the Bill).
- The Bill is referred to appropriate portfolio committee for review and amendment after facilitation of public involvement (second reading of the Bill).
- If NA passes the Bill in is forwarded to the NCOP for its assent if the Bill was introduced and approved in the NA.
- Once both house have passed the Bill, it is presented to the President for signature.

STUDY UNIT 5: SEPARATION OF POWERS AND THE NATIONAL EXECUTIVE

The national executive consists of the President, the Deputy President and members of the Cabinet.

The President is elected by the NA. The President may not serve more than 2 terms.

The President is not directly elected by the voters, but is directly elected by members of the NA.

Removal of the President

NA can remove the President from office in one of two ways:

- Section 89 (1)- if it adopts a resolution to that effect with a supporting vote of at least two-thirds majority on the specified grounds.
- Removing the president in this manner which is called impeachment has potentially serious consequences.

Section 102 (2) -President can be removed from office for purely political reasons:

➢ The NA by a vote supported by a simple majority of its members passes a motion of no confidence in the President.

President powers:

➢ Executive authority of the Republic is vested in the President.
President exercise his/her powers both as head of state and as head of the executive.

The President has the sole authority to appoint the Deputy President, Cabinet ministers and deputy ministers and has the power to dismiss them (See Democratic Alliance v President of the Republic of South Africa in Tutorial letter 102 on the power of the president to dismiss ministers)

As head of executive the president exercises his/her powers together with the other members of the cabinet.

**Limits on the exercise of presidential powers**

There are formal and substantive limits placed on the exercise of power by the President. The President must act in accordance with the Bill of Rights and according to the principle of legality.

**Formal limits**

- When appointing judges of High Court, the president has no discretion but must appoint on recommendation of JSC
- When appointing head of NPA must appoint a fit and proper SA citizen
- When appointing Chief Justice and Deputy Chief Justice the President must first consult with the JSC and the leaders of opposition parties in NA
- Decision by the President must be in writing
- Another Cabinet member must counter sign a decision by the President that concerns a function assigned to that other Cabinet member

**Substantial limits**

The Constitution is supreme, and the rule of law is a founding value of the Constitution

- The exercise of power must not infringe any provision of the Bill of rights and the President must act in good faith and must not misconstrue the powers
- The exercise of the presidential power is subject to the provisions contained in the Bill of Rights and may not act in a manner that would infringe one of the rights protected in the constitution
- Though the President is given a wide discretion to appoint the Deputy President and Ministers, he/she must do so in a manner that complies with the constitution. The power to appoint and dismiss Cabinet ministers is a political discretion entrusted to the President to give effect to the mandate of the political party in government. However, the power may be tested on the other grounds – see Masethla v President of the Republic of South Africa 2008 (1) SA 566 where the decision of the President to dismiss the Head of National Intelligent Agency was challenged; Democratic Alliance v President of the Republic of South Africa, in tutorial letter 102 where the decision of the President to reshuffle the Cabinet was challenged.
Democratic Alliance v President of the Republic of South Africa 2013 (1) SA 248 (CC) - rationality review is concerned with the evaluation of a relationship between means and ends. The aim of the evaluation of the relationship is not to determine whether some means will achieve the purpose better than others but only whether the means employed are rationally related to the purpose for which the power was conferred. If the President decision is rational, a court cannot interfere with it simply because it disagrees or considers that the power was exercised inappropriately.

STUDY UNIT 6: SEPARATION OF POWERS AND JUDICIAL AUTHORITY

Constitutional jurisdiction of the various courts

- Constitutional court
  ✓ Constitutional Court’s jurisdiction can be divided into concurrent jurisdiction and exclusive jurisdiction
  ✓ It exercises concurrent jurisdiction with the High Court and Supreme Court of Appeal
  ✓ Exercises concurrent jurisdiction in respect of challenges to the constitutionality of all forms of legislation
  ✓ All decisions of the HC and SCA declaring a provision of a legislation unconstitutional and invalid should be confirmed by the CC

- The CC has exclusive jurisdiction;
  ✓ To decide disputes between organs of state in the national and provincial spheres concerning the constitutional status, powers or functions of any of those organs of state
  ✓ To decide on the constitutionality of any parliamentary or provincial Bill referred to it by the President or the relevant Premier when they have reservation about the constitutionality of the Bill
  ✓ To decide on constitutionality by members of Legislature to declare invalid the legislation or part of the legislation.
  ✓ To decide on constitutionality of amendment to the constitution
  ✓ To decide that Parliament or the President has failed to fulfill constitutional obligation

In all matters not exclusively reserved for the jurisdiction of the CC, the CC ordinarily functions as a court of appeal, hearing cases that come to it from the HC and SCA

- Supreme Court of Appeal
  ✓ Hear and decide constitutional matters as it hear appeals in any matter arising from the HC
  ✓ When the case raises constitutional issues (not exclusive jurisdiction of CC), the case is first heard by the HC after which an appeal can be done to the SCA
• The High Court
  ✓ May decide any constitutional matter except those matters exclusively reserved for the jurisdiction of the CC
  ✓ Where the HC declares invalid any provisions of an Act of Parliament or provincial legislature, such an order must be confirmed by the CC

The notion of judicial independence

The independence of the judiciary is a distinctive feature of a constitutional democracy

The independence of the Judiciary refers to two ideals

➢ Firstly, individual or personal independence that requires that judges should interpret and enforce the law impartially without bias.
  ✓ Impartiality requires a judge to approach a specific case without considering their own personal views, ideological commitments or party-political beliefs.
  ✓ Impartiality relates to the ability of a judge to apply the law without fear or favor in accordance with the law. It is debatable whether judges can completely ignore their personal views on political and social matters as the interpretation of the open-ended language of the constitution requires a judge to refer to considerations outside the text itself.
  ✓ In S v Makwanyane, 1995 (6) BCLR 665 judges of the Constitutional Court were divided on the principle of the relevance of personal views in deciding a constitutional matter in that while some of the judges emphasized the irrelevance of their personal or political views others acknowledge the need to refer to extra-legal values including South African political context in interpreting the Constitution.
  ✓ Despite these difficulties, the idea of impartial adjudication remains a cornerstone of an independent judiciary. The Constitutional Court has confirmed in various judgment that judges should not be influenced by any belief or outside interference when deciding case before them.
  ✓ In President of the Republic of South Africa v South African Rugby Football Union 1999 (7) BCLR 725 [48] the constitutional court warned that individual judges should disabuse their minds of any predispositions when presiding over cases. In S v Van Rooyen (General
Council of the bar of South Africa Intervening) 2002 (8) BCLR 810 [ 19] the Constitutional Court affirmed that the essence of judicial independence is the complete liberty of individual judges to hear and decide cases before them without any interference by any outsider, pressure groups or even another judge.

- Secondly, institutional independence pertains to structural safeguards that must be put in place to ensure that judges are protected from the influence of and interference by other branches of government.
  - Judges may not be impartial if conditions under which the judicial function is exercised do not allow for this and if the judiciary is not created as an independent institution that function separately from other branches of government.
  - The factors that determine whether courts enjoy sufficient structural independence includes appointment of judges by an independent institution; security of tenure that ensures that judges will not be dismissed or face threat of dismissal from office for making a decision adverse to the interest of the government, financial security that protects judges from threat to reducing their salaries and other benefits for making an unpopular decision and limitation of civil liability that guarantees judges that in carrying out their functions, they will not incur civil liability for what they say or do in the course of carrying out their duties.

Several factors that determine whether courts enjoy sufficient structural independence

- Appointment of judges
  - The Constitution establishes the Judicial Service Commission (JSC) which is the body responsible for appointment of judges.
  - The President as the head of the executive is responsible for appointment of Judges.
  - The President appoints the Chief Justice and the Deputy Chief Justice after consulting the JSC and leader of the parties represented in NA, and appoints the President and Deputy President of the Supreme Court of Appeal after consultation with the JSC
The President appoints other judges of the Constitutional Court from the list of candidates prepared by the JSC, after consulting the Chief Justice, and leader of the parties represented in the NA.

The President appoints judges of all other courts on the advice of the JSC.

The JSC has been under scrutiny and subjected to court litigation

- **In the Freedom Under Law v Acting Chairperson: Judicial Service Commission 2011 (3) SA 549 (SCA),** the matter arose from the complaint lodged by the Justices of the Constitutional Court to the JSC against Judge Hlophe, the Judge President of the Western Cape High Court (WCHC)
  - It was found that the decision by the JSC to dismiss the complaint on the basis that cross-examination would not take the matter any further constituted an abdication of the JSC constitutional mandate
- **In the Judicial Service Commission V Cape Bar Council, 2013 (1) SA 170 (SCA)**
  - The Supreme Court of Appeal held that in the absence of the President of the Supreme Court of Appeal and his Deputy the JSC was not properly constituted and that its decision at that meeting about the unsuccessful six candidates were not validly taken.

**Security of tenure**

The Constitution prescribe for the terms of office for the Constitutional Court judges and requires the legislation to prescribes for the terms off office for judges of other courts.

- Judges of the Constitutional Court hold office for anon-renewable term of 12 years, or until they attain the age of 70, whichever occurs first, but grants Parliament with a discretion to extend the term of office of a Constitutional Court Judge
- The term of office for other judges is determined by the Act of Parliament. Parliament adopted the Judge’s Remuneration and Conditions of Employment Act, to regulate further on the security of tenure for judges.
- The Act restate the provisions of the Constitution that Judges of the Constitutional Court must be discharged from active service as judges when
they attain 70 years or have completed 12 years term of office as judges of the Constitutional Court, whichever occurs first.

- However, A Constitutional Court Judge who on attaining the age of 70 years, has not yet completed 15 years active service, must continue to perform active service as a Constitutional Court Judge to the date which he or she completes a period of 15 years active service or attains the age of 75 whichever occurs first.

The Constitutional Court had had the opportunity to determine whether the extension of the term of office of the Chief Justice by the executive which had expired was in congruent with the notion of judicial independence.

- In *Justice Alliance v President of the Republic of South Africa; Freedom Under Law v President of the Republic of South Africa; Centre for applied Legal Studies v President of the Republic of South Africa*, 2011 (5) SA 388 (CC) the Constitutional Court held that
  - the section 8 (a) Judge’s remuneration and Conditions of Employment Act violated the principle of judicial independence by granting of open-ended discretion to the President that may raise a reasonable perception that the independence of the judiciary may be undermined by external interference of the executive.
  - the court declared section 8 (a) of the Judge’s remuneration and Conditions of Employment Act inconsistent with the Constitution and invalid; the decision of the President to request the Chief Justice of South Africa to continue performing active service as Chief Justice is inconsistent with the Constitution and invalid and that the consequent extension of the term of office of the Chief Justice was of no force and effect.

**Remuneration of Judges**

The Constitution provides that salaries, allowances and benefits of judges cannot be reduced. The salaries of Judges are further regulated by the Judge’s Remuneration and Conditions of Employment Act.
Removal of Judges from office

The condition under which judges may be removed from office are specified by the Constitution. Just like in the appointment of judges, the JSC plays a pivotal role on the removal of judges. A judge may be removed from office only if the JSC finds that the judge suffers an incapacity, is grossly incompetent or is guilty of gross misconduct;

Independence of the national Prosecuting Authority

➢ The constitution establishes a single National Prosecuting Authority (NPA)
➢ A National Director of Public Prosecutions (NDPP) head the prosecuting authority
➢ The President as national heard of the national executive appoints the NDPP
➢ The NDPP must be appropriately qualified
➢ Members of the NPA should act without fear, favour of prejudice
➢ Though the Minister of Justice must exercise final responsibility over NPA, the minister may not instruct the NPA to prosecute or decline to prosecute or to terminate appending prosecution

STUDY UNIT 7: SEPARATION OF POWERS AND CHAPTER 9 INSTITUTIONS

Chapter 9 of the Constitution establishes institutions that are designed to support and strengthen democracy;

➢ The public Protector

The PP has the power to investigate any conduct of government or administration. It has the power to report on that conduct and take remedial action. It reports to the NA at least once per year.

Note: the prescribed textbook on page 264 it is stated that the recommendations of the PP are not binding. The position has changed after the judgment of Economic Freedom Fighters v Speaker of the National Assembly (CCT143/15; CCT171/15) [2016] ZACC 11 (31 March 2016)
The Constitutional Court held that the investigative power of the Public Protector is not supposed to bow down to anybody, not even at the door of the highest chambers of raw State power (par 55)

If compliance with remedial action taken were optional, then very few culprits, if any at all, would allow it to have any effect (par 56)

The power to take remedial action is primarily sourced from the supreme law itself (par 64)

It is inconsistent with the language, context and purpose of sections 181 and 182 of the Constitution to conclude that the Public Protector enjoys the power to make recommendations that may be disregarded provided there is a rational basis for doing so (par70)

The remedial action that was taken against the President has a binding effect (par 76)

➢ The South African Human Rights Commission
➢ The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities
➢ The Commission for Gender Equality
➢ The Auditor-General
➢ The Electoral Commission

STUDY UNIT 8: MULTI LEVEL GOVERNMENT IN SOUTH AFRICA

Division of government powers between spheres of government
The principles of cooperative government
Resolution of conflicts between the national spheres
➢ Conflicts related to concurrent competences
➢ Conflicts related to exclusive competences in schedule 5
Conflicting national, provincial and municipal laws

Note: page 303 to 315 is not part of the syllabus