Dear Student

Read this tutorial letter carefully, as it contains commentary on Assignment 1, Assignment 2 and the Self-evaluation questions.

We trust that you found these assignments challenging but that you are coping with the workload.

1 **FEED-BACK ON ASSIGNMENT 01**

Assignment 01 was relatively simple and should not have given you too much trouble. You simply had to make the following selection to earn 100% for the assignment.

<table>
<thead>
<tr>
<th>CONTENTS</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Feed-Back on Assignment 01</td>
</tr>
<tr>
<td>2. Feed-Back on Assignment 02</td>
</tr>
<tr>
<td>3. Feed-Back on the self-evaluation assignment</td>
</tr>
<tr>
<td>4. Concluding Remarks</td>
</tr>
</tbody>
</table>
You had to do the following:

State whether the following statements regarding the constitutional concepts are True (1) or False (2):

(a) Cooperative government deals with the division of state power among the legislature, the executive and the judiciary.

(b) An inflexible constitution enjoys a higher status than the ordinary laws of the land and requires special procedures for its amendment.

(c) In a parliamentary system of government the head of state and the head of government are the same persons.

(d) The rule of law as espoused by Dicey has been transplanted into South African law.

(e) Democratic states are governed by autocratic individuals who are obsessed with enjoying absolute power to govern. [10]

Your should have answered as follows:

<table>
<thead>
<tr>
<th>QUESTION</th>
<th>ELECTION</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>FALSE (2) - See study units 5 and 6 of your study guide.</td>
</tr>
<tr>
<td>B</td>
<td>TRUE (1) - See page 26 of your study guide.</td>
</tr>
<tr>
<td>C</td>
<td>FALSE (2) - See page 47 of your study guide.</td>
</tr>
<tr>
<td>D</td>
<td>FALSE (2) - See pages 40 and 41 of the study guide.</td>
</tr>
<tr>
<td>E</td>
<td>FALSE (2) - See pages 43-45 of your study guide.</td>
</tr>
</tbody>
</table>

2 FEED-BACK ON ASSIGNMENT 2

Study the cartoon on page 182 of your study guide and give a critical discussion of whether the mechanisms that are in place for protecting the integrity of the courts are sufficient for that purpose. You may refer to other sources in your discussion. [15]

Your should have answered the question more or less on the following lines:

Introduction

Would you agree that the cartoon suggests that there is the possibility of bribery and corruption in the judicial system? If you agree that it does, then the next question is obviously: Are there mechanisms in place to ensure that the judiciary acts in an impartial and independent manner, without fear or favour or prejudice, and that prevent the judiciary from engaging in improper conduct?

In study unit 5 of the study guide you also learned about the counter-majoritarian
dilemma that questioned judges' legitimacy on the grounds that they are appointed to the bench, and not elected in terms of an electoral process.

The above issues raise serious concerns about the independence and impartiality of the courts.

**Body**

**Apart from mentioning the personal and functional independence of the courts you had to critically evaluate whether the mechanisms are sufficient to keep members of the judiciary from acting unlawfully. Students would then of course have come to their own individual conclusions**

**Meaning of judicial independence**

The *trias politica* doctrine, as discussed in study unit 5 of the study guide, is firmly embedded in the 1996 Constitution. One of the consequences of this doctrine is the independence of the judiciary. This means that the idea of judicial independence goes hand in hand with the doctrine of separation of powers. It entails that the courts are subject only to the law, and that no person or institution may interfere with the functioning of the courts. The independence of the judiciary is a vital ingredient of the constitutional state. The reason is obvious: if judges can be told what to do by politicians (or by business or other interest groups) there is little chance that the courts will be an effective mechanism for preventing the abuse of power.

The independence of the judiciary is firmly entrenched in the South African Constitution. The Constitution contains both a general provision that guarantees the principles of judicial independence and noninterference by other organs of state (s 165) and several other specific provisions pertaining to the appointment, salaries, removal and terms of office of judges.

Rautenbach and Malherbe (*Constitutional law* 220–223) distinguish between the personal and functional independence of the courts.

**Functional independence**

Functional independence is primarily an incidence of the separation-of-powers doctrine. Functional independence refers to the way in which the courts operate within the framework of a constitutional state.

In the Canadian case of *The Queen in Right of Canada v Beauegard* (1986) 30 DLR (4th) 481 (SCC) 491 Dickson CJ spoke of the core principle central to the independence of the judiciary as the "complete liberty of individual judges to hear and determine cases before them independent of, and free from, external influences or influence of government, pressure groups, individuals or even other judges". This means that judicial power is exercised by the judiciary, and may not be usurped by the legislature, the executive or any other institutions. Judicial officers exercise their powers subject only to the Constitution and the law, not to the whims of public opinion or of the majority in Parliament.

Through the years, the functional independence of the South African judiciary was threatened on more than one occasion. The most famous (or infamous!) example
occurred during the 1950s, when Parliament attempted to set up a High Court of Parliament that 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 of the Appellate Division (Harris v Minister of Interior 1952 (2) SA 428 (A)), in which it declared the Separate Representation of Voters Act 46 of 1951 unconstitutional, on the ground that it was not adopted in accordance with the correct procedure for constitutional amendments. (The Separate Representation of Voters Act aimed to remove "coloured voters" from the common voters' roll.) The High Court of Parliament subsequently reversed the decision in the Harris case and upheld the validity of the Separate Representation of Voters Act.

The validity of the High Court of Parliament Act was attacked in Minister of the Interior v Harris 1952 (4) SA 769 (A) (the "second Harris case"). It was argued that Parliament was endeavouring to assume the role and functions of the Court and was trying to act as judge, jury and executioner. The Cape Provincial Division accepted this argument, and so did the Appellate Division. The Appellate Division found that the High Court of Parliament was no court of law, but was merely Parliament in a different guise. The Act was therefore invalidated.

Section 165 of the 1996 Constitution seeks to prevent such a situation from ever arising again. Subsection (1) states that the judicial authority is vested in the courts; subsection (2) recognises the independence of the courts; and subsection (3) provides that no person or organ of state may interfere with the functioning of the courts. Subsection (4) goes even further, and enjoins organs of state to assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness.

Another factor that contributes 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. In May v Udwin 1981 (1) SA 19 (A), the following was stated:

"Public interest in the due administration of justice requires that a judicial officer, in the exercise of his judicial function, should be able to speak his mind freely without fear of incurring liability for damages of defamation".

The reason for this rule is obvious. Judicial officers would not be able to perform their tasks competently if they could be sued for defamation every time they expressed an unfavourable view about a litigant or the credibility of a witness during the course of giving judgment.

**Personal independence**

Personal independence, which is also known as institutional independence, is secured by making sure that judicial officers are satisfied with their conditions of service and will not, therefore, derogate from performing their core functions.

The personal independence of judges is determined by the following:

(a) The manner in which they are appointed. Are they simply appointed by the President or the majority party in Parliament? Or are there mechanisms in place to ensure that judges will not be seen as mere political appointees who
are unlikely to act independently and impartially?

(b) Their terms of office. If judges are appointed for a fixed, nonrenewable period, they will not need to seek the favour of politicians in order to be reappointed.

(c) Their security of tenure. It would have serious consequences for judicial independence if the executive were in a position to dismiss judges more or less arbitrarily.

(d) Their conditions of service. Politicians should not be in a position to determine the salaries of judicial officers in an arbitrary manner.

The Constitution seeks to safeguard the personal independence of judges in the following ways:

(e) We have already seen that the Judicial Service Commission plays an important role in the appointment of judges. The involvement of the Judicial Service Commission makes it more difficult for the executive merely to appoint its own loyal supporters.

(f) Section 176 of the Constitution provides that judges of the Constitutional court are appointed for a non-renewable term of 12 years. (However, they must retire at the age of 70 years.) Other judges may serve office until the age of 75 years, or until they are discharged from active service in terms of an Act of Parliament. This means that judges enjoy security of tenure, so that there is no need for them to seek the favour of politicians to make sure that they keep their jobs.

(g) The Constitution makes it difficult for the executive to dismiss judges. Section 177 clearly stipulates the circumstances under which a judicial officer may be compelled to vacate his or her position before the termination of his or her term of office. The President may remove a judge from office only if the Judicial Service Commission finds that he or she suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct, and if the National Assembly has called for his or her removal by a resolution adopted with the support of at least two-thirds of its members.

(h) Section 176(3) provides that the salaries, allowances and other benefits of judicial officers may not be reduced.

Conclusion

Based on your evaluation you should then have made your concluding remarks.

3 FEED-BACK ON THE SELF-ASSESSMENT ASSIGNMENT

Read the following passage and answer the questions that follow:

Prior to 1996, the courts had recognised and acknowledged that intergovernmental cooperation was indispensable in a state where devolution of state authority had taken place.
(a) Identify the section(s) in the 1996 Constitution that confirm that intergovernmental cooperation forms an integral part of state activity.

**Sections 40 and 41 of the Constitution**

(b) Briefly discuss the two cases that dealt with the issue of cooperative government prior to the 1996 Constitution coming into effect.

Your answer should have contained a discussion of the following cases:

In *In re: Certification of the Constitution of the Republic of South Africa*, 1996 1996 (10) BCLR 1253 (CC) pars 287-292, the Constitutional Court considered the objection that chapter 3 of the new constitutional text detracts from the autonomy of the provinces. It was argued, in this case, that chapter 3 of the constitutional text, and in particular the requirement that the different spheres of government should avoid legal proceedings against each other (s 41(1)(h)(vi) read with s 41(3)), violated Constitutional Principle XX. Constitutional principle XX provided that the allocation of powers between different levels of government should be done on the basis of recognising “legitimate provincial autonomy”.

The Constitutional Court stressed that the Constitutional Assembly was free to choose a model of cooperative government rather than one of competitive or divided federalism. It rejected the notion that section 41 outlaws litigation between organs of state. Moreover, the fact that it is left to an Act of Parliament to establish the necessary structures and institutions, and to prescribe the mechanisms and procedures for facilitating the settlement of intergovernmental disputes, is not invasive of provincial autonomy (par 291).

At paragraph 290 the Court concluded that intergovernmental cooperation is implicit in any system where powers have been allocated concurrently to different levels of government. The fact that the 1996 Constitution has made explicit what would otherwise have been implicit cannot, in itself, constitute a failure to promote or recognise the need for legitimate provincial autonomy.

The Court also rejected the contention that chapter 3 placed certain obligations on the provinces that restricted and diminished the powers of the provinces. The court found this argument to be unpersuasive on the premise that any suggested diminution of the powers of the provinces was balanced by a corresponding reciprocal reduction in the reciprocal powers of the national government.

In *In re: the National Education Policy Bill No 83 of 1995* 1996 (4) BCLR 518 (CC), the Constitutional Court considered the constitutionality of draft legislation that imposed an obligation on provincial governments to cooperate with the national government. The National Education Policy Bill empowered the national minister of education (in the event that the standards of education provision, delivery and performance in a province do not comply with the Constitution or with national policy) to require the MEC for education in that province to submit a plan to remedy the situation. The Court rejected the argument that this provision is unconstitutional. It stated (pars 34--35) the following:
“Where two legislatures have concurrent powers to make laws in respect of the same functional areas, the only reasonable way in which these powers can be implemented is through cooperation. And this applies as much to policy as to any other matter. It cannot therefore be said to be contrary to the Constitution for Parliament to enact legislation that is premised on the assumption that the necessary cooperation will be offered, and which requires a provincial administration to participate in cooperative structures and to provide information or formulate plans that are reasonably required by the minister and are relevant to finding the best solution to an impasse that has arisen.

Clauses 8(6) and (7) of the Bill contemplate a situation in which a provincial political head of education may be called upon to secure the formulation of a plan to bring education standards in the province into line with the Constitution or with national standards. All education policy, national or provincial, must conform with the Constitution. If national standards have been formulated and lawfully made applicable to the provinces in accordance with the Constitution, those must also be complied with. The effect of clauses 8(6) and (7) is therefore to give the province concerned an opportunity of addressing the alleged shortfall in standards itself, and of suggesting the remedial action that should be undertaken. And this is so even if the national standards have been formulated, but have not yet been made the subject of legislation. The alternative would be for the government to act unilaterally and to take decisions without allowing the province this opportunity”.

(c) Briefly discuss the Western Cape decision on whether section 41(1)(g) had been violated or not.

Refer to pages xiv to xix of your study guide for the answer.

4 CONCLUDING REMARKS

We hope that the above commentary helps you understand what is expected of you in this course.

NOTE:

Two cases were omitted from the Reader by Unisa Press. We apologise for the inconvenience and have attached them to this tutorial letter.

Good luck with your studies!

Your lecturers
EX PARTE THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA: IN RE: CONSTITUTIONALITY OF THE LIQUOR BILL

Decided on: 11 November 1999

CAMERON AJ:

Introduction
[1] The legislation before us is inchoate. Parliament has passed a Bill, but it has not received the assent of the President, who referred it to this Court for a decision on its constitutionality. This is the first time that the provisions of the 1996 Constitution (“the Constitution”) allowing for such a referral have been invoked, and our decision requires consideration of what that procedure entails as well as of the questions raised concerning the Bill’s constitutionality.

[2] The Liquor Bill was introduced in the National Assembly on 31 August 1998. It passed through various legislative stages in terms of section 76(1) of the Constitution before Parliament approved it on 2 November 1998. When the Bill was sent to the President for his assent, he declined to grant it. Instead, because he had reservations about its constitutionality, he referred it back to the National Assembly on 22 January 1999 for reconsideration. On 3 March 1999, the National Assembly resolved that “the House, having reconsidered the Liquor Bill [B 131B-98], returns it to the President”. No amendments had been effected. On 8 March 1999, the President referred it to this Court for a decision on its constitutionality. In doing so, he invoked his power pursuant to section 84(2)(c) of the Constitution, which provides that the President is responsible for “referring a Bill to the Constitutional Court for a decision on the Bill’s constitutionality” [all footnotes omitted].

…

Presidential Referral Under Section 79

[6] Our decision requires us to consider first what the referral to this Court by the President for a decision on a Bill’s constitutionality entails. The Constitution, which subjects all legislation to review for its constitutionality, and makes any law inconsistent with it invalid,3 embodies three routes to judicial consideration of the constitutionality of legislation passed by Parliament. One is a challenge by an interested party in a competent Court under one or more provisions of the Constitution. Another is an application by at least one third of the members of the National Assembly to the Constitutional Court for an order declaring all or part of an Act of Parliament unconstitutional. The third is that invoked in the present case, namely referral by the President before a Bill becomes a statute.

…

[10] The procedure the President must follow when referring a Bill to this Court is set out in section 79.20 In terms of section 79(1) the President must either assent to and sign a Bill passed by Parliament, or, if he has reservations about its constitutionality, refer it back to the National Assembly for reconsideration. Section 79(4) then provides:

“If, after reconsideration, a Bill fully accommodates the President’s reservations, the President must assent to and sign the Bill; if not, the President must either —
(a) assent to and sign the Bill; or
(b) refer it to the Constitutional Court for a decision on its constitutionality.”
[11] Three related questions require clarification in the light of the President’s invocation of this procedure:

(a) Is the Court required to consider only the reservations the President has expressed, or can and should it direct its attention more widely?
(b) Should the Court in determining the Bill’s “constitutionality” examine its every provision so as to certify conclusively that in every part it accords with the Constitution?
(c) Does the Court’s finding regarding the Bill’s constitutionality or otherwise preclude or restrict later constitutional adjudication regarding its provisions once enacted?

[12] Section 79(5) requires a decision from this Court as to whether “the Bill is constitutional”. In terms of section 167(4)(b), only the Constitutional Court may decide on the constitutionality of any parliamentary Bill, but may do so only in the circumstances anticipated in section 79. The general powers of the courts in dealing with constitutional matters are set out in section 172. That section requires that a Court when deciding a constitutional matter within its power “must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency”. Since the Bill has not yet been enacted, it is clearly not a “law” as envisaged by section 172(1). Moreover, since the Bill as yet lacks legal force, the remedy section 172 envisages — a declaration of invalidity — is plainly inappropriate. It follows that the provisions of section 172 are not directly helpful in guiding the Court as to its role in the section 79 referral procedure.

[13] The terms of section 79 contrast with those of section 80, which empowers members of the National Assembly to seek an order that “all or part” of an Act of Parliament is unconstitutional. The contrasting wording of section 79 may seem to suggest that this Court is obliged to audit the whole of a Bill so as to determine its constitutionality comprehensively and conclusively. But this impression is countered by the fact that section 79 clearly envisages that the President’s “reservations” must be specified when he refers a Bill back to Parliament. Section 79(3)(a) requires that the National Council of Provinces participate in the reconsideration of the Bill if the President’s reservations are of a specific kind — namely if they relate to “a procedural matter that involves the Council”; while section 79(4) requires the President to assent to and sign the Bill if after reconsideration it “fully accommodates” his reservations. Both provisions entail that the President must itemise his reservations in relation to a Bill.

[14] It is moreover clear that the President is empowered to refer a matter to this Court in terms of section 79 only if his reservations concerning the constitutionality of the Bill are not fully accommodated by Parliament. If the President has no reservations concerning the constitutionality of the Bill, or if his reservations have been fully accommodated by Parliament, the referral would be incompetent. In the circumstances, the presidential power is limited under section 79(4)(b) to the power to refer a Bill to the Constitutional Court “for a decision on its constitutionality” with respect to his reservations. Section 79(5) must thus be read as subject to a comparable limitation, empowering the Court to make a decision regarding the Bill’s constitutionality only in relation to the President’s reservations.
[15] This makes it clear, in answer to the first question posed in para 11 above, that the Court considers only the President’s reservations. Whether it may ever be appropriate for the Court upon a presidential referral to consider other provisions which are manifestly unconstitutional, but which are not included in the President’s reservations, need not be decided now.

[16] By corollary (as Mr Wallis, who appeared with Mr Govindsamy for the Minister, submitted) section 79 does not entail a “mini-certification” process. The specificity required of the President in spelling out his reservations plainly negatives the notion that this Court’s function is to determine, once and for all, whether a Bill accords in its entirety with the Constitution. What section 79 entails is that in deciding on the constitutionality of the Bill this Court must in the first instance consider the reservations the President specified when he invoked the section 79 procedure. This contrasts with the function the interim Constitution required this Court to fulfil at the time of the adoption of the 1996 Constitution. There its task was to render a “final and binding” decision on whether “all” the provisions of the 1996 Constitution conformed with the Constitutional Principles enumerated in the interim Constitution. The answer to the second question posed in para 11 above is therefore No.

...  

[20] The referral procedure in my view requires this Court to give a decision in terms of section 79(5) relating to the President’s reservations, and the submissions regarding those reservations made by parties represented in the National Assembly, and thereby to decide on a Bill’s constitutionality. However, regarding the third question posed in paragraph 11 above, even if this Court does decide that the Bill is constitutional, supervening constitutional challenges after it has been enacted are not excluded, save to the extent that this Court has in deciding the questions the President placed before it in the section 79 proceedings already determined them. In this regard, the well-established principle that a Court of final appeal will not depart from its previous decisions unless they are shown to have been clearly wrong has obvious relevance.
Executive Council of the Western Cape v minister of Provincial Affairs and Another; 
Executive Council of KwaZulu-Natal v President of the Republic of South Africa 1999 (12) BCLR 1353 (CC)

Decided on: 15 October 1999

NGCOBO J:

INTRODUCTION

[1] These two cases raise important questions relating to the authority to establish municipalities and their internal structures. They arise out of a dispute between the governments of the Western Cape and KwaZulu-Natal, on the one hand, and the national government on the other. The dispute concerns the constitutionality of certain provisions of the Local Government: Municipal Structures Act, No 117 of 1998 (“the Structures Act”) … [all foot notes omitted].

THE CONSTITUTIONAL CHALLENGE

[22] The constitutional challenges can be divided into two main groups. First, it was contended that the provisions of the Structures Act encroach on the powers of the provinces. This challenge concerned in particular the provincial power to establish municipalities in terms of section 155(6) of the Constitution. Second, it was contended that the Structures Act encroaches on the constitutional powers of municipalities. This challenge related in particular to a municipal council’s power to elect executive committees or other committees in violation of section 160(1)(c) of the Constitution and their power to regulate their internal affairs in terms of section 160(6) of the Constitution.

[23] In regard to both these complaints, the national government contended that although the Constitution allocates powers to provinces and municipalities in Chapter 7, it does not deprive Parliament of legislating in relation to the same matters. The broad contention advanced by the national government was that, in terms of section 44(1)(a)(ii) of the Constitution, Parliament has legislative capacity in all fields other than the exclusive powers referred to in Schedule 5. The powers vested in the provinces and municipalities in Chapter 7 of the Constitution are accordingly concurrent with those of the national government, so it was argued. This broad contention shall be considered before I turn to the specific challenges themselves.

THE CONCURRENCY ARGUMENT

[24] In order to set the stage on which the constitutional challenges will be considered, it is necessary first to consider the contention by the national government that in terms of section 44(1)(a)(ii) it has, except for matters falling within Schedule 5, concurrent powers with the provinces and municipalities.

[25] The legislative power vested in Parliament by section 44(1)(a)(ii) “to pass legislation with regard to any matter . . . excluding, subject to subsection (2), a matter within
a functional area listed in Schedule 5” must be exercised, in terms of subsection (4), “in accordance with, and within the limits of, the Constitution”. Thus, where on a proper construction of the Constitution such limits exist, they constrain the residual power of Parliament.

[26] There are a number of such constraints in the Constitution. The most obvious example is the power to pass or amend a provincial constitution which, on a proper construction of section 104(1) of the Constitution, is clearly an exclusive provincial competence. Other provisions of the Constitution also place constraints on the powers of Parliament. A few examples are: the provisions of Chapter 2, the “manner and form” procedures prescribed by the Constitution for the passing of legislation, the entrenchment of the judicial power in the courts by Chapter 8, the protection given to state institutions protecting democracy by Chapter 9, legislation sanctioning the withdrawal of money from a provincial revenue fund which, apart from the provisions of the Constitution, is an exclusive provincial competence, and the fiscal powers of provinces and municipalities which in terms of Chapter 13 are subject to regulation, but not repeal, by Parliament.

[27] The question then is whether, on a proper construction of Chapter 7 of the Constitution dealing with local government, the provinces are correct in contending that there are certain constraints upon Parliament’s powers. If regard is had to the plan for local government set out in Chapter 7, we see that there is indeed a comprehensive scheme set out in the Chapter for the allocation of powers between the national, provincial and local levels of government. That is apparent not only from the way the Chapter is drafted, with the allocation of specific powers and functions to different spheres of government, but also from the provisions of section 164 that:

“Any matter concerning local government not dealt with in the Constitution may be prescribed by national legislation or by provincial legislation within the framework of national legislation.”

[28] The submission that Parliament has concurrent power with the other spheres of government in respect of all powers vested in such spheres by Chapter 7 is inconsistent with the language of the provisions of Chapter 7 itself, and cannot be reconciled with the terms of section 164. If Parliament indeed had full residual power in respect of all matters referred to in Chapter 7, there would have been no need for the reference in section 164 to “any matter not dealt with in the Constitution”. The only explanation that Mr Trengove could offer for this conundrum was that the provision was necessary because national legislation includes subordinate legislation. But this is no answer. If subordinate legislation was contemplated one would expect that to have been referred to specifically. In any event, if Parliament has residual powers in respect of all matters dealt with in Chapter 7, that would include the power to pass laws dealing with such matters and to sanction the making of subordinate legislation if that should be necessary. The power to sanction subordinate legislation is an incident of the legislative power, and does not require a provision such as section 164. It is necessary, therefore, to consider the allocation of powers made in Chapter 7 and to decide whether, on a proper construction of each of those provisions, they constrain Parliament in the manner contended for by the provinces.

[29] Municipalities have the fiscal and budgetary powers vested in them by Chapter 13 of the Constitution, and a general power to “govern” local government affairs. This general power
is “subject to national and provincial legislation”. The powers and functions of municipalities are set out in section 156 but it is clear from sections 155(7) and 151(3) that these powers are subject to supervision by national and provincial governments, and that national and provincial legislation has precedence over municipal legislation. The powers of municipalities must, however, be respected by the national and provincial governments which may not use their powers to “compromise or impede a municipality’s ability or right to exercise its powers or perform its functions” (emphasis supplied). There is also a duty on national and provincial governments “by legislative and other measures” to support and strengthen the capacity of municipalities to manage their own affairs and an obligation imposed by section 41(1)(g) of the Constitution on all spheres of government to “exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere”. The Constitution therefore protects the role of local government, and places certain constraints upon the powers of Parliament to interfere with local government decisions. It is neither necessary nor desirable to attempt to define these constraints in any detail. It is sufficient to say that the constraints exist, and if an Act of Parliament is inconsistent with such constraints it would to that extent be invalid.

[30] Chapter 7 of the Constitution also allocates powers and functions to national and provincial governments in relation to the establishment and supervision of local governments. These provisions also place constraints upon the power that Parliament has under section 44. For example, the provision of section 155(5) that “[p]rovincial legislation must determine the different types of municipality to be established in the province” is the allocation of a specific power to the provincial level of government. National legislation inconsistent with such provisions would also be inconsistent with the Constitution and to that extent invalid.

ESTABLISHMENT POWERS

[Ngcobo J then inquired into the constitutionality of certain provisions of the Structures Act. He found, inter alia, that section 4 and 5 were unconstitutional. These provisions vested certain powers in the Minister which, upon Ngcobo J’s interpretation of the Constitution, had to be vested in an independent authority (i.e. the Demarcation Board). The majority of the Court agreed with Ngcobo J’s interpretation. However, in a dissenting judgement, O’Regan J found that the Constitution does not specify by whom these powers must be exercised, and that Parliament may therefore, in terms of section 164, regulate these matters. The Court then considered the constitutionality of section 13 of the Act.]

[77] Section 13 provides:

“(1) The Minister, by notice in the Government Gazette, may determine guidelines to assist MECs for local government to decide which type of municipality would be appropriate for a particular area.

(2) An MEC for local government must take these guidelines into account when establishing a municipality in terms of section 12 or changing the type of a municipality in terms of section 16(1)(a).”

[78] The provinces contended that Parliament has no powers to prescribe to the provinces guidelines which they must take into account in the exercise of their legislative power to determine the types of municipality that may be established in the provinces.
On its face, the issue raised by the provinces may appear to be insignificant. However, upon a proper consideration, the issue is not a trivial one. It goes to the fundamental principle of the allocation of powers between the national government and the provincial governments. This principle is entrenched, for instance, in section 41(1)(e) of the Constitution (all spheres of government must respect the constitutional status, institutions, powers and functions of government in the other spheres); section 41(1)(g) (spheres of government must exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere); and section 44(4) (when exercising its legislative authority, Parliament must act in accordance with, and within the limits of, the Constitution). These provisions must be understood in the light of the supremacy of the Constitution, set out in section 2 of the Constitution, which provides:

“This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid . . .”

All these provisions underscore the significance of recognising the principle of the allocation of powers between national government and the provincial governments. The Constitution therefore sets out limits within which each sphere of government must exercise its constitutional powers. Beyond these limits, conduct becomes unconstitutional. This principle was given effect to by this Court in Fedsure when it said:

“It seems central to the conception of our constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law.”

Limits on the powers and functions on each sphere of government must therefore be observed. The enquiry, therefore, is whether the impugned provisions deal with a matter which falls within the powers conferred upon the sphere of government enacting the challenged provision. If it does not fall within its powers, that sphere of government has acted outside its powers and the impugned legislation cannot stand. The importance or otherwise of the matter in issue is not relevant. It is the principle that is relevant and which must be given effect to.

The question, therefore, is whether what section 13 purports to do falls within the powers conferred upon the national government. Section 155(5) confers on the provinces the power to determine the different types of municipalities which may be established within a province. This power must necessarily include the legislative and executive power to establish the types in the provinces and to determine in which areas the types are to be established. Section 155(5) must be read with section 155(6), which deals with the establishment of municipalities. Read together, these two provisions mean that in relation to the establishment of categories of municipality in the province, the provincial governments have executive powers only, while in relation to the establishment of the types of municipalities, provincial governments have both the legislative and executive powers.

Section 13 of the Structures Act, in peremptory terms, tells the provinces how they must set about exercising a power in respect of a matter which falls outside the competence of the national government. It is true that the MEC is only required to take the guidelines into account, and is not obliged to implement them. That the MEC, having taken the guidelines
into account, is not obliged to follow them, matters not. Nor is the fact that the Minister may
decide not to lay down any guidelines, of any moment. What matters is that the national
government has legislated on a matter which falls outside of its competence.

[84] Section 13 deals with a matter which section 155(5) of the Constitution vests in
provincial legislatures, namely the determination of “the different types of municipality to be
established in the province”. The section is, therefore, inconsistent with section 155(5) of the
Constitution.

[120] Section 159(1) of the Constitution provides:

“The term of a Municipal Council may be no more than five years, as determined by
national legislation.”

[121] The constitutional attack on section 24 is premised on the proposition that it constitutes
an impermissible assignment of plenary legislative power to the Minister, and that it does not
constitute “subordinate legislation” within the meaning of section 239 of the Constitution.107
Section 24 provides:

“(1) The term of municipal councils is no more than five years as determined by the
Minister by notice in the Government Gazette, calculated from the day following
the date or dates set for the previous election of all municipal councils in terms
of subsection (2).
(2) Whenever necessary, the Minister, after consulting the Electoral Commission,
must, by notice in the Government Gazette, call and set a date or dates for an
election of all municipal councils, which must be held within 90 days of the date
of the expiry of the term of municipal councils . . .”

[122] The authority of Parliament to delegate its law-making functions is subject to the
Constitution, and the authority to make subordinate legislation must be exercised within the
framework of the statute under which the authority is delegated.

[123] The competence of Parliament to delegate its law-making function was recognised by
this Court in Executive Council, Western Cape. The Court held:

“The legislative authority vested in Parliament under s37 of the Constitution is expressed
in wide terms - ‘to make laws for the Republic in accordance with this Constitution’. In
a modern State detailed provisions are often required for the purpose of implementing and
regulating laws and Parliament cannot be expected to deal with all such matters itself.
There is nothing in the Constitution which prohibits Parliament from delegating
subordinate regulatory authority to other bodies. The power to do so is necessary for
effective law-making. It is implicit in the power to make laws for the country and I have
no doubt that under our Constitution Parliament can pass legislation delegating such
legislative functions to other bodies. There is, however, a difference between delegating
authority to make subordinate legislation within the framework of a statute under which
the delegation is made, and assigning plenary legislative power to another body, including
. . . the power to amend the Act under which the assignment is made.”

[124] Although the Court was concerned with the interim Constitution, it seems to me that
the same principle applies to the present Constitution. It is a principle of universal application
which is recognised in many countries. This authority is, of course, subject to the
Constitution. The enquiry is whether the Constitution authorises the delegation of the power in question. Whether there is constitutional authority to delegate is therefore a matter of constitutional interpretation. The language used in the Constitution and the context in which the provisions being construed occur are important considerations in that process.

[125] The Constitution uses a range of expressions when it confers legislative power upon the national legislature in Chapter 7. Sometimes it states that “national legislation must”; at other times it states that something will be dealt with “as determined by national legislation”; and at other times it uses the formulation “national legislation may”. Where one of the first two formulations is used, it seems to me to be a strong indication that the legislative power may not be delegated by the legislature, although this will of course also depend upon context.

[126] Section 159(1) of the Constitution makes it clear that all municipal councils will have a uniform term of office, subject to a maximum of five years. It requires national legislation to determine such term of office by using the expression “as determined by legislation”. The term so established is subject to the prescribed maximum of five years. Section 159(2) requires that a municipal election be held within 90 days of the date that the previous council was dissolved or its term expired. The term of office of an elected legislative body such as a municipal council is a crucial aspect of the functioning of that council. In the case of the National Assembly, section 49(1) of the Constitution determines the term, and in the case of the provincial legislatures, section 108(1) of the Constitution determines the terms. Given its importance in the democratic political process, and given the language of section 159(1), the conclusion that section 159(1) does not permit this matter to be delegated by Parliament, but requires the term of office to be determined by Parliament itself, is unavoidable. In addition to the importance of this matter, I also take cognizance of the fact that it is one which Parliament could easily have determined itself for it is not a matter which requires the different circumstances of each municipal council to be taken into consideration. All that is required is to fix a term which will apply to all councils. In my view, this is not a matter which the Constitution permits to be delegated. The delegation was, therefore, impermissible and section 24(1) must be held to be inconsistent with section 159(1) of the Constitution.