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**SOURCES AND DEFINITIONS**

**Binding sources**

- The constitution
- Legislation
- Common law
- Case law
- International law

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

The dividing line between public and private law has become blurred:

⇒ The state has become involved in private relationships – employer and employee, landlord and tenant and husband and wife.

⇒ The constitution states that private relationships are often unequal = bill of rights apply to private relationships

⇒ Public functions have become increasingly privatized – Telkom and Transnet

**What makes our government different from the previous dispensation is:**

- The fact that we have an inflexible constitution
- Our constitution is supreme
- We apply certain aspects of the rule of law
- We are both a formal and material rechtsstaat
- We are a democratic state
- Constitutional democracy
- Separation of powers limits the power of government
Flexible constitution: enjoys the same status as the other laws of the country and requires no special procedure for amendment e.g. SA constitution of 1961

Inflexible constitution: enjoys superior status to the ordinary laws of the land and require a special amendment procedure e.g. SA 1996 constitution S74

<table>
<thead>
<tr>
<th>Supreme constitution</th>
<th>Not supreme:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ranks above all other laws in a state – any law which is inconsistent with it will be declared invalid e.g. SA 1996 constitution</td>
<td>Doesn’t enjoy any special status. The legislature can pass laws, which are inconsistent with the constitution. The courts can’t question the validity of such laws, provided the correct procedure has been complied with E.g. Britain</td>
</tr>
</tbody>
</table>

Autochthonous and allochthonous constitutions

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

Van der Vyver said there are 3 kinds of constitutions:

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

State:

⇒ Geographically defines territory
⇒ Community of people who live on the territory
⇒ A legal order
⇒ An organised system of government to uphold legal order
⇒ Separate political identity
The rule of law:

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

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

c) A judge made constitution

The Rechtsstaat principle
Refers to a government by law and not by force

<table>
<thead>
<tr>
<th>Formal Rechtsstaat:</th>
<th>Material Rechtsstaat:</th>
</tr>
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<tbody>
<tr>
<td>requires compliance with:</td>
<td>the state authority is bound by higher legal values, which are embodied in the constitution</td>
</tr>
<tr>
<td>1. Due process</td>
<td></td>
</tr>
<tr>
<td>2. Separation of powers</td>
<td></td>
</tr>
<tr>
<td>3. Legal certainty</td>
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</tbody>
</table>

Constitutional mechanisms to limit the powers of the government:

- Bill of rights
- The constitution is subject to judicial review
- Democratic elections of representatives to parliament
- Collective and individual responsibility of cabinet to parliament
- Separation of powers between the legislature, executive and judiciary
- An independent judiciary
- The demarcation between the national and provincial spheres of government

Democracy

S1 of the constitution proclaims that SA is a democratic state GOVERNMENT BY THE PEOPLE

Democracy is derived from ancient Greek words demos (the people) and Kartos (strength) – this implies that a democracy is a government by the people.
Direct democracy:
Means that all the major political decisions are made by the people themselves – may work in a small community where the people can meet on a regular basis and decide matters

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

Criticisms of direct democracy:
- The people can’t be said to govern in any real sense if they go to the polls once every 4 or 5 years to elect representatives who are free to govern as they see fit

On the other hand it’s stated that it’s the only workable form of democracy in modern times

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

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

<table>
<thead>
<tr>
<th>Presidential system</th>
<th>Parliamentary system</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. The head of government is also head of state (SA)</td>
<td>1. The head of state and head of government are 2 different people</td>
</tr>
<tr>
<td>2. The head of government isn’t a member of the legislature and isn’t responsible to it</td>
<td>2. The head of government and his cabinet are members of the legislature</td>
</tr>
<tr>
<td>3. The head of government is elected directly by the people</td>
<td>3. The head of government is the leader of the party with a clear majority in parliament (SA)</td>
</tr>
</tbody>
</table>

Separation of powers:

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

Carpenter states that the doctrine implies the following:

- 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 = Certification Case: it was argued that the new constitutional text didn’t comply with one of the constitutional principles; cabinet members remain members of parliament. The overlap between the legislative and executive in the new constitution serves an NB check and balance = it ensures accountability of the executive towards the voters.

- Separation of function: so that one branch can’t usurp on the powers and functions of the other branches

  ⇒ Legislature: make and amend law
  ⇒ Executive: enforce and execute
  ⇒ Judiciary: interpret and apply

- Checks and balances: with each branch of government given specific powers to restrain other branches and therefore achieve equilibrium among the 3 components of government authority. SA constitution provides for checks and balances. The most NB is judicial review, which allows legislative or administrative action to be tested for validity in court. The judiciary must ensure government acts comply with procedural and substantive requirements of the constitution.
The counter majoritarian debate

Arguments to defend judicial review:

- 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.

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

- 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.
LEGISLATIVE AUTHORITY

<table>
<thead>
<tr>
<th>Functions of the NA</th>
<th>Functions of the NCOP</th>
</tr>
</thead>
<tbody>
<tr>
<td>S42 (3):</td>
<td>S42 (4):</td>
</tr>
<tr>
<td>1. Representation of the electorate</td>
<td>1. Representation of provinces in the national sphere</td>
</tr>
<tr>
<td>2. Election of the president</td>
<td>2. Participation in the national legislative process</td>
</tr>
<tr>
<td>3. Public consideration of issues</td>
<td>3. Public consideration of issues effecting provinces</td>
</tr>
<tr>
<td>4. Passing legislation</td>
<td></td>
</tr>
<tr>
<td>5. Overseeing executive action</td>
<td></td>
</tr>
</tbody>
</table>

Elections

S19: guarantees the right of every adult citizen to vote. August Case the issue of the voting of prisoners came before the court. The 1993 Electoral Act declared that no person will be entitled to vote who was convicted of murder, rape, robbery with aggravating circumstances or an attempt to commit these crimes.

1998 electoral act: the following are disqualified:

⇒ Persons who applied for registration fraudulently or in a way other than the prescribed manner
⇒ Persons who aren’t Sa citizens
⇒ Persons declared mentally ill by the high court
⇒ Persons detained under the Mental Health Act
⇒ Persons not normally resident in the district where registration was applied for

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

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

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

<table>
<thead>
<tr>
<th>Advantages</th>
<th>Disadvantages</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Simple</td>
<td>1. Incorrectly reflects the strength of the parties</td>
</tr>
<tr>
<td>2. Strong and stable government</td>
<td>2. Favors the stronger parties to the detriment of the weaker parties</td>
</tr>
<tr>
<td>3. Results in a closer bond between the representative and the voter</td>
<td>3. Artificial delineation of constituencies can give rise to an imbalance</td>
</tr>
<tr>
<td></td>
<td>between constituencies</td>
</tr>
</tbody>
</table>

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

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

Free and imperative mandate theory of representation

| Free mandate theory:                                                      | Imperative mandate theory:                                                  |
| a member of parliament isn’t bound by the mandate given to him by the     | A member of parliament is bound by the mandate given to him by his principal|
| electorate but he must act in accordance with his own conscience and the  | (the electorate) – if he disagrees with his party he must vacate his seat  |
| interests of the country as a whole                                       |                                                                              |
Does SA follow a free or imperative mandate theory?

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.

UDM case: 4 acts of parliament

The effects of the legislation for those members wishing to defect were as follows:

1. Immediately after the amendments were effected, members were given a 15 day window period in which they could change party allegiance without losing their seats.

2. The amendments make provision for a 15 day period in September of the 2nd and 4th year after a general election when the members are allowed to cross the floor without losing their seats.

3. Parties that are represented in parliament are entitled to merge or separate during those periods.

4. Permission to cross the floor and for parties to divide is only required if at least 10% of the members of the party defect or break away.

Parliamentary privileges

- The NA controls its own internal arrangements, proceedings and procedures

- Parliament can summon people to give evidence and submit documents

- They can enforce their own internal disciplinary measures for contempt of parliament

- Members of parliament may not vote on any matter in which they have a financial interest

ARE PARLIAMENTARY PRIVILEGES SUBJECT TO JUDICIAL REVIEW?

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

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

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

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

S79
The liquor bill was in the NA it passed through the various legislative stages in terms of S76 before parliament approved it.

When the bill was sent to the president for assent he declined to approve it, as he had reservations about its constitutionality, so it was referred back to the NA.

1. Must the court only consider the president’s reservations or can it direct wider attention – the court considers only the president’s reservations
2. Should he court examine every provision to certify that every part accords with the constituent – NO the court must 1st consider the reservations of the president.
3. Does the courts finding in respect of the constitutionality of the bill mean that is provisions can’t be adjudicate after its enactment = even if the court does decide that the bill is constitutional, supervening constitutional challenges after its enactment aren’t excluded.
### S74: Bills amending the constitution

<table>
<thead>
<tr>
<th>S1 – may be amended by a bill passed by:</th>
<th>S76: bills affecting the province</th>
<th>S75: Bills not affecting the provinces</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Na with a 75% majority of the members</td>
<td>Bill must referred to the NCOP if introduced by NA and visa versa</td>
<td>If both pass the bill houses its sent to the president for assent.</td>
</tr>
<tr>
<td>The NCOP – 6/9 provinces supporting the vote</td>
<td>If both houses agree it’s sent to President for assent. If they disagree, its sent to a mediation committee who can:</td>
<td>There is no mediation committee. The NA may still pass a bill, which has been rejected by the NCOP without cooperation from the NCOP.</td>
</tr>
<tr>
<td></td>
<td>- Use NA version</td>
<td></td>
</tr>
<tr>
<td></td>
<td>- Use NCOP version</td>
<td>When the NCOP votes in S75 each delegate in a provincial delegation has one vote and the question is decided on the majority of votes passed.</td>
</tr>
<tr>
<td></td>
<td>- Make own version</td>
<td></td>
</tr>
<tr>
<td>Chapter 2 may be amended by:</td>
<td>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.</td>
<td></td>
</tr>
<tr>
<td>NA with a 2/3 majority vote of members</td>
<td>When the NCOP votes, its one vote per province</td>
<td></td>
</tr>
<tr>
<td>NCOP – 6/9 provinces supporting vote</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Any other provision in the constitution may be amended by a bill passed by:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>NA with a 2/3 majority</td>
<td></td>
<td></td>
</tr>
<tr>
<td>NCOP – 6/0 provinces supporting vote if the amendment:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Relates to a matter affecting the council</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Alters provincial boundaries, powers functions</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Amends a provision dealing with a provincial matter</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### Limitations on parliament’s power to make laws

- Fundamental rights limitations
- Federalism limitations
- Separation of powers limitations
- Delegation limitations
- Limitation on the power to amend the constitution
- Procedural limitations
- Extra parliamentary consultation
Federalism limitations

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

MAKE LAW:

Executive Council of Western Cape: The authority of parliament to delegate its law making functions is subject to the constitution. The authority to make subordinate legislation may be exercised by the executive:

⇒ Proclamations by the president
⇒ Regulations by ministers

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

AMEND LAW

Chaskelson

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

EXECUTIVE AUTHORITY

Powers of the president SS4 (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 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

Q: are the powers of the president in terms of S84 subject to constitutional review?

Hugo: the CC considered the question whether the president’s power to pardon offenders is subject to constitutional review. This power, which was a 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 condition. The exercise of these powers is subject to constitutional review.

**Explain how the president must conduct himself when:**

1. **He acts together with other members of cabinet:**
   The functionary who had to be consulted had to concur
   E.g. appointment of judges = is BOUND

2. **He acts after consulting other functionaries:**
   The president must consult the relevant functionary
   E.g. by appointing judges of the constitutional court = NOT BOUND

3. **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 JSC has made a finding in respect of this and the NA calls for the judge to be removed – president is BOUND to act as advised
Individual and collective ministerial responsibility

<table>
<thead>
<tr>
<th>Collective responsibility:</th>
<th>Individual responsibility:</th>
</tr>
</thead>
<tbody>
<tr>
<td>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</td>
<td>Confers 3 duties on the minister concerned:</td>
</tr>
<tr>
<td></td>
<td>1. To explain to parliament what happens in his department</td>
</tr>
<tr>
<td></td>
<td>2. To acknowledge that something has gone wrong in the department and rectify the mistake</td>
</tr>
<tr>
<td></td>
<td>3. To resign if the situation is serious enough</td>
</tr>
</tbody>
</table>

HOW PARLIAMENT CONTROLS THE EXECUTIVE:

⇒ Individual and collective ministerial accountability

⇒ Question time in parliament

⇒ Interpellations are used to enter into short debates with ministers on particular aspects of their responsibilities

⇒ Parliamentary committees

⇒ Approval by parliament of subordinate legislation

⇒ Parliament has to authorize the raising of taxes and spending of funds by the executive

⇒ 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

⇒ 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

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

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

The test for determining whether conduct is administrative action: Howe is the president acting?

- As head of state (don’t have to comply with S33)
- As head of the national executive = comply with S33

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

**SARFU case:**

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

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

Circumstances where the president can be compelled to testify:

- Where a head of state may be called as a witness special arrangements are made for the way in which evidence is given

2 conflicting considerations:

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.
JUDICIAL AUTHORITY

- Constitutional court
- Supreme court of appeal
- High court
- Magistrate court
- Courts created by acts of parliament – Labour court

How the independence of the judiciary is secured through appointment measures in the constitution:

The JSC advised the government on matters in respect of the judiciary, by making recommendations in respect of appointment, removal from office, term of office and tenure of judges. The involvement of the JSC in the appointment of judges was believed to restrict the power of the executive to appoint whomever they wished and thus boost judicial independence.

Judicial independence

Functional independence:

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

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

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

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 is protected in the following ways:

- JSC plays an NB role in the appointment of judges

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

- The constitution makes it difficult for the executive to dismiss judges – S177: the president may remove a judge from office only if the JSC finds that he suffers from
  - An incapacity
  - Is grossly incompetent or
  - Is guilty of gross misconduct and if the NA calls for his removal by a resolution adopted with the support of 2/3 of its members

- S176 provides that the salaries, allowances and other benefits of judicial offices may not be reduced

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

**Bruce v Feecytex**

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

- To bring the matter directly to the constitutional court or
- To appeal directly to the constitutional court from any other court
5 techniques the courts use to avoid or limit the effects of a declaration of invalidity

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

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

S40: the government of the Republic is constituted as the national, provincial and local sphere which is distinctive, interdependent and interrelated.

Unitary form of government:

It has a unified centre of authority – al government bodies are subject to the authority exercised by the national government

Characteristics:

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

Federal System

<table>
<thead>
<tr>
<th>Divided model of federalism</th>
<th>Integrated model of federalism</th>
</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 co-operation between the national and a provincial governments they have no status or constitutional recognition</td>
<td>3. A number of intergovernmental institutions have the responsibility of promoting co-operation between the various levels of government</td>
</tr>
<tr>
<td>4. Provincial interests aren’t represented within the national government</td>
<td>4. Provinces are able to put their interests directly into the national legislative process - NCOP</td>
</tr>
</tbody>
</table>

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

- 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.

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

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

- Provinces have limited powers to raise revenues for themselves and are barred from imposing income, sales or VAT

- 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

- 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.

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

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

The government of the Western Cape challenged the constitutionality of an amendment to the public service act. In terms of the 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.

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.

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.
S41: 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.

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 sphere.

This reflects a requirement in the constitutional principles that the national government won’t exercise its powers so to encroach on the provinces.

**The courts findings:**
The provisions of the amendment dealing with the powers and functions of the DG aren’t inconsistent with the executive power in the province. It’s also not been established that the provision infringes S41.
PROVINCIAL GOVERNMENT

Legislative conflicts

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

BUT S4 (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 unit
- 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

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

- Is prejudicial to the economic, health or security interests of another province or the country as a whole

- Impedes the implementation of national economic policy
LOCAL GOVERNMENT

Public participation

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

● 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.

● It means involving and educating the public.

● Provides mechanisms for ensuring democratization of the planning process.

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

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

Chapter 7 of the final constitution:

The constitutional recognition of local government and the vesting of powers in local authorities have transformed the legal status of the local government.

**FedSure**: constitution – local government is no longer a public body exercising delegated powers – it’s a legislative assembly with legislative and executive powers recognized by the constitution itself. Local governments have a place in the constitutional order, have to be established by a competent authority and are entitled to certain powers, including the power to make by laws and impose rates.

Local government as sphere of government: **S151**:  

1. The local government consists of municipalities, which must be established for the whole of the Republic.

2. The executive and legislative authority of a municipality is vested in its municipal council.

3. A municipality has the right to govern, the local government affairs of its community, subject to national and provincial legislation.
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.