CONSTITUTIONAL LAW

Illovo Paralegal College of Education (Pty) Ltd
“IPCE”

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SOURCES OF CONSTITUTIONAL LAW – DISCUSSION:

WHAT are the binding sources of Constitutional Law ¹?
- The Constitution ² – is a body of rules, which govern the exercise of state authority, as well as the relationships between citizens of the state and organs of state.
- Legislation
- Common Law ³ - Is the unwritten law of SA, in the sense that it isn’t contained in legislation.
- Case law – is the practical application of constitutional principles.
- International law ⁴ - S39 (1) states that courts have to consider PIL.

WHAT are the non-binding sources of Con Law?
- Academic writings
- Policy documents
- Foreign law

HOW did South Africa ⁵ “get” the CON? ⁶

PRE1994: SA law was characterized by a culture of authority. Parliament commanded law and there wasn’t room for individuals to challenge government action.

⇒ People were expected to obey what the government dictated.
⇒ Parliament was sovereign, so laws could be adopted even if they were unfair or discriminatory and these laws couldn’t be challenged in court.
⇒ The only judicial review was to ensure that parliament followed the correct procedure when adopting the law.
⇒ This apartheid regime led to the fact that SA became isolated internationally.
⇒ Multi party negotiations were held ⁷

DO we have contradictory provisions?

YES – TWO:

¹ Herein after referred to as Con Law
² Herein after referred to as The CON.
³ Herein after referred to as CL
⁴ Herein after referred to as PIL (Public International Law)
⁵ Herein after referred to as SA
⁶ Not for exam purposes
⁷ These looked at what should be included in the constitution and the way that it should be adopted.
1. Former liberation movements insisted that the new CON would only be legitimate if it was adopted by a democratically elected body.

2. Other groups were afraid that a constitution adopted by a democratically elected representative wouldn’t address the fears of minority groups and might result in tyranny of the majority.

**IT is a two-stage process:**

i) An interim government would govern the country while the final Con was being drafted

ii) The text would comply with guidelines determined beforehand by the negotiating parties

To solve this, a democratic election was held to adopt a constitutional assembly, who would adopt the final Con in accordance with the Con principles. They made a solemn pact that the new text of the Con would comply with the CP. The Con then needed to be certified by the constitutional court.

**IN which respect does the interim and final CON represent a radical break from the previous constitutional dispensations?**

- A constitutional democracy based on the supremacy of the Con protected by an independent judiciary
- A democratic system of government founded on openness, accountability and equality, with universal adult suffrage and regular elections
- A separation of powers between the legislature, executive and judiciary
- The need for appropriate checks on governments power
- The enjoyment of all universally accepted fundamental rights.

**TEST YOURSELF:**

1. Name and discuss the binding sources of SA Law

2. Name the non-binding sources of SA Law.

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8 Majority

9 Herein after referred to as CP

10 Herein after referred to as the CC

11 The 1993 Con

12 The 1996 Con
3. Explain in your own words how “our” Constitution in SA was born.

CONCEPTS OF CONSTITUTIONAL LAW – DISCUSSION:

WHAT does the concepts of Con Law entail?

Let’s look at the definition of Con Law:
It is the sum total of binding rules relating to the distribution and exercise of state authority. The rules of Con Law define the relationship between organs of state and between organs of state and individuals.

WHICH part of law is Con Law a part of?

Answer – Public Law!

WHAT is Public Law?

That branch of law, which regulates the exercise of state authority in relationships of inequality

WHAT is Private Law?

Is said to govern the relationships between people who are on equal footing

Lets look at the division between public and private law:

⇒ It is important to note that this relationship has become blurred – WHY do we say this? –
  o The state has become involved in private relationships:
    employer and employee, landlord and tenant and husband and wife.
  o The Con states that private relationships are often unequal – the Bill of Rights apply to private relationships.
  o Public functions have become increasingly privatized – Telkom and Transnet.

HOW can we classify Constitutions in general?

<table>
<thead>
<tr>
<th>Flexible Constitutions</th>
<th>Inflexible Constitutions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Enjoys the same status as the other laws of the country and requires no special procedure for amendment – SA CON of 1961</td>
<td>Enjoys superior status to the ordinary laws of the land and require special amendment procedure.</td>
</tr>
</tbody>
</table>

Example – SA `96 CON

S74:

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13 Public or private
14 Herein after referred to as B.o.R
1. S1 may be amended by a bill passed by:
   a) 75% of the National Assembly\textsuperscript{15}  
   b) 6 provinces in the National Council of Provinces\textsuperscript{16}

2. Chapter 2 may be amended by a bill passed by:
   a) $\frac{2}{3}$ of the NA, and  
   b) 6 provinces from the NCOP  

3. Any other provision of the constitution can be amended by a bill passed:
   a) By $\frac{2}{3}$ of the NA and  
   b) 6 of the provinces of the NCOP, if the amendment:
      (i) Relates to a matter that affects the council  
      (ii) Alters provincial boundaries, powers or functions  
      (iii) Amends with a provision which deals with a provincial matter

It is important to distinguish between a Con that is supreme and one that is not supreme!  

Supreme Con:  
Con, which is not supreme:

\textsuperscript{15} Herein after referred to as NA  
\textsuperscript{16} Herein after referred to as NCOP
o Ranks above all other laws in a state.
o Any law which is inconsistent with it will be declared invalid
o Its usually also inflexible
o E.g. The SA '96 Con

o Doesn't enjoy any special status when compared to other laws
o The legislature can pass laws, which are inconsistent with the Con. The courts cannot question the validity of such laws, provided the correct procedure has been complied with.
o Its usually flexible
o E.g. Britain

WHEN A CONSTITUTION ISN'T SUPREME, PARLIAMENT IS SUPREME!!!

Autochthonous \(^{18}\) and Allochthonous \(^{19}\) constitutions:

Van der Vyver – 3 kinds of CON:

致癌 Reactive constitution:
Which was the result of specific problems in the past and which seeks to resolve those problems – indigenous
致癌 There are constitutions which are intended to maintain the continuity with established norms in legal tradition of the society concerned – indigenous
致癌 Superimposed constitutions:
The contents of the CON are unrelated to the history of the country concerned

The SA CON is generally described as indigenous in the sense that it was a product of negotiations between representatives of political parties but the drafters of the CON drew upon the constitutional experience of a number of countries and were also influenced by PIL.
致癌 With adoption of the CON – SA became part of a Constitutionalist tradition.
致癌 Also be interpreted in light of SA history and background against which the CON was adopted
致癌 Death penalty case: S vs Makwanyane 1995 – judges emphasised the importance of taking into account indigenous values when interpreting the CON. They especially relied on the reference to *Ubuntu* \(^{20}\).

The State and Government:
WHAT does "the" State feature?

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\(^{17}\) Not always
\(^{18}\) Indigenous
\(^{19}\) Foreign / Borrowed Con
\(^{20}\) Spirit of humanness
✓ Geographically defines territory
✓ Community of people who live on the territory
✓ A legal order
✓ An organized system of government to uphold legal order
✓ Separate political identity

WHAT about “the” Government of “the” State?
The state is the permanent legal entity, while the government is the temporary bearer of state authority – the government represents the state at a certain time.

Soverignty:
WHAT does sovereignty mean?
A sovereign state in PIL refers to states, which are independent – THUS – the state isn’t subject to the authority of another state.

LETS look at some “ideas” / “terminology in Con Law:

WHAT is constitutionalism?
✓ It refers to a government in accordance with the CON.
✓ The government derives its powers from and is bound by the CON.
✓ The government’s powers are limited by the CON.

WHAT is the Rule of Law?
✓ Constitutionalism – describes a state in which the law reigns supreme.
✓ Related to the Anglo-American concept of rule of law
  
  21 According to Dicey – Rule of Law rests on the following premises:
    i) Absence of arbitrary power – no person is above the law
    ii) Equality before the law – Everyone subject to ordinary law in ordinary courts
    iii) Judge – made constitution – Gen principles of British Constitutional law – result of judicial decisions confirming common law
✓ Doctrine should be seen against the background of the 19th century English Constitutional Law.

21 Rechtsstaat
22 Received exposition in 1885 in AV Dicey’s *Introduction to the study of the law of Constitution.
David et al “Democracy & Constitutionalism”:
The equation of CL – with the ordinary law of the land – prevented development of adequate legal principles to which the bureaucracy was subject.

**WHAT is the Rechtsstaat principle?**
- It is a German concept that refers to a government by law and not by force.
- This concept distinguishes between formal and material Rechtsstaat.
- Formal rechtsstaat: requires compliance with:
  - Due process
  - Separation of powers
  - Legal certainty

**Material Rechtsstaat** – the state authority is bound by higher legal values, which are embodied in the CON.

With the adoption of the ’96 CON, SA in addition to being a formal Rechtsstaat also became a material one. *The ’96 CON contains a number of requirements that validates government actions*

**WHICH mechanisms does the CON contain to limit powers of Government and realise the value of the CON?**

- B.o.R
- The CON is subject to judicial review
- Democratic elections of representatives to parliament
- Collective and individual responsibility of cabinet to parliament
- Separation of powers between the legislature, executive and judiciary
- An independent judiciary
- The demarcation between the national and provincial spheres of government
- Civil control of the military

**WHAT do you understand under the term Democracy?**

- S1 of the CON proclaims that SA is a democratic state.
- Democracy is derived from ancient Greek words *demos* and *Kratos* which

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23 The people
24 Strength
implies that a democracy is a government by the people.

- In a democracy the right to govern doesn’t vest in a single person but in the people as a whole
- Democracy includes free political discussion, the toleration of differences between people and the right of all citizens to participate in political decision-making.

Let’s look at the different forms of democracy:

<table>
<thead>
<tr>
<th>Direct Democracy</th>
<th>Representative Democracy</th>
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<tbody>
<tr>
<td>- All major political decisions – taken by people themselves</td>
<td>- Citizens of the state elect a representative of their choice &amp; express the will of the people.</td>
</tr>
<tr>
<td>- May work in a small political community – where they can get together regularly to discuss and decide matters of common interest</td>
<td>- Created via process of elections</td>
</tr>
<tr>
<td></td>
<td>- Meant to ensure the interest of society are protected &amp; cared for by elected representative.</td>
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</tbody>
</table>

Criticisms against modern representative democracy:

The people can’t be said to govern in any real sense if they go to the polls once every 4 / 5 years to elect representatives who are free to govern as they see fit and are not obliged to consult the public on important issues.

It’s also weakened by certain groups and individuals – they finance election campaigns.

BUT on the contrary:

It is stated that it’s the only workable form of democracy in modern times – elections remain powerful mechanisms to keep a government accountable to the people THUS if a government loses sight of the concerns of the population they are unlikely to be re-elected.

AND
S.o.P, freedom of the press and freedom of information may prevent any particular group from becoming too strong and promote democratic debate and competition.

**WHAT features are indispensable for democratic governance?**

- The protection of minorities
- Mechanisms to ensure the accountability of government to the electorate.
- Multi party system
- Universal suffrage
- Free and regular elections (4 or 5 years)

SA is in addition also a **Constitutional democracy**.

⇒ Representatives are not free to make whatever laws they wish.
⇒ They are bound to observe the norms and values in the CON
⇒ Laws inconsistent with the CON are declared invalid.

**DISTINCTION between Parliamentary and presidential systems of government:**

<table>
<thead>
<tr>
<th>Presidential System</th>
<th>Parliamentary System</th>
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<tbody>
<tr>
<td>• Head of government = head of state (USA)</td>
<td>• Head of State and Head of Government = not the same person.</td>
</tr>
<tr>
<td>• Head of government – not a member of legislature and not responsible to it</td>
<td>• Head of Government and Cabinet members of legislature and responsible to it.</td>
</tr>
<tr>
<td>• Head of government (President) often elected directly by the people.</td>
<td>• Head of government is leader of party with a clear majority in Parliament.</td>
</tr>
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</table>

SA's '93 and '96 CON – Presidential and Parliamentary System:

**Presidential**

President is the head of state and head of government

**Parliamentary**

- The voters elect the President by Parliament and not directly.
- Members of Cabinet must be members of Parliament

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25 Adult
26 Every 4 / 5 years.
27 USA – President – not a member of Congress and neither are the members in Cabinet
28 Complete separation of powers
TEST YOURSELF:

1. Distinguish between a supreme constitution and one that is not supreme. Give an example of each.

2. Briefly assess whether the final Constitution is an example of a flexible or an inflexible constitution.

3. Discuss the difference between direct democracy and representative democracy and indicate which is the better form of democracy for a modern state.

4. Explain what constitutional law means?

5. Distinguish between public and private law, and state why constitutional law is said to be part of public law.

6. “The distinction between private and public law has become blurred in modern times”. Discuss this statement with particular reference to the reasons why this blurring has occurred.

7. Distinguish an inflexible constitution from a flexible one and mention an example of each.

8. Does South Africa have a flexible or inflexible constitution?

9. Explain why South Africa has a supreme constitution.

10. Explain the difference between autochthonous and allochthonous constitutions.

11. Discuss the following concepts:
    - State
    - Government
    - Sovereignty

12. Discuss the following constitutional principals:
13. Explain whether South Africa is a constitutional state or a Rechtsstaat.

14. Explain what is meant by the term democracy.

15. Explain whether South Africa is a democracy.


17. Distinguish between public and private law, and state why constitutional law is said to be part of public law.

18. “The distinction between private and public law has become blurred in modern times”. Discuss this statement with particular reference to the reasons why this blurring has occurred.

19. Is a supreme constitution and an inflexible constitution the same thing? Give reasons for your answer.

20. Discuss the 1996 Constitution in the light of the following:
   - Flexibility/inflexibility
   - Whether it is autochthonous or allochthonous

   In each case, your answer needs to include the definition of these concepts.

21. What majorities are required to amend different provisions of the Constitution?

22. Explain the relationship between constitutional supremacy and the courts' power to test the constitutionality of legislation.

23. The state of Abysmal has been in existence for more than 20 years. It is governed by a dictator referred to as 'the Butcher' because of the reign of terror that he imposes on his people. Curfews are imposed. People cannot engage in
free speech. The ‘Butcher’s’ special army roams the country plundering and committing the most heinous of crimes. No elections are held and the people live in constant fear and uncertainty. A secret organisation called ‘the Liberators’ is established to rid Abysmal from the grips of ‘the Butcher’. The Liberators do not know how to go about changing their political situation and approach you (political advisor) for advice on a plan of action. Briefly discuss the five most important constitutional concepts, which you believe would have to be adopted for the State of Abysmal to become a democracy.
THE SEPARATION OF POWERS AND CHECKS AND BALANCES – DISCUSSION:

WHAT is the Trias politica 29?
It is one of the “essential principles” of constitutionalism and democracy. It refers to the division of state authority among the legislative, executive and judicial branches of government.

WHAT are the components of separation of powers 30?
Legislature:
Is the power to create, amend and repeal legal rules

Executive:
Is the power to execute and enforce legal rules

Judiciary:
Is the power to interpret legal rules and apply such rules to concrete situations.

WHAT significance does S.o.P have?
⇒ The French writer, Montesquieu 31 was regarded as the father of the doctrine of separation of power.
⇒ According to M the reason for division was that there can be no political freedom in a country when 1 person / body of persons make all the laws, implements them and acts as arbiter when they are contravened.
⇒ Doctrine states that authority should be divided to lesson power in hands of organs of state.

According to Carpenter this doctrine refers to:
✓ Formal division of state authority among legislative, executive and judiciary
✓ Separation of personnel – 1 person not to perform in more then one branch of government
✓ Separation of function – One branch of government can’t usurp functions and powers of another
✓ Checks and Balances – Each branch of government is given specific powers to restrain other branches and achieve desired balance amongst the 3 components.

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29 Separation of powers
30 Herein after referred to as S.o.P
31 Herein after referred to as Mont
Distinctions and separation must be made – **but not absolute**
If absolute – would lead to **inefficiency and inflexibility.**

**Lets look at some case law:**

*The Certification Case:*

In this case it was argued that the new constitutional text didn’t comply with one of the CP’s, which requires the separation of powers with checks and balances – cabinet members remain members of parliament. The court found that there was no universal model for the separation of powers. The overlap between legislation and executive in the new CON serves as an important check and balance – WHY – it ensures accountability of the executive towards the voters.

The CC has shown that it won’t accept the unconstitutional usurpation of function of one branch of government by another.

In *Executive council of the Western Cape* – The court invalidated a provision in an Act, which authorized the president to amend or repeal the provisions of certain legislation.

The SA CON provides for checks and balances. The most important 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 CON.
In *Minister of Health and Others v TAC and Others 2002 (5) SA 721 (CC)* the High Court held that the executive didn’t address the need to reduce the transmission from mother to child of HIV in pregnant women.

There was a violation of rights in the B.o.R in terms of S27 – the right to healthcare and S28 – involves the rights of children. It was argued that they didn’t make provision to make the drugs available and they didn’t make time for the national programme.

The executive argued that this would amount to the infringement of S.o.P, as the making of policy is a prerogative of the executive and not the judiciary.

The judiciary must apply the law impartially and respect the B.o.R and any action / policy, which is inconsistent with the constitution, must be declared invalid to the extent of the inconsistency.

There is also a requirement on the executive to respect and include socio economic rights.

**Representative democracy and the separation of powers**

The ’93 CON established a representative democracy in SA. The ’96 CON guarantees the right of all citizens over 18 to vote in democratic elections and provides for direct election representatives in the national, provincial and local sphere of government.
SA is also a constitutional democracy – WHY – the people’s representatives in parliament, municipal councils and provincial legislatures aren’t allowed to make any law they wish, they were bound to observe the values in the constitution. Laws inconsistent with the constitution will be invalid. It may be argued that this is undemocratic.

Entrenchment of the trias politica doctrine in ‘96 CON:
SA is a sovereign democratic state based amongst other things on the rule of law and supremacy of the CON. It follows that government derives it powers from the CON and is bound by it, and its actions are justiciable in the court of law, which has the power to declare it invalid due to it’s inconsistency with the constitution.

⇒ Formal Division:
Our CON states provides for a formal division of legislature, executive and Judiciary. It provides that the national legislative authority in national sphere of government is vested in parliament; provincial legislature is vested in Provincial Legislature and the local legislature in the Municipal Council. The Executive authority in the national level is vested in the President who exercises his power together with his cabinet and in the Province is vested in the Premier who exercises this power together with his Executive Council. The Judicial authority is vested in the Court, which are independent

⇒ Separation of Function and Personnel:
Our CON provides that the National Legislature is responsible for enact matters conferred to it by the CON and may enact laws affecting the province in certain circumstance 32. The Executive implement and enforce the laws as enacted by parliament, and the Judiciary interpret and apply the law. The CON also provides that no one branch may assume powers or function not conferred to it by the constitution or by legislature and calls for respect of the power and function conferred to another sphere.

⇒ Check and Balances:
There are instances where these branches to some extent concurrently share powers and serves as check and balances. Our CON provides for concurrent powers between National and Provincial legislature, and provides for a solution when there is a conflict. The most important check and balance is judicial review, the court have the powers to test legislature and executive action and to declare action invalid

32 S44(2)
if it is inconsistence with the constitution to the extent of its invalidity. It serves as a watchdog over legislature and executive, and any one may seek a court relief in any matter that may be settled by the courts

ARE there any arguments that defend judicial review?

YES:

• The fact that the CON was made the representatives\(^{33}\) themselves, and a result of lengthy discussion and compromise, which explains to some extent the superiority it, enjoys over other laws.

• Democracy presupposes an environment where people engage without fear on vigorous political debate, and challenge accepted beliefs. The Judiciary contribute by protecting the individuals political rights, freedom of expression

• Judiciary may inquire into the validity of legislature, and any legislature not consistent with the CON may be invalidated to the extent of the inconsistency.

• Judiciary are subject to the CON and to the rule of law

LETS look at a diagram\(^{34}\) to express the above:

\(^{33}\) The CON had to be adopted by a \(\frac{2}{3}\) majority

\(^{34}\) Taken from the UNISA Study guide for CSL2601

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TEST YOURSELF:

1. Discuss the doctrine of “separation of powers” and “check and balances”.

2. Discuss whether South Africa has adopted the separation of powers under its new dispensation.

3. Discuss the question whether judicial review is undemocratic.

4. Discuss whether South Africa has adopted the separation of powers under its new dispensation.

5. The principles of cooperative government and the trias politica doctrine are one and the same thing.

6.
COOPERATIVE GOVERNMENT – DISCUSSION:

**WHAT** does S40 say?
The government of the Republic is constituted as the national, provincial and local spheres, which are distinctive, interdependent and interrelated.

One can distinguish between two primary forms of government:
- Unitary
- Federal

**LETS** look at Unitary Form of Government:
Unitary form of government in its pure form is not conducive of good governance, almost all state finds it necessary to delegate power, and thus recognition has been given to the principle of devolution, where the central government delegates certain powers to the provinces without abdicating its sovereignty or converting a unitary state in federal state.

**Characteristics:**
- Powers are concentrated in central government
- The provinces are subject to the authority of the central government
- Emphasis is place on centralization rather that decentralization, and were it occurs it enjoys only limited degree of autonomy
- Certain power are delegated to other level, but this does not divest the central government of it authority

**Advantages:**
- It is conducive for central planning, and better suited for a state phased with dislocation and economic crises
- Aimed at achieving homogeneity in a country be it in realm of economic or legal affairs
- It saves cost because there is not duplication of government different levels
- In turn result in more efficient administration and economical efficiency.

**In general:**
A system, which operated prior ‘93, parliament was sovereign and political dispensation was centralized on both law and practice. The three tiers of government, Central government at the top, provincial second and local the weakest, characterized government. This form of government was used to promote segregation in South Africa. It was a parliamentary system of government.
NEXT we look at Federal Form of Government:

Federal government has two dimensions PIL or domestic. PIL refers to a single order or state with a constituent part that enjoy a defined measure of autonomy and domestic refers to a constitutional arrangement that allows territorial diversity, in an organized structure of state, two legal orders exist, the national and provincial ruling over the same territory.

Characteristics:

- State power and source of incomes in divided between the two orders 35
- Regions given wider powers
- Important issues regulated by national government 36
- An arbiter resolves dispute between legal orders.

Advantages:

⇒ Minimizes abuse of power due to the demarcation between national and provincial government
⇒ Efficient for a country with large land area
⇒ Allow for economical and social experimentation, which is not possible in unitary government
⇒ Most appropriate for plural society characterized by culture, linguistic or religious diversities.

Classification of FEDERAL FORM OF GOVERNMENT

<table>
<thead>
<tr>
<th>Divided model</th>
<th>Integral model</th>
</tr>
</thead>
<tbody>
<tr>
<td>- Powers and responsibility clearly divided between national and provincial</td>
<td>Integrate and coordinates national and provincial politics at all levels</td>
</tr>
<tr>
<td>- Provinces give independent power of taxation</td>
<td>- Few areas where national government enjoys autonomy</td>
</tr>
<tr>
<td>- No formal or express recognition of requirement of corporation between the national and provincial</td>
<td>- Revenues and powers of taxation are shared between the spheres</td>
</tr>
<tr>
<td>- Provincial interest not represented in national government</td>
<td>- Provinces represented in national sphere</td>
</tr>
<tr>
<td></td>
<td>- Number of intergovernmental institutions charged with corporation between the two spheres and</td>
</tr>
</tbody>
</table>

35 National and Provincial
36 Defence / taxation / etc
Simeon says that SA follows a more integrated form of federalism than a divided one.
This is evident from the following:

⇒ **Reference to Sphere as opposed to Level of Governance:**
Level depicts a hierarchical relationship with central as powerful, province second and local the weakest, the constitution refer to a sphere of government with denotes a move away from the stratified level of government to an approach where national, provincial and local sphere operate in a more or less as equal partners in government

⇒ **Reference to National as opposed to Central Government:**
The CON states that government is constituted of national, provincial and local sphere of government, which is distinctive, interdependent and interrelated. Central government depicts the stratified level of government. The CON also provides for the principles upon which the sphere must conform to.

⇒ **Relationship between Spheres of Government:**
Both national and provincial have some measure of autonomy on certain matter, the province has autonomy on matter listed under schedule 5, however this power is not absolute and the national government may intervene under certain circumstance. Both spheres have share power on matter listed under schedule 4, and the CON provides for remedies when disputes arise from the sharing of this power. The corporation between the spheres is inevitable.

⇒ Parliament is required to provide structure facilitation intergovernmental and mechanism of resolving disputes

⇒ The spheres must make reasonable effort to exhaust all other remedies before approaching the court

⇒ Provincial interest represented in Parliament in the Provincial Legislature.

**WHY do we have the Integral form?**

- Previously in SA the province were not independent, for this reason they lack separate political identity and administrative capacity to manage it own affairs, this may be
  - developed through intergovernmental corporation, and the constitution enjoins parliament to assist the provinces to develop administrative capacity for effective exercise of power
• provincial government must assist local government to develop administrative capacity for effective exercise of its powers.

**WHAT is Cooperative Governance?**

**Definition**

It adopts political flexibility, negotiations, compromise and less reliance on rigid S.o.P and synthesis and coordination of endeavors and function of the sphere working together for the common good of the nation.

Our CON states that government is constituted of a national, provincial and local sphere of government, which is distinctive, interdependent and interrelated and that they must observe and adhere to the principles of cooperative government.

**WHAT are the principles of Cooperative Government**

- Preserve peace, national unity and indivisibility of the Republic
- Secure the well being of the people of the republic
- Provide, effective, transparent, accountable and coherent government
- Loyal to the CON, the Republic and its people
- Respect the CON’s status, institutions power and function of another sphere
- Not assume powers or function except those conferred on it by the CON
- Exercise their power in a manner not encroaching on geographical, institutional integrity or function of another sphere
- Cooperate with one another in mutual trust and good faith by
  - Fostering friendly relations
  - Assisting and supporting one another
  - Information one another and consulting one another on matters of common interest.
  - Coordinate their actions and legislation with one another
  - Adhere to agreed procedure
  - Avoid legal proceedings with one another
- Exhaust all other remedies before approaching a court
- If court not satisfied that the remedies provided for are exhausted to refer the dispute back to the spheres
- Parliament to provide institution facilitating intergovernmental corporation and the

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37 Section 42

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mechanism and procedures followed in respect of disputes

LETS look at the following case:

_Premier of Western Cape v President of RSA (1999):_

The Western Cape premier challenged the constitutionality of Public Service Amendment Act which provides head of administration with same broad functions as those in the national department, and that they no longer fall under the provincial Director General. That the DG assumes responsibilities amongst other things of administration of office of premier, intergovernmental and intergovernmental relation, secretary of executive councils and give directions on policy matter.

The challenge was on the bases of:

⇒ Inconsistency with section 42(1)(g) exercise powers in a manner not encroaching on geographical, institutional integrity and power and functions of another department,

⇒ The Act assign function to the provincial DG and head of department in an unacceptable manner

⇒ Act constrain the premiers power to establish and abolish department of government

⇒ The Act empower minister to give direction concerning the transfer of certain function to and from the provincial and it department

The court held as follows:

Section 42(1)(g):

The CON states that the spheres are distinctive, interdependent and interrelated, that both national and provincial legislature have competent powers to structure local government and for overseeing it function. The national legislature has competency of schedule 4 matters and limited competence on schedule 5 matters. The national government ensure that other spheres carry out their constitutional obligation and may interfere if a sphere fails to carry it these obligations. The court held that Cooperate governance is designed to ensure that in field of common endeavours the spheres will communicate with one another to implement legislature and to further take reasonable steps in settling disputes. The court held that the provision is concerned with the way the power is exercised not whether it exist, that its purpose is to prevent one sphere from using its powers to undermine another sphere and prevent it from functioning effectively.

The function and institutional integrity of spheres is determined by:

i) Its place in the constitutional order, powers and
The court further held that the CON requires that establishment of one public service, gives the powers of structuring the public services to national legislation, this power need to be exercised carefully in context of the said provision, therefore in exercising this power it does not encroach on the ability of provinces to carry out the function entrusted with it.

The court therefore disposed this argument.

⇒ The Argument was rejected by the court, it held that national legislature is enjoined to enact legislature that facilitate cooperate governance, and therefore establishment of such post does not infringe on provincial powers or autonomy. The court referred to the First Certification case of the Constitution where the court held that province should have ability to employ personnel in provincial administration, determine its function and the national legislature is to provides for framework within which the appointment are made. Further the functionary is not a representative of National Government, is appointed by the premier and is accountable to the premier and the executive council. It also held that the public service structures are a matter determined by parliament and the provinces must conform to the legislature.

⇒ The act provided for the premier with power to establish and abolish provincial department the power limited to only the extent it must be exercised by way of request directed at the President who may do so retrospectively. The procedure requiring the premier and president to seek agreement concerning legality of proposed action are consistent with the principles of cooperate governance.

⇒ The provision was invalidated. The court held that a law implementing a provincial government will be made in terms of act of parliament and not by executive directions by the minister and that the minister power to transfer functions from provincial to national department has no qualifications.

The court held that the Act complies with section 41 of the CON in that

1) The law was not made in an arbiter way, the Western Cape was given an opportunity to comment on the law and their comment were taken to consideration and the original law was amended accordingly

2) The premier reserves the power to appoint, dismiss, promote the functionary and remains accountable to him
**WHAT** will happen if Parliament and the Provincial legislature pass legislation on the same subject matter?

**Answer** – a conflict will exist regarding the legislation

<table>
<thead>
<tr>
<th>Schedule 4 matter</th>
<th>Schedule 5 matter</th>
</tr>
</thead>
<tbody>
<tr>
<td>S146 (2) national legislation that applies uniformly with regard to the entire country prevails if one of the given conditions are met:</td>
<td>Usually there won’t be conflicts since provinces have the exclusive power to pass legislation relating to these matters, but S44(2) says that parliament may pass legislation on a matter falling within a functional area listed in schedule 5 when it is required to:</td>
</tr>
</tbody>
</table>
| • The national legislation deals with a matter that can’t be regulated effectively by legislation enacted by the provinces individually | • 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 the country |
| • The national legislation deals with a matter that requires uniformity across the nation and the national legislation provides that uniformity if found when establishing: | |
| o Standards  
 o Frameworks or  
 o National policies | |

**WHY** do we need national legislation?

| o To maintain national security  
 o To maintain economic unity  
 o To protect the common market of mobility if goods, services, capital and labour  
 o To promote economic activities across provincial boundaries  
 o To promote equal opportunities or equal access to government services  
 o To protect the environment |

**WHAT** does the court in *Ex Parte President of RSA: In Re Constitutionality of the Liquor Bill say*?

The Constitutional Court stated that “any Bill whose provisions in substantial measure fall within a functional area listed in Schedule 4 [must] be dealt with under section 76”.

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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 entire country
- It impedes the implementation of national economic policy

If the court can’t resolve a conflict then the national legislation will always dominate!
TEST YOURSELF:

1. List the three spheres of government that make up the Republic of South Africa.
2. List the three branches of government in the national sphere.

3. Is there a difference between the three spheres and three levels of government? Discuss.

4. Explain what you understand by the term “federalism”.

5. Explain whether South Africa is a federal state.

6. What are the primary differences between a divided and integrated model of federalism?

7. “Simeon says South Africa follows a more integrated form of federalism than a divided one”. Briefly discuss the differences between these two models and list the reasons Simeon gives for his view.

8. According to Simeon, the 1996 Constitution embraces an integrated form of federalism. Briefly list five features from the 1996 Constitution, which supports the above statement.

9. You are the research assistant to one of the Appeal Court judges. A case has come before the Supreme Court of Appeal, which deals with the issue of whether the national government can design mechanisms in order to promote intergovernmental relations. The judge requests that you prepare a paper on the general principles (as contained in the Constitution) pertaining to this issue. Set out the content of this paper.

10. Discuss the principles of cooperative government as set out in chapter three of the 1996 constitution?

11. Given the current disparities between the various provinces, do you think that the notion of cooperative government is compatible with the autonomy of provinces?

12. Discuss the issue of cooperative government in the light of the Premier of the Western Cape v the President of the Republic of South Africa?
13. Mention 4 examples of institutions designed to facilitate cooperative government.
NATIONAL LEGISLATIVE AUTHORITY – DISCUSSION:

NEXT we will look at the conflicts regarding legislation BUT lets 1st define:

**WHAT is legislative authority?**
It’s the power to enact, amend and repeal rule of laws that are binding to the people within the state and to state organs. In a system of government based on corporate federalism, it is not a single institution but is divided amongst the spheres of government, national, provincial and local governance, working together for the common good of the nation. In SA, which prescribes to this corporate federalism, the legislative authority is divided amongst the spheres that must work to together.

**WHAT does Parliament consist of?**
- Two houses
  - NA
  - NCOP

This means that in SA Parliament is bicameral

**WHY do we have two houses?**
- To alleviate parliament workload
- Encourages through consideration of any matter before parliament
- The two houses act as check and balance which is consistence with the doctrine of S.o.P
- Better representation of the electorate, if underrepresented in one house, he might be adequately represented in another.

**WHAT are the functions of the NA?**
It not only entrusted with law making functions but also:
- Parliament as an elected represent the people in the national government, it must therefore represent the people in decision-making and articulates the peoples interest. It serves as communication channel between the people and the government
- It elect the President
- It debate and approves bills submitted to it by the executive

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39 Twofold
40 Passes legislation
Maintain oversight over executive and organs of state
Initiate and prepares legislature except for Money bills
Ensure public participation in law making process and conduct business in public within reasonable measure of public access.

**WHAT** are the functions of the NCOP?
- Represent the provinces in the NA
- Provide for public consideration on laws affecting the province
- Participate in the National Legislative process

**WHAT** is an election?
It’s another method to keeping government accountable to the people. It is process through which the people elect a representative of choice in the national government, who must therefore express the will of the people. To assist in facilitating this process the CON established the Electoral Commission, which ensure that the process is free and fair. The NA is elected to represent the people and ensure governance by the people.

**WHO** has the right to vote?
Our CON guarantees the right to vote and to be elected and stand and hold public office, and to do is in secret. However such right is not absolute it comes with qualifications, such that you must be of a certain age and a SA citizen and those restriction that are imposed by the Electoral Act.

*Keep in mind that certain provisions of the Electoral Act were subject to constitutional litigation*

**Q –** Can a SA adult citizen ever be deprived of the right to vote?
**A –** S19(3)(a) guarantees the right of every adult citizen to vote

**CAN** prisoners vote?
In *August 1999* case the actions of the Electoral Commission to deny a prisoner the right to vote came under judicial scrutiny. The court found that the actions of the Commission were unconstitutional.

It held that the there was no duty on the Commission to ensure that prisoners who were waiting for their trial or have already been sentenced prisoners have the right to vote in the general elections.
Our CON provides that one of the values of a sovereign democratic state of RSA was based on universal adult suffrage. Adult suffrage is one of the values in the CON and has historical importance in SA. That the vote of each and every person is a badge of dignity and personhood, and the right may not be limited without justification.

Contrary to the ’93 CON, the above sections don’t contain provisions, which allows for the disqualification from voting to be described by law.

Q – HOW can Parliament limit the right?
A – Yes, but only in terms of the limitation clause 41 of the CON.

Limitations MUST be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

In our 1st democratic elections, Parliament stated that all prisoners were allowed to vote – BUT this was not without exceptions – in the ’93 CON prisoners weren’t expressly disqualified from voting – BUT it said that disqualifications may be described by law.

WHAT did the ’93 Electoral Act say?
No person will be entitled to vote if convicted of:

- Murder,
- Rape,
- Robbery with aggravating circumstances or
- Attempt to commit these crimes

Thus all OTHER prisoners were allowed to vote.

WHAT does the ’98 Electoral Act say?
Any citizen in possession of a barcoded identity book may apply for registration as a voter.

WHO is disqualified?
⇒ Persons who applied for registration due to fraud or in anyway other than the prescribed manner
⇒ Anyone who is not a SA citizen
⇒ Anyone who was declared mentally ill by the High Court
⇒ Anyone in detention under the Mental Health Act
⇒ Anyone who is not normally a resident in the district where registration is applied for.

Prisoners were not disqualified.

41 Section 36
From the above it is clear that every SA citizen is given the eight to vote in unqualified terms – thus prisoners also have the right to vote – WHY – parliament is yet to pass any law that states otherwise or limits this right.

LETS go back to the August case:
The simple argument of the respondents was that even though prisoners had the right to vote, they lost this right through their own wrongdoing. This argument was accepted by the judge. Further no provisions were made in the ’98 Electoral Act or the Commision Act that enabled prisoners to exercise their right to vote. The Commission further didn’t make any arrangements to allow prisoners to vote.
WHAT is the problem with this?
We had no disqualifying legislative provisions in place meaning that the respondets could’t justify infringements of of a prisoner’s right to vote.

Following the decision of the CC, Parliament enacted a law which amended the Electoral Act, which disenfranchised prisoners sentenced without an option of a fine from voting during their imprisonment. This provision was subject to litigation in the CC in the case of Minister of Home Affairs v NICRO on the basis on their constitutionality. The legal question before the court was whether the limitation was reasonable and justifiable in an open democratic society based on human dignity equality and freedom. There where two contentions advanced on behalf of the Minister which are:

- The special arrangement for enabling all prisoner to vote will put strain on financial and logistical resources available to the commissioner
- That it is important for government to denounce crime, and communicate to the public that rights that citizens have are related to their duties and obligations as citizens

The Court held that the right is infringed and further held that

i) The right to vote must be seen in light of it context, and is foundation to democracy which is the core value of the CON. In a country with a history where denial of the right confirm to white supremacy and marginalize great majority of the country it is a.
precious right that must be vigilantly protected and respected. It held that the right might only be limited subject to section 36 of the CON.

ii) The reason for strains on logistical and financial resources available to the Commission was disposed by the court on the basis that is established an evidential burden, which the Minister failed to discharge. The fact that there are polling station that would be made available to those prisoner who are allowed to void is one such counter argument

iii) On the second leg of the contention advanced on Behalf of the Minister, Chaskalson CJ with reliance to the Canadian Case Sauve V Canada which dealt with the limitation of the right to prisoners sentence to two year or more whilst in prison on objective amongst other things to enhance civic responsibility and respect for the rule of law.

The court held that the court failed to establish connection between denial of the right and the objective of enhancing respect if known and ensuring appropriate punishment. The Court further held that the measure, did not meet minimum impairment test and the requirements for proportionality. In agreement Chaskalson CJ, concluded that there was not enough information enabling the court to assess and evaluate the policy that is pursued by the limitation, that the limitation disenfranchised prisoners whose convictions and sentences are under appeal. It therefore ordered that arrangement be made for the excluded prisoners to be registered and to vote.

iv) Madala J, held that the denial of the right was government objective of balancing individual rights and the values of society. The removal of the rights was temporal and restored upon released. That the limitation served an important purpose to ensure integrity of voting process and assures that the interests and the rights of ordinary law abiding citizens are important as those of prisoners and therefore dismissed the application

v) Ngcobo J was of the view that denouncing of crime by government promotes a culture of observance of civic duties and obligation, that the limitation is not absolute. However the limitation makes no distinction between prisoners awaiting outcome of appeal and those whose appeals have been finalized and sentenced reduced to a fine. And found that reading in could adequately cure the defect.
Electoral Systems

What is an electoral system?

A system through which the citizens elect a representative of choice, and set out procedures for the election of political parties. It normally regulates:

- The franchise
- Method of voting
- Frequency of elections
- Qualification and nomination of candidates
- Determination and declaration of results

WHAT are the forms of electoral systems that we get?

A number exist, but two main ways in which political parties can participate in elections are:

- Territorial / regional representation
- Proportional Representation

<table>
<thead>
<tr>
<th>Territorial representation:</th>
<th>Proportional representation:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Characterised by the Westminster system and was operational in SA prior ‘93.</td>
<td>All parties participating in the election obtain a represent in Parliament and reflects votes cast for these parties</td>
</tr>
<tr>
<td>Principles:</td>
<td>Advantages:</td>
</tr>
<tr>
<td>- National territory is divided in to</td>
<td></td>
</tr>
</tbody>
</table>

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43 How votes are cast and translated into seats in legislature
Constituencies

- Each constituent elects a representative which can be more than one, but votes for one
- Candidate with more vote is elected
- The winner is the person who first past the post.

Advantages:
- It’s simple
- Conducive for strong stable government
- Personal bond between electorate and the representative

Disadvantages:
- Incorrectly reflect relative strength of parties
- Favour stronger parties to the detriment of weaker parties
- Artificial delineation of constituencies, can give rise to imbalanced in constituency
- May lead to gerrymandering

System in use in South Africa

The ’93 CON provided for the list system, where the voter has one chance to vote for a political party of choice. The ’96 CON however provided for the use of electoral system resulting in proportional representation.

MEMBERSHIP AND TERM OF OFFICE:
DOES the CON prescribes a free / imperative mandate theory of representation?

<table>
<thead>
<tr>
<th>Free Mandate</th>
<th>Imperative Mandate</th>
</tr>
</thead>
<tbody>
<tr>
<td>The elected member is not bound by the mandate given to him by the electorate,</td>
<td>The elected is bound to by the mandate of the electorate, and if he resigns membership</td>
</tr>
</tbody>
</table>

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44 The process of dividing a particular state / territory into election districts in such a manner as to accomplish an unlawful purpose, such as to give one part a greater advantage.
Parliament:

Parliamentary Privileges

WHY does Parliament need privileges?
In order to protect Parliament from outside interference.

WHAT are these privileges?

- To punish people for contempt and determine their own procedures
- The freedom of members to say anything in Parliament without the fear that they will be held liable in a court of law.

WHAT privileges does Parliament have under the ‘96 CON?

⇒ NA determines its own internal procedures and controls with due regard to participatory and representative democracy, accountability and transparency.
⇒ Guaranteed freedom of speech in accord to internal rules of debate, and exempted from civil or criminal action emanating from what is said in parliament
⇒ Parliament committees may summon people to give evidence and submit documents

Which one do we follow in SA?

Imperative mandate operated during the ‘93 CON and transitional period in the ‘96 CON. The ‘96 CON provided that an Act of Parliament might abolish the imperative mandate. The position was indeed amended by four Acts regulating the position of Parliament of Provincial legislature. The constitutionality of this provision was challenged in UDM V President of Republic. To which the court invalidated the legislation due to it not being passed within reasonable period of time as mandated by schedule 6. Shortly after the case the CON was amendment to regulate the issue of floor crossing. Which entailed:

⇒ Member given 15 days in September the 2nd or 4th year after general election within which they could change party allegiance
⇒ Parties may merge or separate during this period
⇒ Permission to cross the floor and for parties to divide is only required if at least 10% of member of party defect or break away

This resulted in mistrust by the electorate in the election process, hence they elect a body to represent them in parliament and then the member defect to another party against the believes of the electorate.
Parliament may enforce its own rules and disciplinary measures for contempt of parliament and other infringements of the Act.


In the *De Lille v The Speaker of Parliament* case, parliament privileges came under constitutional scrutiny.

**WHAT was the question in this case?**

If the exercise of parliamentary privileges are subject to the constitutional review power of the courts

**ANSWER – YES!!!**

**LETS** look at the facts and finding of the case:

De Lille was suspended for 15 days from the NA after making allegation that certain ANC officials had been spies for the apartheid regime. On behalf of the NA it was argued that the Assembly exercised its parliamentary privilege to manage its own affairs and as such the parliamentary privileges are not subject to judicial review.

The court held that the suspension indeed unjustly violated De Lille’s right to freedom, just administration and access to court.

- The judge stated that Parliament could not give to itself any powers, which are not given to them by the CON expressly or by necessary implication.
- The judge concluded that the exercise of parliamentary privileges must be consistent with the CON.
- That privileges as constitutional powers is subject to judicial review, however if parliament privilege is exercised in breach of constitution, redress may be sought and the aggrieved party may approach the courts for relieve.

It was found that De Lille’s suspension amounted to and 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 is not consistent with the requirements of a representative democracy. It will result in a punishment, which was calculated to penalize not only the member but also his party and members to the electorate who voted for that party and who remain entitled to be represented in the assembly.
COMMITTEES:
WHAT is the role of parliamentary committees?
Due to the complexity of matters before parliament and the workload, it cannot be expected to deal with everything. Hence the reason why committees are charged on behalf of parliament to fulfill certain functions these members consist of member of the assembly. This system encourages thorough consideration of matters, and accountability and transparency.

Both houses of Parliament have standing committees, which exist for the duration of parliament. The general rule is that all parties must be represented proportional to the seat they hold in Parliament in this committee.

KINDS of committees:
⇒ Portfolio Committee:
   Usually consist of 17 members and attached to a particulate department. They consider bills relating to the department, and monitors government activation of that department. This committee may also investigate legislative programs, budget functioning, staff etc

⇒ Select Committee:
   Functions in the same manner as portfolio committee

⇒ Committee for Public Finance:
   This committee checks financial statement and audit report of organs of state, and may investigate and report of all irregularities. It is important because it prevents misuse of funds and corruption.

⇒ Medication Committee:
   This committee settles disputes emanating from bills between the NCOP and the NA.
TEST YOURSELF:

1. Define legislative authority and state to which it is vested in the national and provincial spheres of government.

2. Parliament consists of two houses. What are they? Discuss the motivation behind this dual structure.

3. Briefly lists the functions of the following:
   - National Assembly
   - National Council of Province

4. Explain the circumstances under which adult citizens may be deprived of their right to vote. Refer to case law in your answer.

5. Distinguish between territorial and proportional representation.

6. List the advantages and disadvantages of each electoral system.

7. Which system has South Africa adopted? Explain.

8. What do you understand by the free mandate and imperative mandate theory of representation?


10. Explain what parliamentary privileges are and whether their exercise is subject to judicial review. Refer to case law in your answer.

11. Discuss the role of parliamentary committees.

12. In an attempt to step up the fight against poverty, Parliament adopted a new Bill to create a Social Justice and Reconciliation Commission (SJRC). The task of the Commission is to investigate and monitor compliance with structural interdicts issued by Courts in cases of successful socio-economic rights litigation. The
Commission is to be chaired by a judge of the Supreme Court. When the Bill was sent to the President for his assent, he declined to grant it. Instead, he referred the Bill back to Parliament for reconsideration in terms of section 79 of the Constitution. The President noted that the Bill violates the separation of powers doctrine as set out by the Constitutional Court in its TAC and Heath judgments, because

(i) it enables Courts to exercise supervision over the economic policy choices of the executive; and

(ii) it allows a judicial officer to serve as Head of a Commission of inquiry.

During further debate in Parliament, open disagreement was expressed with the views of the President. The Bill was accordingly readopted without any amendment. The President now seeks your legal counsel on the matter.

- May the president veto the bill by refusing to sign it? If not, indicate in detail how the president should deal with the matter if he or she has reservations about the constitutionality of a bill. Compare the position of the president of South Africa with that of the president of the USA.

- Is the bill indeed unconstitutional, as claimed by the president? Refer in detail to the provisions of the Constitution and to the judgments of the Constitutional Court on which the president relies.
NATIONAL LEGISLATIVE PROCESS – DISCUSSION:

WHAT is the legislative process?
Series of procedures that must take place before a law is formulated, considered, refined, and approved by the competent body, in order to be valid and have the force of law.

WHAT are the exclusive powers of Parliament?
Parliament has exclusive powers:
✓ To repeal, amend it’s own laws
✓ On laws that are conferred to it either by the CON
✓ Has residual legislative powers, on matters not numerated on the constitution or mentioned in schedule 4 or 5

WHAT are the exclusive powers of the Provinces?
The Legislative authority of the provinces is vested in the province, and enjoys autonomy on matters listed under schedule 5. However this right is not absolute, the National Legislature may intervene in the right only in terms of Section 44(2) if the National Legislature:
• Maintains
  o National Standards
  o Economic Unity
  o National security
• Prevent the province from actions that are prejudicial to the interest of another province or the country
• Establish minimum standards required to render services

Concurrent Powers between National Legislature 45 and Provincial Legislature 46:
Schedule 4 enumerates areas that both the NL and PL share, in cases of a conflict between the two laws. S146(2) applies and the National Law will prevail only if:
i) The law deal with a matter that the PL can not regulate effectively by law enacted by respective province individually

ii) Deals with matter requiring uniformity, and the law provides for:
• Norms and standard
• Frameworks

45 Herein after referred to as NL
46 Herein after referred to as PL
• National policy

iii) The Legislature is necessary to:\n• Maintain national security
• Maintain economic unity
• Protect common market in relation of goods, services, capital and labour
• Promote economic activities across provincial boundaries
• Promote equal opportunity and access to governmental services
• Protect the environment

iv) Prevent unreasonable action by province prejudicial to the economic, health and interest of another province or impedes implementation of economic polity

v) Law made in terms of Act of Parliament that prevails when approved by NCOP

HOW is legislature passed?

A General Process must be followed for the passing of legislature:

Step 1:
Legislature is formulated and finalized in view of introduction in parliament. Most Legislation is prepared by executive as executor and administrator of law as they are better equipped to determine the need for new law or which interest need to be regulated

Step 2:
A competent functionary may only introduce a Bill

Step 3:
The bill is consider, debated in the committee and plenary session of parliament

Step 4:
Referred to the NCOP for consideration, if it is approved then the Bill is sent to the President for assent but only has legal force after it has been published in the Government Gazette

Before we proceed lets look at important sections of the CON:

S74 – Bills amending the CON:
The SA CON is not flexible thus it needs special procedures and majorities for any amendments to take place – WHY – to ensure that the CON is not amended without carefully considering all the issues involved.

S74 – deals with how an amendment can be made:
1. S1 – may be amended by a bill passed by:

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47 The court must give due regard to rejection of bill by NCOP
48 To determine background / purpose / put to vote
a) The NA with a 75% majority of the members  

b) The NCOP – \( \frac{6}{9} \) provinces supporting the vote

2. Chapter 2 may be amended by:
   a) Na with a \( \frac{2}{3} \) majority vote of members  
   b) NCOP – \( \frac{6}{9} \) provinces supporting vote

3. Any other provision in the constitution may be amended by a bill passed by:
   a) NA with a \( \frac{2}{3} \) majority  
   b) NCOP – \( \frac{6}{9} \) provinces supporting vote if the amendment:
      i. Relates to a matter affecting the council  
      ii. Alters provincial boundaries, powers, functions  
      iii. Amends a provision dealing with a provincial matter

S76 – Ordinary bills affecting provinces
Parliament must be able to identify an ordinary bill as either affecting or not affecting the provinces. Should a bill that affects provinces be passed as one that doesn’t or the other way round the bill will not have been properly enacted and will not become law.
WHAT happened in the Liquor Bill Case?
The court stated that any Bill whose provisions fall within schedule 4 must be dealt with under S76.
WHAT does s76 deal with?
The adoption of bills that have been passed by the NA. These bills are then referred to the NCOP
– S76(1)
S76(2) – deals with the bills passed by the NCOP. These bills must in turn be referred to the NA.
Should both houses pass a bill it must be sent to the President for assent.
S76(1)(d) – if the NCOP rejects the bill or the NA refuse to pass the amended bill, then the bill is
referred to the mediation committee who must agree on the following:
 ⇒ The bill as passed by the NA
 ⇒ The amended bill by the NCOP
 ⇒ Another version of the bill
Should the NCOP still decide not to pass the bill, the NA has the power to override the
NCOP with a $\frac{2}{3}$ majority after which the bill must be sent to the president for assent.
In the event that the President might have reservations regarding the constitutionality of the
particular bill he can decide to refer it to the CC. Should the CC subsequently find the bill to
be constitutional the President will have no choice but to assent to it.

Upon voting by the NCOP, each province shall have a single vote and a bill will only pass
with a $\frac{6}{9}$ majority.

S75 – Ordinary bills not affecting the provinces $^{49}$:
Should both houses pass a bill, it must be sent to the President for assent – Here you have
no mediation committee is available.
The NA can still pass a bill without the co-operation of the NCOP, if it was rejected by the
NCOP
Votes by the NCOP in terms of S75 states that each delegate in a provincial delegation have one
vote and the matter will be decided on the majority of votes.

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$^{49}$ Bills not affecting provinces may be introduced in the NA and NCOP
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WHAT powers does the President have?
If NA passes a bill it must be sent to the President to assent, if President has reservation must refer it back to NA and NCOP to participate in the reconsideration process if the reservation affects the provinces. If NA accommodates the reservation the president may sign the bill if not he may refer the bill to the CC for decision on it constitutionality. In *In re constitutionality of liquor bill*, the president referred the bill to the constitutional court for decision on it constitutionality, the court found that in relation to the invocation of section 79 by the president, the court is called upon to decided on the following matters:

⇒ Circumstances under which the President may refer the bill to the CC
⇒ The scope of the courts power to consider the constitutionality of the bill
⇒ Referral by the President before a bill becomes a statute

The CON embodies 3 routes to judicial consideration of the constitutionality of legislation passed by parliament:

i) A challenge by an interested party in a competent court under the provisions of the CON

ii) An application by at least \( \frac{1}{3} \) of the members of the NA to the CC for an order declaring all or part of an Act of parliament unconstitutional

iii) Referral by the President before a bill becomes a statute

Should the President refer a bill to the CC, the court must answer three questions:

i) Should the court consider only the Presidents reservations or can it direct wider attention?
   The court considers only the Presidents reservation.

ii) Must the court examine every provision to certify that every part accords with the CON?
No, the court must first and foremost consider the reservations of the President.

iii) Does the court finding in respect of the constitutionality of the bill mean that its provisions cannot be adjudicated after its enactment?
Should the court decide that the bill is constitutional; supervening constitutional challenges after the enactment are not excluded.

WHAT kinds of limitations are on Parliament to make law?

⇒ Parliament derives its power from the CON and is subject to it and the rule of law
⇒ Parliament may not assume function not conferred to it by the CON, and therefore must respect power and integrity of other government
⇒ Fundamental rights limitations – Parliament is always bound by the B.o.R and may not limit any rights unless it is justified in terms of S36 50
⇒ Limitations on the power to amend the CON 51
⇒ Procedural limitations – The CON has various procedures upon which parliament must conform with when enacting laws
⇒ It also provides for extra parliamentary consultation – The CON states that certain categories of bills may not be passed by Parliament unless certain bodies have been consulted or have had an opportunity to make representations.
⇒ S.o.P limitations – Parliament cannot usurp any powers of the judiciary or executive and cannot allow either of them to usurp its own powers.
⇒ Delegation limitations
⇒ Federalism limitations – S40 makes a division into the national, provincial and local divisions, which are distinctive, interdependent and interrelated.

50 The limitation clause
51 Special procedures required along with the required percentage of votes
LETS have a closer look at Delegation in terms of Federal limitations:

⇒ Accepted in a democracy the parliament can’t attend to every task its enjoined to perform – it usually drafts a skeletal form
⇒ It is often left by parliament to the provincial legislatures / members of the executive to fill in gaps in the preliminary legislation with proclamations / regulations.
⇒ WHY is delegation needed – because the legislative process is an extremely time consuming procedure

WHAT about delegation to the executive?

1st lets look at what the executive authority actually is:

• That body of the law that execute and enforce the law.
• This powers are vested in the President and he exercises them together with his cabinet

Who is the President then?

In SA he is both the Head of State and the executive and he must respect, protect, uphold the CON and must promote national unity that which advances the Republic.

IS the President accountable to anyone?

The president in personally accountable for the powers conferred upon him either by the CON or by Legislature

NOW lets look at the Executive’s power to make law:

Executive Council of Western Cape:

The issue of delegation of legislative authority arose in here. The authority of parliament to delegate its law making functions is subject to the CON.

In the Executive Council of the Western Cape the power was delegated to the executive to make subordinate legislation, which may be exercised within the framework of the statute under which the authority is delegated.

The court did recognise the competence of parliament to delegate in this case. It further held that nowhere in the CON a prohibition exists that parliament couldn’t delegate subordinate regulatory authority to another; in actual fact it is needed for effective law making.
WHAT about the power to amend the law?

Chaskelson P – said there was a difference between delegating authority to make subordinate legislation and assigning plenary powers^{52}.

WHAT is subordinate legislation then?

It is the power to make and implement laws for the Republic.

- Legislature can delegate subordinate legislation to the executive but not plenary power.

NEXT we look at delegation to the Provincial Legislature

⇒ S44 authorises the NA "to assign any of its legislative powers, except the power to amend the CON to any legislative body in another sphere in Government"

WHAT is the basic structure doctrine and does it apply in SA?

⇒ It originally came from India where the Supreme Court held that certain implied limitations on the power of parliament to amend the CON exist
⇒ The basis of this doctrine entails that parliament is limited in its power in the sense that it cannot amend the basic structure of the CON

This has not been adopted in SA – WHY – S74 contemplates an amendment of S1^{53} which states S1 is amendable by a 75% majority in the NA and with the support of 6 provinces in the NCOP.

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^{52} Power to amend or repeal legislation
^{53} Sets out the founding values of SA
TEST YOURSELF:

1. Discuss the process of adoption for bills amending the constitution.

2. Discuss the process of adoption for ordinary bills affecting the provinces.

3. Discuss the process of adoption for ordinary bills not affecting the provinces.

4. What are the main differences between 2 and 3 above?

5. Briefly explain when the president may send a bill back to the National Assembly. Furnish us with the exact provision of the constitution dealing with this aspect of law.

6. Briefly explain when the president may pass a bill back to the Constitutional Court for a decision on its constitutionality. Refer to the Liquor Bill case for your answer.

7. Discuss the seven limitations on parliaments power to make laws

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

   Refer to case law in your answer.


10. Explain what would happen if there was a conflict between national and provincial legislation dealing with a Schedule 4 matter. You must give the name of the law
that takes precedence in such a case and the circumstances under which it this law takes precedence.

11. Explain what will happen in the event of conflict between national and provincial legislation dealing with a Schedule 4 matter. You must mention the law that takes precedence and the circumstances in which it takes precedence.

12. Discuss the manner in which the courts will deal with overlaps between a schedule 4 and schedule 5 matter.
THE EXECUTIVE AUTHORITY: NATIONAL SPHERE – DISCUSSION:

CAN you remember what the Executive Authority is?
It is the power to execute and enforce legal rules – HOW –

⇒ National sphere
    Power is vested in the President and his cabinet

⇒ Provincial sphere
    Vested in the Premier of the province with other members of the executive council

⇒ Local sphere
    Vested in the municipal council

WHAT powers does the President have as Head of State?
S84(1):
Powers entrusted in him by the CON and legislation including those needed to perform the functions as Head of State and Head of the National Executive

S84(2):
The President is responsible for:

✓ assenting to bills
✓ referring bills to the CC
✓ call for a national referendum
✓ appoint a commissioner of enquiry
✓ summon NA to a special seating to conduct government business
✓ receive and recognize foreign diplomat and consular representative
✓ confer honors
✓ appoint ambassadors, diplomats, consular representatives
✓ pardon and reprieve offenders and remitting any fines penalties and forfeiture
✓ refer bill to the NA for reconsideration on it constitutionality
✓ make any appointment required by constitution or by legislature

S85(2):
- The President exercises executive authority together with other members of Cabinet.
- It is not the sole responsibility of the President
Members of Cabinet are individually and collectively responsible for executive decisions

WHAT prerogatives does the President have?

What is a prerogative?

A prerogative is a discretionary power exercised at will, in modern sense refers to CL discretionary exercised by head of state.

In SA before ’93 the President had royal prerogative, which include powers to conclude treaties, pardon prisoners, declare war and make peace. These prerogatives were provided for in the ’83 CON, which provided that all the prerogatives exercised by the President before commencement of the CON, the President retains them. The ’93 and “96 CON’s are silent.

It is argued that the President retain power of issuing passport which now is regulated by an Act which vest this power on government and powers to perform Acts of State. The court held in Hugo 1997 that the President only has prerogative enumerated in the CON, and exercise of these powers is subject to judicial review flowing form supremacy of the CON and that the branches are bound by it.

CL prerogatives previously enjoyed by the president

- Conclude treaties
- Declare war
- Make peace
- Confer honorary titles
- Pardon offenders
- Appoint a commission of enquiry

NOW – Acts of State are the only prerogative power, which have not been written into the CON or legislation.
WHAT powers does the President have as Head of the National Executive?

Acting together with other members of Cabinet:
The functionary consulted must concur in accordance with its decision-making procedures
Example – appointment of judges – President is bound

Acting after consulting with other functionaries:
WHAT does this mean?
The President must consult with a relevant functionary but he is not bound by what they recommend
Example – appointing judges of the CC – President is not bound

Acting on the recommendation of / or advice of other functionaries:
According to the CON the President has to exercise certain powers on the recommendation of other functionaries
Example – Removing of a judge from office by the President after a finding made by the Judicial Service Commission and a call by the NA for the judge to be removed – President is bound as advised

The President and the Courts
CAN the President be ordered to give evidence in open court?
The answer is found in the SARFU case:
A decision requiring the President to give evidence is flawed. It must be kept in mind that the President is not in a similar position as other witnesses. The doctrine of S.o.P 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 oral evidence in open court in civil matters, which relate to his performance of official duties in exceptional circumstances. The applicants in this case submitted that the order requiring the President to testify was wrong in law.

DOES situations exist where the President can be compelled to testify?
On consulting foreign law no case exist where a President was compelled to give oral evidence in court regarding the performance of his official duties. Should a Head of State be called as a witness special arrangements are made in which he gives evidence. Regardless
of the fact that the courts have to protect the status, dignity and efficiency of the office of the President, administration of justice should not be impeded just to safeguard the Presidents dignity.

**LETS look at two conflicting considerations:**

⇒ Public interest in ensuring protection of dignity, status and efficiency of the office of the President.
⇒ Need to ensure the administration of justice isn’t impeded

One needs to give careful consideration to a decision compelling the President to give evidence and such order should not be made unless the administration of justice demands it.

**NEXT we look at the Accountability of Cabinet:**

Cabinet members are both individually and collectively accountable to NA for the exercise of powers and performance of their functions and a responsible for the powers entrusted with by Constitution or National Legislature.

**Collective accountability**

It means that cabinet members must act in unison to the public and carry joint responsibility before Parliament; members who disagree with decision may either support it or resign.

**Individual accountability**

Duties on the Ministers

- Report regularly to parliament on what is happening in his department
- Acknowledge when something went wrong and
- Provide the remedies taken to rectify the defect
- Resign if the situation is sufficiently serious if:
  - Minister is personally responsible for that which went wrong
  - Guilty of immoral personal behaviour
  - Is vicariously responsible fore the actions of his officials.

**Parliamentary control:**

The CON states that parliament must provide for mechanism to ensure that executive is accountable to it, and must maintain an oversight over the executive. This is so due to
a) Prior ’93 too much power was concentrated in the executive, which was not accountable and resulting in gross violation of human rights and corruptions

b) The CON moves away from authoritarian culture and aim to ensure accountability, transparency and responsiveness

c) The NA are elected members and they must ensure that the interest of the people are protected at all times

**HOW does Parliament keep the Executive accountable?**

⇒ Cabinet ministers are individually and collectively accountable to parliament and are obligated to provide parliament with regular reports on what is happening in their departments.

⇒ Parliament may pose question to Cabinet Minister on any aspect of their functions and powers

⇒ Interpellation, which are used to engage on debates with ministers on their responsibilities

⇒ Parliamentary committees may investigate and report on activities of executive

⇒ Parliament authorizes raising of taxes and spending of public funds

⇒ Parliament tables and approves subordinate legislature

⇒ Parliament may remove president either by adopting motion of no confident or a resolution

**HOW is Judicial Control exercised over the Executive?**

The main object is to ensure that executive respect and observes the CON

⇒ The CON contains the B.o.R against which any conduct must be tested against, and which provides that limitation of any right must be in accordance with s36 55.

⇒ The testing power of the court into the validity of executive action, which may be invalidated if inconsistent with the CON to the extent of its invalidity 56

⇒ The CON guarantees of access to information and just administration action ensure openness and transparency

⇒ The requirement of certain procedures to be followed in order for conduct to be valid provided in the CON

⇒ Obligation that executive organs must respect doctrine of *trias politica* and may not usurp functions of another organ

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55 Reasonable and justiciable in an open democratic society based on human dignity, equality and freedom

56 S172
⇒ The obligation on executive to respect constitutional status, functions, powers of another sphere.

ADMINISTRATIVE LAW:
The CON guarantees to everyone the right to administrative action 57, which is reasonable, just and procedurally fair, and to be given reason when right are adversely affected. This provide a measure upon which administrative action must conform and ensures that executive apply their mind in when taking administrative decisions. This serves to protect citizens in subordinate position to people entrusted with state authority.

LETS look again at what the SARFU case said:
Here it was argued that the President when appointing a commission of enquiry into the administration of rugby he did not act in a manner that was procedurally fair – WHY – the President never gave SARFU the opportunity to make representations to him prior to making the decision to appoint the commission, the judge of the High Court agreed but the CC found that the appointment of the commission in terms of S84 does not constitute administrative action in terms of S33.
In this case it was held that two legal decisions came under scrutiny:
   i) The decision to appoint a commission of enquiry in terms of the CON
   ii) The decision to make powers of subpoena afforded to by the Commissions Act applicable to that commission.

In order to establish if these decisions constitute administrative action in terms of S33 it is needed to consider the function performed. The conclusion was that the power of the President to appoint a commission of enquiry is NOT administrative action.
WHAT test is used to determine this?
⇒ It is not if a member of the executive branch of government performs an action but if the task itself is an administrative act.
⇒ Not all acts by the executive will be an administrative action

In the SARFU case it was not as the President was exercising an original constitutional power vested in him alone.

57 S33
ARE there any other institutions, which can exercise control over the Executive?

1) **Public Protector:** It is an independent and impartial body, which investigates on any conduct alleged to be prejudicial or improper report on it and take remedial steps.

2) **Auditor-General:** Audits and report on financial statement of all government departments and report on any irregularities.

3) **Commission of Enquiry:** this commission is appointed by the president and investigate on conduct of the executive

4) **Media:** report on the conduct of politicians

5) **General Public:** through public debate, pressure groups or association such as trade unions, churches it exercises control over executive

6) **Special investigation Unit and Special Tribunal Act:** in terms of which the presidents appoint a special investigation unit to investigate alleged illegal conduct by government employees.
TEST YOURSELF:

1. You are a legal advisor in the office of the President. Advise the President whether he is constitutionally bound to consult any functionaries in exercising the following functions:
   - Referring a bill back to the National Assembly for reconsideration of the bill's constitutionality
   - Appointing a commission of inquiry
   - Developing policy dealing with illegal immigrants
   - Appointing judges of the High Court
   - Removing a judge from office

2. Define executive authority.

3. Who is responsible for exercising executive power in the different spheres of state?

4. Discuss the powers of the president.

5. Is there a difference between the powers the president exercises under section 84 and those that he exercises under section 85(2).

6. What do you understand by the term "prerogative" in the constitutional sense?

7. List some of the common law prerogatives previously enjoyed by the president.

8. Discuss the question of whether the President has retained any of his common law prerogative powers that are not contained in the constitution. Refer to relevant authority to substantiate your answer.

9. Are the powers of the president in terms of section 84 subject to constitutional review? Refer to case law in your answer.

10. Study the SARFU case and discuss whether the president can be compelled to give evidence in a civil matter in relation to the performance of his official duties.
11. Discuss the parliamentary control mechanisms that are designed to ensure that the national executive is accountable.

12. Discuss the means that courts have at their disposal to test whether the executive is acting in accordance with the constitution or not.

13. Are there any other institutions (other than Parliament and the courts) that can exercise control over the executive?

14. Explain when the president will be bound to comply with section 33 of the constitution. Refer to relevant case law in your answer.

15. Critically discuss whether the President of South Africa may be called to give evidence in a civil trial. Refer to case law in your answer.

16. List five (5) parliamentary control mechanisms that are in place to ensure that the executive acts in accordance with the provisions of the 1996 Constitution.
JUDICIAL AUTHORITY – DISCUSSION:

WHAT is judicial authority?
It is the competence of the court to hear a particular dispute.
It is the 3rd branch of government and has the power to interpret legal rules and to apply such rules to legal disputes 58

WHICH courts make up the SA legal system:
⇒ The CC
⇒ The Supreme Court of Appeal 59
⇒ High Court 60
⇒ Magistrate Court 61
⇒ Courts created by acts of parliament such as Labour Court / Tax Court / etc

WHAT are the functions of the CC?
S167(3)
• The CC is the highest court on constitutional issues
• Decide constitutional matters and issues connected with decisions on constitutional matters
• Final decision on constitutional matters

LETS look at the jurisdiction of the CC
S167(4) states that the CC can decide:
• Disputes between organs of state in the national / provincial sphere concerning the constitutional status / power/ functions by any organ of state
• The constitutionality of any parliamentary / provincial bill 62
• Applications envisaged in terms of S80 or S122
• The constitutionality of any amendments to the CON
• If the President or Parliament failed to fulfill a constitutional obligation
• Certify a provincial CON
CAN the SCA and / or HC / MC / etc exercise jurisdiction to hear constitutional matters?

SCA – S168(3):
• Allowed to hear and decide constitutional issues, except those that fall within the exclusive jurisdiction of CC
• Has the same breadth (extent) of constitutional jurisdiction as the HC’s.
• The final court of appeal in non-constitutional matters.

HC – S169:
• Any constitutional matter except a matter that:
  o Only the CC may decide
  o Is assigned by an Act of Parliament to another court of a similar status to the HC
• Any matter not assigned to another court by an Act of Parliament

MC – S170:
And all other courts may:
• Decide any matter determined by an Act of Parliament
• A court of status lower than HC may not inquire into or rule on the constitutionality of any legislation or conduct of the President

NEXT we look at the Independence of the Judiciary:
⇒ The interim 63 CON created the Judicial Service Commission 64 which was made up of the judiciary, the legal profession and politicians
⇒ The JSC gave advice to the government on matters dealing with the judiciary by making recommendations regarding the appointment / removal from office / term of office / tenure of judges
⇒ The final 65 CON also allowed for the role of the JSC
⇒ The JSC restricts the ability of the executive to appoint whomever they want and gives a boost to judicial independence

S167(1) – CC consists of a Chief Justice 66, deputy Chief Justice 67 and 9 other judges 68
S167(2) – Any matter before the CC must be heard by at least 8 judges

S168(1) – The SCA consists of the CJ, DCJ and a number of judges as determined by an Act Of Parliament

S174(3) – The President as Head of the National Executive appoints the CJ and DCJ of the CC after consulting with the JSC and leaders of the parties represented in the NA

**WHY is Judicial Independence so important?**

We are a Constitutional State, which means that if judges could be told what to do by politicians there is no chance that the courts will remain an effective tool for the prevention of the abuse of power.

It is an integral part of S.o.P – WHY – courts are subject only to the law and no person may interfere with the functioning of the court.

**WHAT is Functional Independence?**

In the *Beauegard* case the court said that the independence of the judiciary is complete liberty of individual judges to hear and determine cases free from external influences / influence of governemnt.

Judicial power is exercised by the judiciary and may not be usurped by the legislature / executive / anyone else – Judicial officers exercise their powers subject only to the law and the CON and NOT to public opinion.

**LETS consider the history of Functional Independence:**

- Functional independence of the courts in SA have been threatened
Most famous occurred in the ‘50’s when parliament tried to set up a HC of parliament which would have the power to set aside decisions of the appellate division of the supreme court.

The creation of the HC of parliament was parliament’s response to an earlier decision of the Appelate Division\(^{69}\) in *Harris* case – WHAT happened in this case – The Separate Representation of Voters Act was declared unconstitutional \(^{70}\) - the HC of parliament reversed the decision in *Harris* and upheld the validity of the act.

There was a 2\(^{nd}\) *Harris case* in which 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 AD found that the court of parliament was no court of law, but merely parliament in a different disguise – the act was therefore invalidated.

S165 seeks to prevent such an occurrence from happening again:

165(1) – states judicial authority is vested in courts
165(2) – Recognises independence of courts
165(3) – Provides that no-one may interfere with function of courts
165(4) – Enjoins organs of state to assist and protect courts to ensure independence, impartiality, dignity, accessibility and effectiveness

Another influential factor is that judicial officers enjoy immunity against civil action and offence of contempt of court

*It was stated in May vs Udwin 1981* that Judicial officers wouldn’t be able to perform their task competently if they could be sued for defamation every time they expressed unfavourable view about a litigant / credibility of a witness during course of giving judgment.

⇒ Judges may not perform any other job which would be inconsistent with the independence of the judiciary
⇒ It was stated in the *SARFU* case that judges must give judgment in an impartial was relying on the law and CON.
⇒ S.o.P state that the judges can’t perform functions in any other department as there must be a separation of personnel
LETS look at some more case law:

*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, which was set up to investigate malpractices in state institutions and in connection with state assets and public money.

WHAT did they look at:

- Looked at the validity of the appointment of a judge to head the Unit.
- It dealt with the validity of the President's referral to the Unit for investigation of an allegation concerning a failure by attorneys acting for road victims from the Road Accident Fund to pay over to such persons the full amount due in settlement of their claims after deduction of reasonable costs.
- The appellant had unsuccessfully challenged the provisions in the Transvaal High Court.

WHAT did the court decide?

- The court held that the appointment of a judge to head the Special Investigating Unit violated the S.o.P required by the CON.
- 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 the judicial office and inappropriate to the central mission of the judiciary and prohibits judges from undertaking such functions.
- The matters to be investigated are determined by the President and not by the unit itself, and involve questioning persons, searching premises, gathering evidence and instituting court actions for the recovery of losses alleged to have been suffered by the state.
- These are executive and not judicial functions, which under the CON scheme are ordinarily performed by the police.
- The functions that a judge is required to perform under the Act are of a nature incompatible with the independence of the judiciary and judicial office.

71 Headed by a judge
72 Herein after referred to as RAF
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.

PERSONAL INDEPENDENCE OF JUDGES:

WHAT is personal independence?
Also known as Institutional Independence – secured by making sure judicial officers are satisfied with conditions of service and will not derogate from performing their functions.

The CON seeks to safeguard personal independence in the following ways:

✓ JSC plays important role in appointment of judges.
   Involvement of JSC makes it more difficult for exec to appoint its own supporter

✓ Sec 176
   States that judges are appointed for a non-renewable period of 12 years – but must retire at the age of 70.

✓ Means judges enjoy security of tenure

✓ The CON makes it difficult for executive to dismiss judges.
   o Sec 177 – stipulates circumstances in which judge has to vacate their position
   o The President may remove judge from office only if JSC find they suffer from incapacity, is grossly incompetent / guilty of gross misconduct and NA has called for their removal by resolution adopted with support of at least \( \frac{2}{3} \) majority of members.

✓ Sec 176(3) provides that salaries, allowances and other benefits of judicial officers may not be reduced

WHAT does control over the Judiciary entail?
It is an important checks and balances on the power of legislative and executive authority.

WHO controls the judiciary?

▪ Fear that control over judiciary may put independence of courts at risk.

▪ Doesn’t mean judges cannot be held accountable except through stringent control measures that are likely to sacrifice independence of courts.

HOW can a judge be held accountable?

▪ Judicial Control – Fact that their decisions can be taken to higher court for review / appeal encourages them to furnish reasons for their decision

73 A length of time during which an individual has a right to occupy a position
- Involvement of JSC in appointment of judges makes judicial process more transparent and may instill in judges a greater sense of their own accountability
- Removal from Office – If they suffer from incapacity, is grossly incompetent / guilty of gross misconduct
- Public debate and criticism – Is hoped that S16 will help create an environment in which judicial decisions are subject to vigorous public debate and criticism. Only then judges will realise their responsibility towards the public. Also explaining and justifying their decisions – the right to discuss and criticise judicial decision is not absolute
- Civil liability – Judicial officers enjoy immunity from civil action arising from their decisions – but a judge that has acted mala fide will not escape civil liability.

WHEN will someone be granted direct access to the CC?

In Bruce v Feecytex - the court held that rule 17(1) provides that the court shall allow direct access in terms of S100 of the '93 CON in exceptional exceptional circumstances only, which will normally only exists where the matter is so urgent / of such public importance that delay by use of normal proceedings would prejudice public interest / the ends of justice and good government.

S167(6) of the final CON states that national legislation or the rules of the CC must allow a person when it’s in the interests of justice and with leave of the CC to:

⇒ Bring the matter directly to the CC or
⇒ Appeal directly to the CC from any other court.
WHAT can a court do 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 is inconsistent with the CON invalid to the extent of its inconsistency.
- Usually a declaration of invalidity has retrospective effect and any actions taken under the legislation are invalidated from the moment the rule came into operation.
- Usually a court will invalidate a rule and then leave it to the legislature to rectify the unconstitutional law.
- It is time consuming which may give rise to serious disruptions in the running if the country or
  The administration of justice – it is thus advisable for the courts to avoid / limit the extent of declarations of invalidity.

HOW would they avoid this?

- Court should decide case on grounds other then constitutional if possible.  
  Principle enforced in S v Vermaas and S v Du Plessis
- Where possible the court should interpret provision in such a manner that it does not conflict with the CON.
- Court should declare any law / conduct that is inconsistent with the CON invalid only to extent of inconsistency rather then invalidating entire law / conduct.
- Court may limit retrospective effect of declaration of invalidity.
- Court may suspend declaration of invalidity for any period and on any conditions to allow competent authority the opportunity of correcting the defect.
TEST YOURSELF:

1. List the five categories of courts created by the Constitution.

2. Suppose that Parliament passes an Act in terms of which it seeks to test the validity of a judgment of the Constitutional Court. Would this Act be constitutional? Give reasons for your answer.

3. What do you understand by the term “jurisdiction”?

4. What is the main function of the third branch of government?

5. In order of hierarchy, list the categories of courts that make up our legal system.

6. Read section 167(3) of your constitution. What does it say about the functions of the constitutional court?

7. The Constitutional Court exercises exclusive jurisdiction over certain matters, that is, only the Constitutional Court may hear these matters. List the matters over which the constitutional court can exercise sole authority.

8. Do the supreme court of appeal, the high courts and other courts have jurisdiction to hear constitutional matters, or is this power restricted to the constitutional court only?

9. Discuss how the independence of the judiciary is secured through the entrenchment of appointment measures in our new constitution. In your answer discuss the manner in which different judges are appointed.

10. If the independence of the judiciary is fundamental to a constitutional state, what factors would have to exist for this independence to be maintained and promoted? Make sure that you make the distinction between personal and functional independence.
11. Discuss your understanding of the term “control”. Also discuss all of the mechanisms that exist to ensure that the judges perform their functions without undue interference.

12. Discuss briefly the circumstances in which the Constitutional Court will allow direct access. Mention the case that dealt with this issue.

13. Explain the circumstances under which direct access to the Constitutional Court may be sought.

14. Discuss the five techniques that courts employ to avoid or limit the effect and extent of a declaration of invalidity.
PROVINCIAL GOVERNMENT – DISCUSSION:

WHAT powers does the legislative authority of a province have?

Powers of the provincial legislature – S104 (1):
1. Pass a CON 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 CON envisages
3. To assign any of its legislative powers to the municipal council in the province.

WHAT about Executive Authority in a Province?

Executive authority of a province is vested in the Premier of that province, who exercises authority with other members of the executive council.76

WHAT powers does the executive authority have?
⇒ Implement provincial legislation in the province
⇒ Implement national legislation within the functional areas of schedule 4 and 5 except where the CON or Act of Parliament prescribes otherwise
⇒ Develop and implement provincial policy
⇒ Coordinate the functions of the provincial administration
⇒ Prepare and initiate provincial legislation
⇒ Perform any function assigned in terms of the CON or an Act of Parliament

A province has executive authority only to the extent that the province has administrative capacity to assume effective responsibility. The national government must assist provinces to develop the administrative capacity required for effective exercise of their powers.

WHEN can cabinet assign powers to a member of the provincial executive council?

S99 states that an assignment must:
- Be in terms of an agreement between the relevant cabinet members and the MEC
- Be consistent with an Act of Parliament
- Takes effect upon proclamation by the President

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76 Herein after referred to as MEC
CAN the national government intervene in provincial government affairs?

S100 states that national government can take certain steps such as:

- Issuing a directive to the provincial executive, describing the extent of the failure to fulfill its obligations and stating any steps required to meet its obligations
- Assuming responsibility for the relevant obligation in that province to the extent that its necessary to:
  - Maintain essential national standards, or mere minimum standards for the rendering of service
  - Maintain economic unity
  - Maintain national security
  - Prevent that province from taking unreasonable action that is prejudicial to the interests of another province or the country as a whole

Removal or impeachment of Premiers

- The MEC are accountable collectively and individually to the legislature for the exercise of their powers and the performance of their functions
- The provincial legislature may by a vote supported by a majority of their members pass a motion of no confidence in the provinces executive council excluding the premier and the premier must reconstitute the council.
- They can also pass a motion of no confidence in the premier.77

Provincial CON

CAN the provinces adopt their own CON?

- Sec 142 – states that provincial legislature may adopt a CON for the province if this has agreement of at least a \(\frac{2}{3}\) majority vote of members in favour of it
- Sec 143 – Makes clear the Provincial CON must not be in conflict with the CON 78.
  - Must comply with values of s1 and chapter 3
  - May not confer Province with greater powers than those conferred in the CON.

WHEN does provincial CON become law?

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77 The Premier and all the MEC’s must resign
78 May differ
Sec 144 – Provincial CON may be submitted to the CC for certification and does not become law until CC has certified that it has been passed in accordance with s142 and the rest complies with s143.

WHICH provinces have adopted their own CON?

- Kwazulu Natal – but the CON never passed – WHY – wasn’t certified by C
- Western Cape – Initially not certified – but after amendments were made – CC certified amended text
  - *In re Certification of the Amended text of the Const of the Western Cape.*
    - 1997
  - CON came into force 16 January 1998
TEST YOURSELF:

1. Briefly discuss whether political parties are involved in the appointment of the Chief Justice of the CC, Deputy Chief Justice of the CC, President of the SCA and other Judges. If not, then which person(s) or bodies must be consulted during the appointment process of the various judges.

2. Briefly list the mechanisms that are in place, in the South African context, to ensure that magistrates and judges do not take bribes.

3. Briefly discuss the extent to which the 1996 constitution recognizes the autonomy of the provinces.

4. Discuss the legislative powers of the provincial legislature in terms of section 104 of the Constitution.

5. Discuss the executive authority of the provinces under section 125 of the constitution.

6. Discuss the powers of provinces to adopt provincial constitutions.

7. Explain when parliament can adopt legislation dealing with a schedule 5 matter.
LOCAL GOVERNMENT – DISCUSSION:

BEFORE we start lets look at he historical context of Local Governments:

• Pre ‘93 = implementation of apartheid policies at local level – result – highly fragmented, dysfunctional and illegitimate system of government

• Government marked by sharp separation between:
  o White areas = Developed, well-serviced and representative local government.
  o Black areas = Underdeveloped, seriously under-serviced and unrepresented local government.

• Mid ‘80’s = apartheid local authorities were in state of deep crisis. If steps were not taken – consumer boycotts and civil unrest would erupt.

• Process of negotiation between white municipal structures and black civic representatives resulted in three principle outputs:
  i) Agreement of Local Finances and Services
  ii) Local Government Transition Act
  iii) Chapter 10 of Interim CON of SA.

• These above doc’s = concerned with reconstructing local government and addressing legacy of local government bodies constructed along rigid geographical, institutional, social and racial lines.

WHY is a participatory government so important?

A number of reasons why public participation in matters that directly affect members of public is considered important:

⇒ Facilitates access to information about local conditions, needs, desires and attitudes – which may be important in terms of adopting informed and implementable decisions in policy management cycles

⇒ Participation provides peoples whose lives will be affected by proposed policies with opportunity to express their views and attempt to influence public officials about the desirability of proposed policies

⇒ Participation is a means of involving and educating public.

  Benefit of participation = people are more likely to be committed to project / programme / policy if involved in planning and preparation.

⇒ Participation provides mechanism for ensuring democratization of planning process in particular and public management process in general.
Participation is a means of balancing demands of central control against demands for concern for unique requirements of local government administration.

Participation also plays watchdog role = Openness and participation tend to reduce possibility of corruption and may help maintain high standards of behaviour.

Success of participatory democracy depends on the active involvement of people at lowest level.

To make participation easier – important to address numerous practical problems involved in participation:
- Language problems
- Difference in attitudes and expectations
- Mutual feelings of distrust, suspicion and resentment

Also necessary to educate citizens on range of options:
- Forums available in which they can express their views and wishes
- Forums in which they are free to comment on proposed policies

**HOW do we bridge the gap?**

With Chapter 7 of the Final CON

Chapter 7 – has had profound effect on status of local government and for the 1st time in SA history provision is made for autonomous local government with its own constitutionally guaranteed and independent existence, powers and functions.

In *Fed sure vs Greater Johannesburg Metropolitan Council 1999 CC* stated:
- Under the '93 CON that a local government is no longer a public body exercising delegated powers. Its council is a deliberate legislature assembly with legislature and executive powers recognised by the CON.
- CON status of local government is thus materially different to what it was when Parliament was supreme.
- Local government have place in the CON order, have to be established by competent authority and are entitled to certain powers, including the power to make bylaws and impose rates.

⇒ Chap 7 – extension of principle of cooperative government.
⇒ Provisions contained in Chap 7 designed to promote intergovernmental relations between local and provincial government.
⇒ Chap 7 also functions as framework for implementation and application of new local government legislation.
Local government as a sphere of government:

Sec 151
i) Local spheres of government consist of municipalities, which must be established for the whole territory of Republic
ii) Executive and legislative authority of a municipality is vested in its Municipal Council
iii) Municipality has right to govern, the local government affairs of its community, subject to national and provincial legislation, as provided for in the CON

WHAT implications does s151 have?
⇒ The recognition of the local government as a sphere means that it cannot be abolished by the national or provincial governments
⇒ Sphere illustrates a shift away from the hierarchal division of government authority

What does this mean?
It means that the central government no longer has the power to grant / revoke / limit the powers of the lower spheres and unilaterally overrides local government decisions.

Local government in the context of intergovernmental relations – s154:

i) 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
ii) Draft national or provincial legislation that affects the status / institutions / powers / functions of local government must be published for public comment before it is introduced into Parliament / the provincial legislature in a way which allows an organised local government / municipality / other interested party an opportunity to make representation.

Organized local government plays a consultive role in the following forums:

• In form of ten part-time representatives chosen to represent different municipal categories – entitled to participate in proceedings of NCOP
o Allows local government to have small say in National legislative process that relates to concurrent and local matters.

• Organized local government – through 2 nominees – entitled to serve on Financial and Fiscal Commission.

• Another area where local government is given opportunity to address issues relating to:
  o Equitable division on nationally raised revenue to provincial and local government
  o Regulation of provincial and local fiscal powers
  o Regulation of Provincial and municipal loans and loan guarantees.

• Nat Act must provide for establishment of national and provincial organisation to represent interest of municipalities.

**Autonomous local government versus Administrative handmaiden:**

**S156 – local government cannot legislate in conflict with national and provincial legislation**

• National and provincial government must assign to local government the local matters that would be administered the most effectively locally bearing in mind that the local government 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 an administrative role which is at odds with the description of local government as a sphere that is autonomous and one that enjoys original powers.

**HOW is municipalities established?**

**S151 – Municipalities must be created for the entire Republic.**

The CON expressly says that different categories of municipalities must be set up in the different regions. The Local Government: Municipal Structures Act of 1998 defines the different types of municipalities that may be established in each category.

Examples of the different types of municipalities are as follows:

⇒ Local councils or city councils
⇒ Metropolitan councils
⇒ District councils
⇒ Rural councils

**WHAT happened in The City of Cape Town and Another v Robertson and Another?**

It dealt with an appeal, which was concerned with the validity of a provincial valuation roll of property in the area of jurisdiction of the City of Cape Town.

The Robertson's are an elderly couple. They lived in a house owned by Mrs Robertson, the first respondent, situated on erf 1829, Camps Bay. In 1969 the Robertson's purchased the erf as a vacant and unimproved lot for R7 250. Soon thereafter they built a house on it at a cost of some R15 000. Although registered in her name, she and her husband, the second respondent, consider the house to be their joint property.

In June 2002 the Roberstons approached the Cape HC for an order restraining the City from charging property rates based on the provisional property valuations roll which the City opened inspection and objection on 21 May 2002.

**TEST YOURSELF:**

1. Critically evaluate whether local government is nothing more than an ‘administrative hand maiden’. Your answer must contain a discussion of the following aspects:
   - Whether local government is an autonomous sphere of government?
   - Whether it is important to involve people at grassroot level in decision making at the highest levels?
   - An evaluation of the issue as stated above.

Refer to relevant sections in the Constitution and to case law to support your answer.