These notes are compiled in line with the UNISA study guide and prescribed text books and are not for sale. These notes are not sold to students and constitute hand-outs to registered IPCE students. The IPCE reserves all its rights. For any queries contact 011-268 6854 or email us on ipce@legalcorporate.co.za
FEATURES OF SA CONSTITUTION

Briefly distinguish between supreme constitutions and constitution which are not supreme

Supreme constitution
a. Ranks above all other laws in a state
b. Any law which is inconsistent with it will be declared invalid
c. It’s usually also inflexible (not always)
E.g. SA 1996 constitution

Constitution, which isn’t supreme:

a. Doesn’t enjoy any special status when compared to other laws
b. The legislature can pass laws, which are inconsistent with the constitution. The courts can’t question the validity of such laws, provided the correct procedure has been complied with
c. It’s usually flexible
E.g. Britain

When a constitution isn’t supreme, parliament is supreme.

Briefly assess whether the 1996 constitution is an example of a flexible or an inflexible constitution?

Inflexible constitution: enjoys superior status to the ordinary laws of the land and require a special amendment procedure.
E.g. SA 1996 constitution

S74:
1. S1 may be amended by a bill passed by:
   a. 75% of the NA
   b. 6 provinces in the NCOP

2. Chapter 2 may be amended by a bill passed by:
   a. 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 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

Discuss the difference between direct democracy and representative democracy and indicate which is a better form of democracy for a modern state (4)

Direct democracy: means that all the major political decisions are made by the people themselves – may work in a small community where the people can meet on a regular basis and decide matters.

Representative democracy: the citizens of the state elect a representative of their choice and then the representative exercises the wishes of the people. It demands all the inhabitants of the state should via direct representation, have a say in which the state is governed – usually be being represented in the legislature. It’s created by elections, which need to be held at regular intervals.

Assess whether SA adheres to the Rechstaat principle. (4)

Refers to a government by law and not by force.

Formal Rechstaat: requires compliance with:

1. Due process
2. Separation of powers
3. Legal certainty

Material Rechstaat: the state authority is bound by higher legal values, which are embodied in the constitution.

With the adoption of the 96 constitutions SA in addition to being a formal rechstaat also became a material one.

Discuss the following constitutional concepts:

a. State
b. Sovereignty
c. Autochthonous and allochthonous constitutions

a. State: features
   a. Geographically defines territory
   b. Community of people who live on the territory
   c. A legal order
   d. An organised system of government to uphold legal order
e. Separate political identity

b. Sovereignty
Sovereign state in international law refers to states, which are independent – the state isn’t subject to the authority of another state.

c. Autochthonous
Are said to be indigenous and allochthonous are borrowed constitution.

Van der Vyver said there are 3 kinds of constitutions:

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

SA constitution 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 constitution drew upon the constitutional experience of a number of countries and were also influenced by international law.

**Does the basic structure doctrine apply in SA?**

This doctrine originated in India, where the Supreme Court held that there are certain implied limitations on the power of parliament to amend the constitution.

The substance of the doctrine is that parliament is limited in its power, in that it can’t amend the basic structure of the constitution. SA hasn’t adopted the basic structure doctrine. A reason why this doctrine can’t be adopted is that S74 contemplates an amendment of S1 – which sets out the founding values of SA.

If the founding values are amendable by a 75% majority in the NA and support of 6 provinces in the NCOP.

**Briefly discuss the term “constitutionalism”**

**Constitutionalism**: refers to a government in accordance with the constitution. The government derives its powers from and is bound by the constitution. The government’s powers are limited by the constitution.

Briefly explain whether the Rechstaat principle is synonymous with the ideals of a constitutional state
The Rechstaat principle
Refers to a government by law and not by force.

Formal Rechstaat: requires compliance with:
1. Due process
2. Separation of powers
3. Legal certainty

Material Rechstaat: the state authority is bound by higher legal values, which are embodied in the constitution.

With the adoption of the 96 constitutions SA in addition to being a formal rechstaat also became a material one.

What is meant by the term democracy?

S1 of the constitution proclaims that SA is a democratic state.

Democracy is derived from ancient Greek words demos (the people) and Kratos (strength) – this 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.

Forms of democracy:

Direct democracy: means that all the major political decisions are made by the people themselves – may work in a small community where the people can meet on a regular basis and decide matters.

Representative democracy: the citizens of the state elect a representative of their choice and then the representative exercises the wishes of the people. It demands all the inhabitants of the state should via direct representation, have a say in which the state is governed – usually be being represented in the legislature. It’s created by elections, which need to be held at regular intervals.
True or false:

Democracy is irreconcilable with a constitution that isn’t supreme

False, democracy is derived from ancient Greek words demos (the people) and Kratos (strength) – this 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.

Difference between a Supreme constitution and a constitution which isn’t supreme

Supreme constitution
a. Ranks above all other laws in a state
b. Any law which is inconsistent with it will be declared invalid
c. It’s usually also inflexible (not always)

Constitution, which isn’t supreme
a. Doesn’t enjoy any special status when compared to other laws
b. The legislature can pass laws, which are inconsistent with the constitution. The courts can’t question the validity of such laws, provided the correct procedure has been complied with
c. It’s usually flexible
   E.g. Britain

A state representative of the newly formed state of Krela comes to see you for legal advice. The people of Krela would like to become a democratic society but are not sure what a democracy consists of. Explain to the state representative the full details re this concept.

S1 of the constitution proclaims that SA is a democratic state.

Democracy is derived from ancient Greek words demos (the people) and Kratos (strength) – this 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.

Forms of democracy

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

Criticisms:

The people can’t be said to govern in any real sense if they go to the polls once every 4 or 5 years to elect representatives who are free to govern as they see fit and aren’t obliged to consult the public on NB issues. It’s also weakened by certain groups and individuals - they fiancé election campaigns.

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

Plus separation of powers, freedom of the press and freedom of the information may prevent any single group from becoming too strong and promote democratic debate and competition.

Features:

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

Briefly discuss the extent to which Montesquieu doctrine of *trias politica* has been incorporated in SA present dispensation. Refer to the 96 constitutions and relevant case law to motivate your answer.

**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.

**Separation of powers:**

Montesquieu is regarded as the father of the doctrine of separation of powers (*Trias politica*), according to the traditional view, the doctrine separated executive, legislature and judiciary. According to him there can be no political freedom in a country where one person makes the law, enforces the law and provides sanctions when he law is contravened.

Carpenter states that the doctrine implies the following:

1. The formal division of state authority into the legislature, executive and judiciary
2. Separation of personnel so that one person shouldn’t simultaneously perform in more than one branch of government
3. Separation of function: so that one branch can’t usurp on the powers and functions of the other branches
4. Checks and balances: with each branch of government given specific powers to restrain other branches and therefore achieves equilibrium among the 3 components of government authority.

**Certification Case:** it was argued that the new constitutional text didn’t comply with one of the constitutional principles, 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 the legislative and executive in the new constitution serves an NB check and balance = 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.
Executive council of Western Cape: the court invalidated a provision in an Act, which authorized the president to amend or repeal the provisions of certain legislation.

SA constitution provides for checks and balances. The most NB is judicial review, which allows legislative or administrative action to be tested for validity in court. The judiciary must ensure government acts comply with procedural and substantive requirements of the constitution.

Representative democracy and the separation of powers.
The 93 constitution established a representative democracy in SA. The 96 constitution guarantees the right of all citizens over 18 to vote in democratic elections and provides for direct election of representative in the national, provincial and local sphere of government.

SA is also a constitutional democracy – the people’s representative 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.

Arguments to defend judicial review:

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

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

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

The majority of people in the country have brown eyes. In the elections the Party For The Brown Eyed People received the most votes and consequently has the most seats in the NA. Parliament enacts legislation declaring that people with blue eyes are not longer allowed to own property in certain areas. Blue-eyed people are outraged and approach the High Court to have the act declared unconstitutional and thus invalid on the grounds that it discriminates against people with blue eyes.

The act is declared unconstitutional and an order of invalidity is referred to the Constitutional court for confirmation. In the constitutional court counsel for the
government argue that the will of the majority of the people in SA is represented in parliament and that it would be undemocratic to declare the act invalid.

The constitutional court declares the act invalid. Adamant that the will of the people should prevail, the parliament passes an act in terms of which the decision of the constitutional Court can be reviewed by parliament.

1. Do you agree with the argument put forward by counsel for the government? Explain

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.

Separation of powers:

Montesquieu is regarded as the father of the doctrine of separation of powers (Trias politica), according to the traditional view, the doctrine separated executive, legislature and judiciary. According to him there can be no political freedom in a country where one person makes the law, enforces the law and provides sanctions when he law is contravened.

Carpenter states that the doctrine implies the following:

a. The formal division of state authority into the legislature, executive and judiciary
b. Separation of personnel so that one person shouldn’t simultaneously perform in more than one branch of government
c. Separation of function: so that one branch can’t usurp on the powers and functions of the other branches
d. Checks and balances: with each branch of government given specific powers to restrain other branches and therefore achieves equilibrium among the 3 components of government authority.

Certification Case: it was argued that the new constitutional text didn’t comply with one of the constitutional principles, 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 the legislative and executive in the new constitution serves an NB check and balance = 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.

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

SA constitution provides for checks and balances.

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

**Arguments to defend judicial review:**

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

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

3. Judges may enquire into the constitutionality of legislation, but they don't substitute their view for those of the legislature. If a judge strikes down a law as unconstitutional she doesn't make a new law. The legislature may amend the law – the only condition being that it must be constitutional.
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 have been imposed. People cannot engage in free speech. The Butchers’ special army roams the country plundering property and committing the most heinous crimes. No elections have been held and the people live in constant fear and uncertainty. A secret organization called “the Liberators” has been 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 the way forward. 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.

- Discuss inflexible constitution
- Supreme constitution
- Separation of powers
- Democracy
- Rechstaat
LEGISLATURE

Electoral systems. Tabulate the advantages and disadvantages of the proportional system.

Proportional representation: all parties participating in the election get representation corresponding with the votes obtained with those parties in the election.

Advantages
1. Provides for reflection of the voters opinion
2. Eliminates problems in respect of delimitation of electoral districts
3. All votes carry the same weight
4. Accommodates wider presentation of parties than territorial representation
5. Minorities can form coalitions against the majority parties and therefore avoid dominance by the majority

Disadvantages
1. May lead to weak unstable government as it may be impossible for one party to obtain absolute majority
2. No contact between the voter and the representative
3. Often complicate
4. Often fails to produce a clear majority
5. Be-elections don’t operate as indicators of political trends.

Briefly discuss the process that takes place for the adoption of an ordinary bill not affecting the provinces.

Ordinary bills not affecting the provinces:

- Bills not affecting the provinces may be introduced in the NA and NCOP.
- If the bill is passed by both houses it’s sent to the president for assent.
- There is no mediation committee
- The NA may still pass a bill, which has been rejected by the NCOP without cooperation from the NCOP

When the NCOP votes in S75 each delegate in a provincial delegation has one vote and the question is decided on the majority of votes passed.
What are the main differences between the processes prescribed by S75 and S76? Refer to case law

Ordinary Bills affecting the provinces – S76
It’s important for parliament to identify an ordinary bill as affecting or not affecting the provinces. If a bill affecting the provinces is passed as a bill not affecting the provinces or visa versa the bill isn’t property enacted and doesn’t become law.

In the Liquor Bill Case: the court stated that any bill whose provisions fall within schedule 4 must be dealt with under S76.

S76 (1) deals with the adoption of bills that have been passed by the NA. Such bills must then be referred to the NCOP.

S76 (2) deals with bills passed by the NCOP; such bills must then be referred to the NA. If both houses pass a bill it is sent to the president for assent.

S76 (1) (d): if the COP rejects the bill or the NA won’t pass the amended bill, the bill is referred to the mediation committee which may agree on:

- The bill as passed by the NA
- The amended bill by the NCOP
- Another version of the bill

If the NCOP still doesn’t pass the bill the NA has the power to override them with a 2/3 majority. In which case the bill is then sent to the president for assent. If the president has reservations regarding he constitutionality of such a bill, he may refer it to the constitutional court. If it’s found to be constitutional, president must assent to it, he has no discretion.

When the NCOP votes each province has a single vote and the bill must be passed by 6 of the 9 provinces.

Ordinary bills not affecting the provinces
Bills not affecting the provinces may be introduced in the NA and NCOP. If the bill is passed by both houses it’s sent to the president for assent. There is no mediation committee. The NA may still pass a bill, which has been rejected by the NCOP without co-operation from the NCOP.

When the NCOP votes in S75 each delegate in a provincial delegation has one vote and the question is decided on the majority of votes passed.
It’s universally accepted in modern democracies that parliament can’t be expected to perform all the functions allocated to it.

Answer the following:

a) What do you understand by the term delegation in the constitutional sense?

b) May parliament delegate its legislative function to the executive? Refer to the case Executive Council for the Western Cape legislature v President of SA

c) May parliament delegate its legislative functions to the provincial legislature? Explain.

It’s accepted in modern democracies that parliament can’t attend every task it’s enjoined to perform - it normally drafts in skeletal form. Discuss delegation of legislative authority and discuss whether parliament may delegate its functions to the executive and provincial legislature.

Parliaments often leave it to their provincial legislatures or members of the national executive to fill in gaps in preliminary legislation by means of proclamations or regulations. Delegation is necessary, as the legislative process is such a time consuming process.

DELEGATION TO THE EXECUTIVE

Power to MAKE law:

Executive Council of Western Cape: the issue of delegation of legislative authority arose. The authority of parliament to delegate its law making functions is subject to the constitution.

Here the power was delegated to the executive to make: subordinate legislation may be exercised within the framework of the statute under which authority is delegated.

The competence of parliament to delegate was recognized by the court in this case. The court held that there is nothing in the constitution – prohibiting parliament from delegating subordinator regulatory authority to another – it’s necessary for effective law making.

Power to AMEND law:

Chaskelson: said there was difference between delegating authority to make subordinate legislation and assigning plenary powers.

Subordinate legislation: power to make and implement laws for the republic.

Plenary power is the power to amend or repeal legislation.
Legislature may delegate subordinate legislation to the executive but not plenary power.

DELEGATION TO THE PROVINCIAL LEGISLATURE

In respect of delegation of legislative power to provincial legislatures S44 authorizes the NA to assign any legislative body in another sphere of government.

**Distinguish between the free and imperative mandate theory of representation.**

Free and imperative mandate theory of representation:

**Free mandate theory:** a member of parliament isn’t bound by the mandate given to him by the electorate but he must act in accordance with his own conscience and the interests of the country as a whole

**Imperative mandate theory:** a member of parliament is bound by the mandate given to him by his principal (the electorate) – if he disagrees with his party he must vacate his seat

**Does SA follow a free or imperative mandate theory?**

The interim constitution provided for an imperative mandate – a member of parliament wishing to cross over to another party had to vacate his seat in parliament – this gave rise to criticism.

The ‘96’ constitution doesn’t provide that a member of parliament who crosses to another political party has to vacate his seat, therefore the constitution restores the concept of free mandate. BUT imperative mandate is still in force, it applies to members elected in the 1st election in terms of the ‘96’ constitution.

Answer the following questions based on the De Lille case:

a. **Briefly state the facts of the case**

b. **Discuss whether a court is entitled to review the exercise of parliamentary privileges at all times**

c. **What was the finding of the court in the above case**

In the De Lille case: which dealt with the question whether the exercise of parliamentary privileges is subject to the constitutional review power of the courts – YES

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

The judge said that parliament could not confer on itself any powers not given to them by the constitution expressly of by necessary implication. He concluded that the exercises of parliamentary privileges must be consistent with the constitution. It’s a constitutional power and isn’t immune from judicial review.

a. Parliamentary privileges
These are to protect parliament from outside interference – they include:

- Privilege of parliament to punish people for contempt and determine their own procedures
- The freedom of members to say anything in parliament without fear that they will be held liable in court

Privileges under the ‘96’ constitution

- The NA can determine and control its own internal arrangements, proceedings and procedures and to make rules and orders concerning its business
- Parliament can summon people to give evidence and submit documents
- They can enforce their own internal disciplinary measures for contempt of parliament – examples of contemptuous behavior are disorderliness, failure to comply with an order of parliament, perjury, etc
- Members of parliament may not vote on any matter in which they have a financial interest

The privileges of SA parliament are regulated by the Powers and Privileges of Parliament Act.

b. It was found that De Lille’s suspension amounted to an unjustified infringement of her constitutional rights to freedom of speech, just administrative action and access to the courts.

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

a. S1 of the constitution

b. S2 of the constitution

c. Any other part of the constitution

S74: S1 may be amended by a bill passed by:

a. 75% of the NA
b. 6 provinces in the NCOP

Chapter 2 may be amended by a bill passed by:

a. 2/3 of the NA, and
b. 6 provinces from the NCOP

Any other provision of the constitution can be amended by a bill passed:

a. By 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
EXECUTIVE

Explain the term “prerogative” and discuss the extent to which the prerogatives have been retained in the 1996 constitution.

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

Common law prerogatives previously enjoyed by the president

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

It’s argued that the president retains prerogative powers to issue passports and perform acts of state – BUT the power to issue passports is now regulated by the SA Passports and Travel Documents Act, which provides that the powers and duties in respect of passports which is vested in the president before the ‘93’ constitution, now vest in government = it’s a statutory power and not a prerogative. Therefore acts of state are the only prerogative power which haven’t been written in to the constitution or legislation.

Discuss whether the powers of the president in terms of S84 (2) are subject to constitutional review or remain at the absolute discretion of the president. Refer to case law.

S84 (2): the president is responsible for

a. Assenting to and signing bills
b. Referring a bill to the NA for reconsideration of constitutionality
c. Referring a bill to the constitutional court for a decision on its constitutionality
d. Summoning the NA, NCOP or parliament to an extraordinary sitting to conduct special business

In President of RSA v Hugo: the constitutional court considered the question whether the president’s power to pardon offenders is subject to constitutional review. This power, which was a prerogative power of the crown, is recognized in the ‘93’ and ‘96’ constitutions. The court was of the opinion that the only prerogative, which was still in force, are those in the constitution. The exercise of these powers is subject to
constitutional review. This follows from the fact that the constitution is supreme and all branches of the government are bound by the constitution.

**Briefly explain what is meant by individual and collective ministerial accountability**

**Individual and collective ministerial responsibility**

**Collective responsibility:** signifies that members of cabinet act in unison with the outside world and carry joint responsibility before parliament for the way in which each member exercises and performs powers and functions.

**Individual responsibility:** confers 3 duties on the minister concerned

1. To explain to parliament what happens in his department
2. To acknowledge that something has gone wrong in the department and rectify the mistake
3. To resign if the situation is serious enough

**List 5 control mechanisms that are available to parliament to ensure that the national executive is accountable.**

Parliamentary control mechanisms to ensure that the national executive is accountable:

**S55 (2):** instructs the NA to provide for mechanisms to ensure that all executive organs of state in the national sphere of government are accountable to it. The following types of parliamentary control over the executive exist:

1. Individual and collective ministerial accountability as well as the duty of cabinet members to provide parliament with regular reports in respect of matters under their control
2. During question time in the houses of parliament, members may put questions to ministers on any aspect of the exercise of their powers and functions
3. Interpellations are used to enter into short debates with ministers on particular aspects of their responsibilities
4. Parliamentary committees often report on aspects of the activities of the executive
5. S101 refers to tabling in parliament and the approval by parliament or subordinate legislation
6. Parliament has to authorize the raising of taxes and spending of funds by the executive.

7. S89 – removal of the president from office by the NA. Resolution must be adopted by 2/3 majority of members in the NA and it may only occur on grounds of serious violation of the law or the constitution.

8. S102 – motions of no confidence in the president, or conduct excluding the president. If the motion is adopted, he must resign with other members of cabinet. If a motion of no confidence in the cabinet, excluding the president is adopted the president must reconstitute cabinet.

**Critically evaluate whether the President can be compelled to give evidence in a civil trial in relation to the performance of his official duties. Refer to the SARFU case in your answer.**

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

**SARFU case:**

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

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

The appellants submitted that the order requiring the president to testify was wrong in law.

**Circumstance where the president can be compelled to testify:**

No case can be found in foreign law where the head of state had been compelled to give oral evidence in respect of performance of official duties. Even where a head of state may be called as a witness special arrangements are made for the way in which evidence is given. Even though the courts must protect the status, dignity and efficiency of the office of the president, administration of justice shouldn’t be impeded in order to safeguard the president’s dignity.

2 conflicting considerations:

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

Therefore careful consideration must be given to a decision compelling the president to give evidence and such order should be made unless administration of justice demands it.

Advise the President whether he is constitutionally bound to consult with any functionaries in exercising the following functions:

a. Referring a bill back to the NA for reconsideration of the Bills constitutionality
b. Appointing a commission of enquiry
c. Developing policy dealing with illegal immigrants
d. Appointing judges of the High Court
e. Removing a judge from office

a. S84 (2): the president is responsible for:

   a. Assenting to and signing bills
   b. Referring a bill to the NA for reconsideration of constitutionality
   c. Referring a bill to the constitutional court for a decision on its constitutionality
   d. Summoning the NA, NCOP or parliament to an extraordinary sitting to conduct special business

b. President’s prerogatives:
   A prerogative is a discretionary power exercised at will – they are common law discretionary powers possessed by the leader of a state by virtue of his pre-eminence over other citizens

   Common law prerogatives previously enjoyed by the president

   • Conclude treaties
   • Declare war
   • Make peace
   • Confer honorary titles
   • Pardon offenders
   • Appoint a commission of enquiry
It’s argued that the president retains prerogative powers to issue passports and perform acts of state – BUT the power to issue passports is now regulated by the SA Passports and Travel Documents Act, which provides that the powers and duties in respect of passports which is vested in the president before the ‘93’ constitution, now vest in government = it’s a statutory power and not a prerogative. Therefore acts of state are the only prerogative power which haven’t been written in to the constitution or legislation.

c. He acts together with other members of cabinet: 
The functionary who had to be consulted had to concur – in accordance with its decision-making procedures. 
E.g. appointment of judges 
Here the president is BOUND.

d. He acts on recommendation of or advice of other functionaries: 
The constitution stipulates that the president must exercise certain powers “on recommendation of” other functionaries, i.e. the president may remove a judge from office if the Judicial Service Commission has made a finding in respect of this and the NZ calls for the judge to be removed – president is BOUND to act as advised.

Define executive authority and indicate who is responsible for its exercise in the national and provincial sphere.

Executive authority: this involves the power to execute and enforce legal rules
In the national sphere this power is vested in the president and his cabinet
In the provincial sphere it’s vested in the premier of the province with other members of the executive council
In the Local sphere it’s vested in the municipal council

During one of its recent session, Parliament passed the Sport Development Bill. The Sport Development Bill was sent to the President of SA for assent. The President considered certain provision of the Bill to be inconsistent with the provision of 1996 Constitution and sent the Bill back to Parliament for reconsideration. Parliament subsequently resolved that the President’s reservations were unfounded and returned it, without effecting any amendment for presidential assent. Unconvinced by this action the President now wants to refer this Bill to a court to have its constitutionality determined. Advise the President on the following issues:

1. Which court may the President approach to hear his application? 
   Substantiate your answer.
2. Whether the court will be confined to dealing solely with the President’s reservations or whether it may examine the entire Sport Development Bill? Substantiate your answer by referring to the relevant case law.

3. Assume that during this law-making process, civil proceedings are instituted against the President because he recommended that a commission of enquiry be set up to investigate the ramifications of the Sport Development Bill. May the court hearing the civil matter call upon the President to testify in open court? Substantiate your answer with reference to relevant case law.

Certification case: it was argued that the new constitutional text didn’t comply with one of the constitutional principles, 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 the legislative and executive in the new constitution serves an NB check and balance = it ensures accountability of the executive towards the voters.

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

Executive Council of Western Cape: the court invalidated a provision in an Act, which authorized the president to amend or repeal the provisions of certain legislation.

SA constitution provides for checks and balances. The most NB is judicial review, which allows legislative or administrative action to be tested for validity in court. The judiciary must ensure government acts comply with procedural and substantive requirements of the constitution.

Representative democracy and the separation of powers
The 93 constitution established a representative democracy in SA. The 96 constitution guarantees the right of all citizens over 18 to vote in democratic elections and provides for direct election of representative in the national, provincial and local sphere of government.

SA is also a constitutional democracy – the people’s representative 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.
Liquor Bill case

Powers of the president

S84 (1): the president has powers entrusted in him by the constitution and legislation including those necessary to perform the functions as head of state and head of the national executive

S84 (2): the president is responsible for

a. Assenting to and signing bills
b. Referring a bill to the NA for reconsideration of constitutionality
c. Referring a bill to the constitutional court for a decision on its constitutionality
d. Summoning the NA, NCOP or parliament to an extraordinary sitting to conduct special business

President giving evidence in a civil matter in open court:
SARFU case:
Why it isn’t desirable in the opinion of the court to compel the president to testify in open court:

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

The appellants submitted that the order requiring the president to testify was wrong in law.

Circumstance where the president can be compelled to testify:
No case can be found in foreign law where the head of state had been compelled to give oral evidence in respect of performance of official duties. Even where a head of state may be called as a witness special arrangements are made for the way in which evidence is given. Even though the courts must protect the status, dignity and efficiency of the office of the president, administration of justice shouldn’t be impeded in order to safeguard the president’s dignity.

2 conflicting considerations:

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

Therefore careful consideration must be given to a decision compelling the president to give evidence and such order should be made unless administration of justice demands it.

**Discuss whether the President may be compelled to give evidence in a civil trial. In your answer refer to the relevant case in terms of its facts, issue, the finding and the reasoning of the court.**

**SARFU case:**

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

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

The appellants submitted that the order requiring the president to testify was wrong in law.

**Circumstance where the president can be compelled to testify:**

No case can be found in foreign law where the head of state had been compelled to give oral evidence in respect of performance of official duties. Even where a head of state may be called as a witness special arrangements are made for the way in which evidence is given. Even though the courts must protect the status, dignity and efficiency of the office of the president, administration of justice shouldn’t be impeded in order to safeguard the president’s dignity.

2 conflicting considerations:

e. Public interest in ensuring protection of dignity, status and efficiency of the office of president

f. Need to ensure the administration of justice isn’t impeded

Therefore careful consideration must be given to a decision compelling the president to give evidence and such order should be made unless administration of justice demands it.
JUDICIARY

Briefly discuss the circumstances under which the constitutional court will allow direct access. Mention the case that dealt with this issue

Bruce v Feecytex: rule 17 (1) provides – the court shall allow direct access in terms of S100 of the interim constitution in exceptional circumstances only, which will normally only exist where the matter is so urgent or of such public importance that delay by use of normal proceedings would prejudice public interest or the ends of justice and good government.

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

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

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

Discuss the jurisdiction of

i. The supreme Court of Appeal
ii. The High Courts
iii. Other courts
to decide constitutional disputes

Jurisdiction: is the competence of the court to hear a particular dispute

Judicial authority: constitutes the 3rd branch of government that is the power to interpret legal rules and to apply such rules to legal disputes – this power is vested in the courts

Categories of courts, which make up our legal system:

1. Constitutional court
2. Supreme court of appeal
3. High court
4. Magistrate court
5. Courts created by acts of parliament – Labour court

Jurisdiction of the constitutional court: constitutional court exercised jurisdiction over the following matters: X167 (4):
1. Decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, power or functions of any of those organs

2. Decide on the constitutionality of any parliamentary or provincial bill, but may only do this in terms of S79 or S122

3. Decide applications envisaged in terms of S80 or S122

4. Decide on the constitutionality of any amendment to the constitution

5. Decide that parliament or the president failed to fulfill a constitutional obligation

6. Certify a provincial constitution

Discuss whether the SCA, High Court and other courts have jurisdiction to hear constitutional matters

SCA: S168 (3): may decide appeals in any matter. It’s the highest court of appeal, except in constitutional matters and may only decide:

a. Appeals
b. Issues connected to appeals
c. Any matter which may be referred to it by an act of parliament

S169: High court: may decide

a. Any constitutional matter except a matter that:
   
   i. Only the constitutional court may decide
   ii. Is assigned by an act of parliament to another court or a similar status to the High court

b. And any other matter not assigned to another court by an act of parliament

S170: Magistrate Court: and all other courts may decide any matter determined by an act of parliament, but a court of status lower than the High court may not inquire into or rule on the constitutionality of any legislation or conduct of the president
What is meant by?

⇒ **Functional independence**

⇒ **Personal independence of the judiciary**

**Judicial independence**
Independence of the judiciary is NB for the constitutional state – because if judges could be told what to do by politicians there is little chance that the courts will be an effective mechanism for the prevention of abuse of power.
Judicial independence is related to the separation of powers – courts are subject only to the law and no person may interfere with the functioning of the court.

**Functional independence**
This refers to the way in which the courts operate in a constitutional state.

**Beauegard case:** independence of the judiciary = complete liberty of individual judges to hear and determine cases free from external influences or the influence of government. Judicial power is exercised by the judiciary and may not be usurped by the legislature, executive or anyone else. Judicial officers exercise their power subject only to the law and the constitution and not to public opinion.

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

In the 2nd Harris case it was argued that parliament was assuming the role and functions of the court and was trying to act as judge, jury and executioner. The AD found that the court of parliament was no court of law, but merely parliament in a difference guise – the act was therefore invalidated.

S165 tries to prevent this from happening again, it states that judicial authority is vested in the courts, it recognizes the independence of the courts, it states that no one may interfere with the functioning of the courts and it enjoins organs of state to assist and protect the courts in order to ensure their independence, impartiality, dignity, accessibility and effectiveness.
Another factor, which contributed to the functional independence of the courts, is the fact that judicial officers enjoy immunity against civil actions and the offence of contempt of court.

**May v Udwin:** public interest in the due administration of justice requires that a judicial officer, in exercising his functions, should be able to speak his mind freely without fear of incurring liability

**Personal independence**

**Personal independence of the judges is determined by the following factors:**

- Manner in which they are appointed
- Terms of office
- Security of tenure
- Conditions of service

Personal independence is protected in the following ways:

a. JSC plays an NB role in the appointment of judges

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

c. The constitution makes it difficult for the executive to dismiss judges – S177: states circumstances where a judicial officer may be compelled to vacate his position before the termination of his term of office – the president may remove a judge from office only if the JSC finds that he suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct and if the NA calls for his removal by a resolution adopted with the support of 2/3 of its members

d. S176 provides that the salaries, allowances and other benefits of judicial officers may not be reduced.

**List the 5 categories of courts created by the constitution.**

1. Constitutional court
2. Supreme court of appeal
3. High court
4. Magistrate court
5. Courts created by acts of parliament – Labour court
The majority of people in the country have brown eyes.

The majority of people in the country have brown eyes. In the elections the Party For The Brown Eyed People received the most votes and consequently has the most seats in the NA. Parliament enacts legislation declaring that people with blue eyes are no longer allowed to own property in certain areas. Blue-eyed people are outraged and approach the High Court to have the act declared unconstitutional and thus invalid on the grounds that it discriminates against people with blue eyes.

The act is declared unconstitutional and an order of invalidity is referred to the Constitutional court for confirmation. In the constitutional court counsel for the government argue that the will of the majority of the people in SA is represented in parliament and that it would be undemocratic to declare the act invalid.

The constitutional court declares the act invalid. Adamant that the will of the people should prevail, the parliament passes an act in terms of which the decision of the constitutional Court can be reviewed by parliament.

Can parliament pass an act, which is designated to test the validity of a judgment of the constitutional court? Give reasons for your answer.

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

In the 2nd Harris case it was argued that parliament was assuming the role and functions of the court and was trying to act as judge, jury and executioner. The AD found that the court of parliament was no court of law, but merely parliament in a difference guise – the act was therefore invalidated.

S165 tries to prevent this from happening again, it states that judicial authority is vested in the courts, it recognizes the independence of the courts, it states that no one may interfere with the functioning of the courts and it enjoins organs of state to assist and protect the courts in order to ensure their independence, impartiality, dignity, accessibility and effectiveness.
Another factor, which contributed to the functional independence of the courts, is the fact that judicial officers enjoy immunity against civil actions and the offence of contempt of court.

**May v Udwin:** public interest in the due administration of justice requires that a judicial officer, in exercising his functions, should be able to speak his mind freely without fear of incurring liability

During 2005 parliament proposed 6 pieces of legislation, which would encourage the transformation of the structure, personnel, procedure, functioning and administration of the courts. You are a tutor in constitutional law. Address students on the following issues:

1. **Define judicial independence**
2. **Distinguish between the functional and personal independence of the courts.**
3. **Draw a pyramid in which you illustrate the structure of the court system in SA**
4. **Critically evaluate whether the proposed legislation will undermine the independence of the judiciary or ensure that law and justice are maintained.**

**Judicial independence**

Independence of the judiciary is NB for the constitutional state – because if judges could be told what to do by politicians there is little chance that the courts will be an effective mechanism for the prevention of abuse of power.

Judicial independence is related to the separation of powers – courts are subject only to the law and no person may interfere with the functioning of the court.

We distinguish between functional and personal independence of the courts:

**Functional independence**

This refers to the way in which the courts operate in a constitutional state.

**Beauegard case:** independence of the judiciary = complete liberty of individual judges to hear and determine cases free from external influences or the influence of government.

Judicial power is exercised by the judiciary and may not be usurped by the legislature, executive or anyone else.

Judicial officers exercise their power subject only to the law and the constitution and not to public opinion.
Functional independence of the courts in SA have been threatened – most famous occurred in the 1950’s when parliament tried to set up a high court of parliament which would have the power to set aside decisions of the appellate division of the supreme court. The creation of the high court of parliament was parliament’s response to an earlier decision to the AD in Harris case – in which it declared the Separate Representation of Voters Act unconstitutional which aimed to remove colored voters from the voters’ role – the High court of parliament reversed the decision in Harris and upheld the validity of the act.

In the 2nd Harris case it was argued that parliament was assuming the role and functions of the court and was trying to act as judge, jury and executioner. The AD found that the court of parliament was no court of law, but merely parliament in a difference guise – the act was therefore invalidated.

S165 tries to prevent this from happening again, it states that judicial authority is vested in the courts, it recognizes the independence of the courts, it states that no one may interfere with the functioning of the courts and it enjoins organs of state to assist and protect the courts in order to ensure their independence, impartiality, dignity, accessibility and effectiveness.

Another factor, which contributed to the functional independence of the courts, is the fact that judicial officers enjoy immunity against civil actions and the offence of contempt of court.

May v Udwin: public interest in the due administration of justice requires that a judicial officer, in exercising his functions, should be able to speak his mind freely without fear of incurring liability

Personal independence of the judges is determined by the following factors:

• Manner in which they are appointed
• Terms of office
• Security of tenure
• Conditions of service

Personal independence is protected in the following ways:

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

c. The constitution makes it difficult for the executive to dismiss judges – S177: states circumstances where a judicial officer may be compelled to vacate his position before the termination of his term of office – the president may remove a judge from office only if the JSC finds that he suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct and if the NA calls for his removal by a resolution adopted with the support of 2/3 of its members

d. S176 provides that the salaries, allowances and other benefits of judicial officers may not be reduced.

3. Categories of courts, which make up our legal system:

1. Constitutional court
2. Supreme court of appeal
3. High court
4. Magistrate court
5. Courts created by acts of parliament – Labour court

4. To answer this question you should discuss the following:

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.

Separation of powers:

Montesquieu is regarded as the father of the doctrine of separation of powers (Trias politica), according to the traditional view, the doctrine separated executive, legislature and judiciary. According to him there can be no political freedom in a country where one person makes the law, enforces the law and provides sanctions when he law is contravened.

Carpenter states that the doctrine implies the following:

1. The formal division of state authority into the legislature, executive and judiciary
2. Separation of personnel so that one person shouldn’t simultaneously perform in more than one branch of government
3. Separation of function: so that one branch can’t usurp on the powers and functions of the other branches

4. Checks and balances: with each branch of government given specific powers to restrain other branches and therefore achieves equilibrium among the 3 components of government authority.

Certification Case: it was argued that the new constitutional text didn’t comply with one of the constitutional principles, 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 the legislative and executive in the new constitution serves an NB check and balance = 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.

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

SA constitution provides for checks and balances.

Constitutional democracy:

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

Arguments to defend judicial review:

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

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

3. Judges may enquire into the constitutionality of legislation, but they don’t substitute their view for those of the legislature. If a judge strikes down a law as unconstitutional she doesn’t make a new law. The legislature may amend the law – the only condition being that it must be constitutional.
Critically evaluate whether the appointment of a judge (other than a retired judge) as head of a special investigating unit is constitutional.

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 head by a judge, which was set up to investigate malpractices in state institutions and in connection with state assets and public money.

1. Looks at the validity of the appointment of a judge to head the Unit.

2. It deals with the validity of the President’s referral to the Unit for investigation of an allegation concerning a failure by attorneys acting for road accident victims claiming 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.

The validity of the appointment of a judge to head the Special Investigating Unit = held that the appointment of a judge to head the SIU violated the separation of powers required by the Constitution.

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

The 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 our constitutional 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. 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.
CO-OPERATIVE GOVERNMENT

S41 (1) (g) says that all spheres of government and all organs of state within each sphere

1. Critically evaluate this provision in the light of the Premier of the Western Cape v President of RSA

2. Differentiate between an integrated and divided form of federalism. Mention an example of each form of federalism.

3. Briefly explain the concept “rule of law”

1. Discuss the issue of co-operative government in respect of the Premier of the Western Cape v President of the RSA:
   A co-op government involves all spheres of government working together. This is NB in respect of the new text as S40 and S41 provide for distinctive, interdependent and interrelated spheres and for the settlement of disputes among them.

   The government of the Western Cape challenged the constitutionality of an amendment to the public service act. In terms of this amendment, provincial heads of department are given the same functions and responsibilities as national departments and no longer fall under the administrative control of the provincial Director General (DG).
   The DG is responsible for the administration of the office of premier, intergovernmental relationships and co-operation between the departments of the provincial administration.

   The Western Cape government objected that its part of the executive power of a province to structure its own administration and the national legislature, which wants to impose such structure on the provinces, infringes the provincial power.

   The court rejected this argument:
   It said that the sanctioning of national legislature is a feature of the constitution and a system of co-operation government that it prescribes.
   This legislation is required for the raising and division of revenue.

   In the 1st certification judgment the constitutional court held that such requirements are inconsistent with the constitution.

   The courts’ interpretation of S40:
The Western Cape government argued that the provision of the amended legislation encroached on the geographical and functional integrity of the provincial government contrary to S41.

The principle of co-operative government in S40 where the spheres of government are described as being distinctive, interdependent and interrelated. This is consistent with the way powers have been divided between the spheres of government.

**Distinctiveness:** lies in the provision made for elected government at the national, provincial and local levels.

**Interdependent and interrelatedness:** flow from the founding provision that SA is a sovereign, democratic state and a constitutional structure which makes provision for framework provision to be set by the national sphere of government. These provisions vest concurrent legislative powers in respect of important matters in the national and provincial spheres of government and contemplate that the provincial executive will have responsibility for implementing national laws as well as provincial laws.

**Courts interpretation of S41:**
The constitution makes provisions to make sure that with common effort the spheres of government co-operate with each other to secure the implementation of legislation in which they all have a common interest. This co-operation requires that every reasonable effort be made to settle disputes before a court is approached to do so.

It’s desirable wherever possible to avoid conflicting legislative provisions, to determine the administration, which will implement laws that are made, and to ensure that adequate provision is made and to ensure provisions are made for it in the budget of different governments.

S41 (1)(g) requires that: all spheres of government and all organs of state within each sphere must exercise their powers and perform their functions in a manner that doesn’t encroach on the geographical, functional or institutional integrity of government in another spheres. This reflects a requirement in the constitutional principles that the national government won’t exercise its powers so to encroach on the provinces.

**In this case:**
What is relevant is that the constitutions power to structure public service, vests in the national sphere of government.
The purpose of S41 is to prevent 1 sphere of government from using its powers in such a way, which would undermine the other sphere and prevent them from functioning effectively.

The constitution provides that provinces shall have the exclusive functions shared with the national legislature. Constitution also requires the establishment of a single public service and gives the power to structure that public service to the national legislature. This power of the national legislature is one, which has to be exercised carefully, in the context of S41, to ensure that in exercising its power the national legislature doesn’t encroach on the ability of provinces to carry out the functions entrusted to them by the constitution.

3 objections:

1. It assigns functions to the provincial Director General’s and heads of departments in a manner that’s unacceptable to it.

2. It constrains the premier’s executive powers to establish and abolish departments of government.

3. It empowers the minister to give directions concerning the transfer of certain functions to and from the provincial administration

The courts findings:
On if it’s constitutional for parliament to assign functions to the provincial DG: S41 (2) of the constitution enjoins parliament to enact legislation to facilitate intergovernmental relations. The establishment of a post within the public services for the discharge of such functions doesn’t infringe any provincial powers. The functionary isn’t a representative of the national government but is appointed by the premier. The province has the competence to appoint a functionary who is to occupy this post and that is all that the constitution requires.

It can’t be said that there aren’t valid reasons for having included such functions within the duties of the DG or that to do so would prevent the provincial government from carrying out its constitutional duties effectively.

The provisions of the amendment dealing with the powers and functions of the DG aren’t inconsistent with the executive power if the province. It’s also not been established that the provision infringes S41.
The power of the president at the request of the premier to establish or abolish any provincial department is constitutional:

S3A (a) – premier of a province may subject to S7 establish or abolish any department of the provincial administration concerned.

S7 (5) – president can at the request of the premier.

President is required to amend the schedule by proclamation to give effect to such a requirement if he’s satisfied its consistent with the provisions by way of a request directed to the president.

The premier has the power to establish and abolish provincial departments - this power is limited only by the extent that it must be exercised by way of a request directed to the president.

Proceeding require the president and the premier to see agreement about the legality of a proposed restructuring of the public service within a provincial administration, is entirely consistent with the system of co-operative government prescribed by the constitution and it can’t be said to invade either the executive power vested in the premier or the functional integrity of the provincial government.

If the power of the minister to transfer certain functions to the provincial government to the national government is constitutional: S3 makes provisions for the allocation and transfer of functions to and from departments of government, which by definition includes provincial departments.

The court found the S3 wasn’t reasonably capable of such an interpretation and was therefore unconstitutional.

2. **Federal System**

Characteristics:

1. State power and sources of income are divided between the national and provincial government

2. The provinces are given wider powers

3. NB issues like defence, taxation and custom exercise are normally regulated by the national sphere of government

4. Disputes between the spheres are usually regulated by an arbiter.
<table>
<thead>
<tr>
<th>Divided model of federalism</th>
<th>Integrated model of federation</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Powers and responsibilities of the national and provincial levels of government are clearly divided</td>
<td>1. Few area in which the national government enjoys exclusive power and many areas in which the national and provinces have shared responsibility</td>
</tr>
<tr>
<td>2. Provinces are given independent taxing powers</td>
<td>2. Revenues and taxing powers are shared between the national and provincial governments</td>
</tr>
<tr>
<td>3. Even though mechanisms exist for the cooperation between the national and provincial governments they have no status or constitutional recognition</td>
<td>3. A number of intergovernmental institutions have the responsibility of promoting cooperation between the various levels of government</td>
</tr>
<tr>
<td>4. Provincial interests aren’t represented within the national government E.g. Canada</td>
<td>4. Provinces are able to put their interests directly into the national legislative process – NCOP</td>
</tr>
</tbody>
</table>

3. **The rule of law:**
According to Dicey the rule of law rests on the following 3 premises:

1. **The absence of arbitrary power:** no one is above the law and no one is punishable except for a distinct reach of the law

2. **Equality before the law:** every individual is subject to the ordinary law and the jurisdiction of the ordinary courts.

3. **A judge made constitution**

**True or false:** the principles of co-operative government and the *trias politica* doctrine are one and the same thing?

**False**, co-operative government: S40: the government of the Republic is constituted as the national, provincial and local sphere, which are distinctive, interdependent and interrelated. The doctrine of separation of powers (*trias politica*), according to the traditional view, the doctrine separated executive, legislature and judiciary.
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

- The formal division of state authority into the legislature, executive and judiciary
- Separation of personnel so that one person shouldn’t simultaneously perform in more than one branch of government
- Separation of function: so that one branch can’t usurp on the powers and functions of the other branches
- Checks and balances: with each branch of government given specific powers to restrain other branches and therefore achieves equilibrium among the 3 components of government authority.

True or false: S76 of the constitution sets out the way in which conflicts between national and provincial legislation dealing with a schedule 4 matters may be resolved.

False, it is important for parliament to identify an ordinary bill as affecting or not affecting the provinces. If a bill affecting the provinces is passed a SA bill not affecting the provinces or visa versa the bill isn’t properly enacted and doesn’t become law.

In the Liquor bill Case: the court stated that any Bill whose provisions fall within schedule 4 must be dealt with under S76.

S76 (1) deals with the adoption of bills that have been passed by the NA. Such bills must then be referred to the NCOP.

S76 (2) deals with bills passed by the NCOP; such bills must then be referred to the NA. If both houses pass a bill it is sent to the president for assent.

Legislative conflicts in schedule 4 matters: S146 (2) national legislation that applies uniformly with regard to the whole country prevails if one of the following conditions is met:

1. The national legislation deals with a matter that can’t be regulated effectively by legislation enacted by the provinces individually

2. The national legislation deals with a matter that requires uniformity across the nation and the national legislation provides that uniformity by establishing:
• Standards
• Frameworks or
• National policies

3. The national legislation is necessary for:

• Maintaining national security
• Maintaining economic unity
• Protection of the common market in respect of mobility of goods services, capital and labour
• The promotion of economic activities across provincial boundaries
• The promotion of equal opportunity or equal access to government services
• The protection of the environment

4. National legislation prevails over provincial legislation if the national legislation is aimed at preventing unreasonable action by a province that:

• Is prejudicial to the economic, health or security interests of another province or the country as a whole
• Impedes the implementation of national economic policy

Ex Parte President of RSA: in re constitutionality of the Liquor Bill

True or false: The 96 constitution embraced an integrated form of federalism

True, Simeon says that SA follows a more integrated form of federalism than a divided one. This is evident from the following:

1. Chapter 3 of the constitution is entitled “Co-operative Government” – S40 states that the government is constituted as the national, provincial and local sphere which are distinctive, interdependent and interrelated.

2. The fact that the constitution refers to spheres and not level creates the impression that the aim is to move away from the hierarchy.

3. The constitution has list of functional areas in which the national, provincial and local areas share legislative functions.

4. Provinces have limited powers to raise revenues for themselves and are barred from imposing income, sales or VAT.
5. S41 (2): requires an Act of parliament to establish or provide for structures or institutions to promote or facilitate intergovernmental relations and provide for appropriate mechanisms to settle intergovernmental disputes.

6. S41 (3): an organ of state involved in an intergovernmental dispute must make every reasonable effort to resolve the dispute by means of mechanisms provided and must exhaust all internal remedies before they approach a court to resolve it.

7. Provincial interests are represented in parliament in the NCOP – which ensures that provincial interests are taken into account on a national sphere.

Explain whether the provision of chapter 3 of the constitution promoting co-operative government affect the autonomy of the provinces. Refer to case law.

The concept of co-operative government requires all spheres of government to work together.

S125 (3) order the national government to assist the provinces to develop the administrative capacity for the effective exercise of their powers.

S 154 (1): requires that the national and provincial governments support and strengthen the capacity of municipalities to manage their own affairs and exercise their own functions.

S40: national, provincial and local, which are distinctive, interdependent and interrelated.

- Distinctive: they are separate and have their own powers
- Interdependent: they depend on and help each other
- Interrelated: sometimes they have concurrent powers

Discuss the issue of co-operative government in respect of the Premier of the Western Cape v President of the RSA:

A co-op government involves all spheres of government working together. This is NB in respect of the new text as S40 and S41 provide for distinctive, interdependent and interrelated spheres and for the settlement of disputes among them.

The government of the Western Cape challenged the constitutionality of an amendment to the public service act. In terms of this amendment, provincial heads of department are given the same functions and responsibilities as national departments and no longer fall under the administrative control of the provincial Director General (DG).
The DG is responsible for the administration of the office of premier, intergovernmental relationships and co-operation between the departments of the provincial administration.

The Western Cape government objected that its part of the executive power of a province to structure its own administration and the national legislature, which wants to impose such structure on the provinces, infringes the provincial power.

**The court rejected this argument:**
It said that the sanctioning of national legislature is a feature of the constitution and a system of co-operative government that it prescribes.
This legislation is required for the raising and division of revenue.

In the 1st certification judgment the constitutional court held that such requirements are inconsistent with the constitution.

**The courts’ interpretation of S40:**
The Western Cape government argued that the provision of the amended legislation encroached on the geographical and functional integrity of the provincial government contrary to S41.

The principle of co-operative government in S40 where the spheres of government are described as being distinctive, interdependent and interrelated.
This is consistent with the way powers have been divided between the spheres of government.

**Distinctiveness:** lies in the provision made for elected government at the national, provincial and local levels.

**Interdependent and interrelatedness:** flow from the founding provision that SA is a sovereign, democratic state and a constitutional structure which makes provision for framework provision to be set by the national sphere of government. These provisions vest concurrent legislative powers in respect of important matters in the national and provincial spheres of government and contemplate that the provincial executive will have responsibility for implementing national laws as well as provincial laws.
Discuss the Constitution provisions governing a conflict between national and provincial legislation dealing with a schedule 4 matter

Legislative conflicts in schedule 4 matters

S146 (2) national legislation that applies uniformly with regard to the whole country prevails if one of the following conditions is met:

1. The national legislation deals with a matter that can’t be regulated effectively by legislation enacted by the provinces individually

2. The national legislation deals with a matter that requires uniformity across the nation and the national legislation provides that uniformity by establishing:
   - Standards
   - Frameworks or
   - National policies

3. The national legislation is necessary for:
   - Maintaining national security
   - Maintaining economic unity
   - Protection of the common market in respect of mobility of goods services, capital and labour
   - The promotion of economic activities across provincial boundaries
   - The promotion of equal opportunity or equal access to government services
   - The protection of the environment

4. National legislation prevails over provincial legislation if the national legislation is aimed at preventing unreasonable action by a province that:
   - Is prejudicial to the economic, health or security interests of another province or the country as a whole
   - Impedes the implementation of national economic policy

See Ex Parte President of RSA: in Re constitutionality of the Liquor Bill

Conflicts which can’t be resolved: if it can’t be resolved by the court then the national legislation prevails.
Imagine that you are the newly appointed advisor to the State of Azania which is experiencing severe political turmoil and human rights abuses because the national government has unilaterally taken over the running of the State. The time for change is imminent and you have been asked to map the way forward in terms of the system of government that should be adopted. What would your recommendations be and why?

Discuss:

- Unitary government
- Federal government
- SA co-operative government
- S40 etc
LOCAL GOVERNMENT

Discuss whether local government is nothing more than an administrative handmaiden in your opinion.
Refer to case law.

Autonomous local government versus administrative handmaiden
S156 states that the local government can't legislate in conflict with national and provincial legislation.
The national and provincial government must assign to local government those local government matters that would be most effectively administered locally and where the local government structure has the capacity to administer it.
Municipalities have powers reasonably necessary or incidental to the effective performance of their functions.

Pimstone – says that this definition gives the impression that the local government plays 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.

Critically evaluate whether local government is nothing more than an “administrative handmaiden. Your answer must contain a discussion of the following aspects:

Whether local government is an autonomous sphere of government?

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

Pimstone – says that this definition gives the impression that the local government plays 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.

Establishment of municipalities

S151: municipalities must be created for the entire Republic – constitution expresses that different categories of municipalities must be set up in the different regions.

Examples of these different types of municipalities are:

- Local or city councils
- Metropolitan districts
- District councils
- Rural councils

Whether it is important to involve people at grassroots’ level in decision making at the highest levels?

Reasons why public participation in matters that directly affects members of the public is NB:

1. It facilitates access to information about local conditions, needs and attitudes, which are NB in terms of adopting informed decisions in the policy management.

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

3. It means involving and educating the public.

4. Provides mechanisms for ensuring democratization of the planning process.

5. Participation is a means of balancing the demands of central control against the demands for concern for the unique requirements of local government.

6. Participation plays a watchdog role – this openness and participation renders to reduce the possibility of corruption and may help maintain high standards of behavior.

Parliament passes the National Tourism Control Act of 2001. This regulates access to the beach area during the festive season by providing that only residents will gain entry into certain demarcated areas provided they have a permit. The Cape MEC for travel and tourism proposes an amendment to this legislation to include certain additional persons within the permit system, for example the SAPS and emergency services. The reason is to prevent overcrowding and allow the abovementioned bodies to carry out their duties effectively. The Cape MEC argues that this matter is at best and exclusive provincial competence and at worst a concurrent one. This national minister contends that this is a matter falling within the exclusive jurisdiction of the national governments national standards have to be maintained to promote tourism throughout the country and that the Cape Province isn’t competent to pass the proposed amendment.

The national minister and the MEC approach you for advice on the following issues:
1. Whether the matter falls within the legislative competence of the provinces.

Powers of the provincial legislature – S104 (1):

a. Pass a constitution for the province
b. Pass legislation for its province with regard to:
   a. Any matter in schedule 4
   b. Any matter listed in schedule 5
   c. Any matter outside those functional areas and that is assigned to the province by national legislation
   d. Any matter for which provision of the constitution envisages
c. To assign any of its legislative powers to the municipal council in the province.

2. If it falls within the provincial competence, whether the provincial legislature can amend an act of parliament.

In respect of delegation of legislative power to provincial legislatures S44 authorizes the NA to assign any of its powers, except the power to amend the constitution to any legislative body in another sphere of government.

3. What will happen in the event of a conflict between an Act of Parliament on a provincial amendment when dealing with

   a. Schedule 4 matters and
   b. Schedule 5 matters

Conflict with a schedule 5 matter:
Normally there won’t be conflict since provinces have the EXCLUSIVE POWER to pass legislation relating to these matters.

BUT

S44 (2): states that parliament may pass legislation on a matter falling within a functional area listed in schedule 5 when it’s necessary to:

• Maintain national security
• Maintain economic unity
• Maintain essential national standards
• Establish minimum standards required for the rendering of services
• Prevent unreasonable action taken by a province which is prejudicial to the interests of other provinces or to the country as a whole

Legislative conflicts in schedule 4 matters

S146 (2) national legislation that applies uniformly with regard to the whole country prevails if one of the following conditions is met:

1. The national legislation deals with a matter that can’t be regulated effectively by legislation enacted by the provinces individually

2. The national legislation deals with a matter that requires uniformity across the nation and the national legislation provides that uniformity by establishing:
   - Standards
   - Frameworks or
   - National policies

3. The national legislation is necessary for:
   - Maintaining national security
   - Maintaining economic unity
   - Protection of the common market in respect of mobility of goods services, capital and labour
   - The promotion of economic activities across provincial boundaries
   - The promotion of equal opportunity or equal access to government services
   - The protection of the environment

4. National legislation prevails over provincial legislation if the national legislation is aimed at preventing unreasonable action by a province that:
   - Is prejudicial to the economic, health or security interests of another province or the country as a whole.
   - Impedes the implementation of national economic policy

4. If parliament can override the provisional amendment, what procedure would have to be followed for the law to come into effect?

S76: Bill must be referred to the NCOP if introduced by NA and visa versa.
If both houses agree it’s sent to the President for assent.
If they disagree, it’s sent to a mediation committee who can:
- Use NA version
- Use NCOP version
- Make own version

If there is still a dispute the NA can override it with a 2/3rd majority and send the bill to the President for assent.

When the NCOP votes, its one vote per province.