

CONSTITUTIONAL HANDBOOK

FOR

MEMBERS OF THE EXECUTIVE

compiled by

The Department of Constitutional Development

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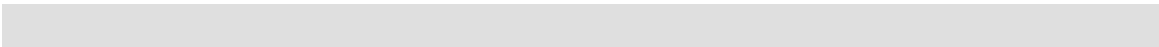


Table of Contents

Item	Page Number
Foreword	4
Glossary	5
Introduction	12
1. Structure of government	14
2. Explanatory notes on the structure of government	18
2.1 National Government	
2.2 Provincial Government	
2.3 Local Government	
2.4 State departments	
2.5 Constitutional Institutions Supporting Democracy	
CHAPTER ONE: THE PRESIDENT AND THE NATIONAL EXECUTIVE	22
1. Introduction	22
2. President	23
2.1 Election of President	
2.2 Powers and functions of the President	
2.3 The President as Head of the National Executive	
2.4 Executive acts of the President	
2.5 The procedure for obtaining the President's approval of executive acts	
2.6 The President's role in respect of Parliament	
3. Acting President	26
4. Cabinet	26
5. The Deputy President	27
6. Cabinet Ministers	27
6.1 Appointment	
6.2 Code of ethics	
6.3 Powers and functions of Ministers	
6.4 Political/administrative interface between Ministers and Directors-General	
6.5 Accountability	
6.6 Relationship with Parliament	
6.7 The role of Ministers in the legislative process	
6.8 Concurrent and Exclusive competencies and the power of intervention	
6.9 Parliamentary oversight role over the Executive	

6.10	Responsibilities towards intergovernmental structures		
6.11	Relationship with caucus		
6.12	Role of the States Attorney		
6.13	Role of the State Law Advisor		
6.14	Relationship with the electorate		
CHAPTER TWO: FINANCE		36	
1.	Introduction		36
2.	Treasury	36	
3.	The Auditor-General		37
4.	The Financial and Fiscal Commission	38	
5.	The South African Reserve Bank	38	
6.	Budgetary Processes		39
7.	Financial responsibilities of executive authorities	40	
8.	Procurement		40
CHAPTER THREE: BILL OF RIGHTS		41	
1.	Introduction		41
2.	Equality	42	
3.	Labour relations	42	
4.	Freedom of expression	43	
5.	Political Rights	43	
6.	Access to information		43
7.	Just administrative action	44	
8.	Socio-economic rights in the Bill of Rights	44	
9.	Limitation of rights		44
CHAPTER FOUR: PROVINCIAL EXECUTIVES		46	
1.	Introduction		46
2.	Premier	47	
	2.1 Appointment		
	2.2 Powers and functions		
	2.3 Formal requirements for executive decisions		
3.	Executive Council		47
	3.1 Composition		
	3.2 Powers and functions		

4.	National supervision of provincial government	49	
5.	Provincial supervision of local government	49	
6.	Provincial constitutions	49	
CHAPTER FIVE: INTERNATIONAL AGREEMENTS		50	
1.	Introduction		50
2.	Negotiating and signing of international agreements	50	
3.	Ratification and accession in international law	50	
4.	“National” or “Domestic” approval	50	
5.	Agreements requiring approval by Parliament	51	
6.	International agreements which may be negotiated and signed by the National Executive		52
7.	Authority to sign a series or set of agreements	52	
CONCLUSION		54	
ADDENDUM OF SUMMARIES OF THE CONSTITUTIONAL COURT CASES		55	
REFERENCES		58	
STATUTES			59

FOREWORD

Our young democracy ushered in a new culture of governance which is based on the supremacy of the Constitution and the rule of law. The transformation of South African society and effecting change in a country that has been subjected to colonial and apartheid rule for many decades, remain the greatest challenges facing government since the inception of democracy in 1994. The constitutional values and principles enshrined in the Constitution provide government with the weaponry it requires to transform the country.

As members of the executive, we have been duly mandated by the Constitution, the supreme law of the country, to administer the laws of the Republic and to formulate government policies. This Handbook is a simplified manual which is intended to familiarise members of the executive with the process of governing the country.

This Handbook is in no way intended to substitute other resource material that Ministers will need to execute their duties effectively. It must be read with the Constitution, the Ministerial Handbook, the Manual on the Executive Acts of the President and other legislation and policy documents which impact on the powers and functions of the executive authority.

As we are all aware, a Constitutional Review Committee has been established by Parliament to review, on a continuous basis, constitutional matters which influence our constitutional development, with a view to considering constitutional amendments. Therefore, the Handbook will be updated when significant constitutional amendments are made to the Constitution.

I wish to express my profound thanks to the Department of Constitutional Development for its tireless work on this project and the Editorial Board for guiding the drafting process. I also thank the National Democratic Institute for International Affairs and Constitutional Concepts for their invaluable contribution to this work.

SF MUFAMADI
MINISTER FOR PROVINCIAL AND LOCAL GOVERNMENT

GLOSSARY

Accession	An act whereby a State accepts the offer or the opportunity of becoming a party to a treaty already signed by some other States, though not necessarily yet in force. The word ‘accession’ is applied not only to the process of accession, but to the instrument whereby that process is effected. An accession does not require ratification, unless it is made subject to ratification.
Accounting officer	As defined in section 36 of the Public Finance Management Act No. 1 of 1999, in respect of a department, means the head of such department, and in respect of a constitutional institution, the chief executive officer of such constitutional institution.
A constitution	The whole system of government in a country, including all the rules, conventions, practices and customs by which it is conducted.
Administrative act	An act that implements or gives effect to a policy, a piece of legislation or an adjudicative decision. This is the operational side of the state: since policies, laws and judgements are not self-executing, they have to be put into operation by the public authorities responsible for administering them. Administrative acts include every conceivable aspect of state activity, such as granting a licence, promoting an officer, stamping a passport, arresting a suspect, paying out a pension.
‘Applying one’s mind’	When an executive authority is required to apply his or her mind, such executive authority must give full consideration to all the available and relevant information which is at his or her disposal, or which his or her mandate requires to be considered. The executive authority may not approach such an issue with his or her course of action already decided, and may not simply ratify a decision or recommendation taken or made by another executive authority without himself or herself giving due consideration to the matter at hand. (<i>See SARFU v President of the RSA and Others</i>).
‘After consultation’	A member of the executive is allowed to act “after consultation” with a body by consulting and receiving representations or motivation in respect of the subject matter, though he or she is not required to agree with the body consulted. If the member of the executive has a different view, that view should be communicated to the body for its response.
Collective responsibility	The principle that each and every member of the Cabinet is responsible for Cabinet decisions on issues of government policy. He or she must accept, defend and implement it and not disclose any opposition or doubts he or she has to it. If

the Cabinet member is not prepared to accept it, he or she should resign.

Constitutionalism

The doctrine by which the power of the state should be defined and limited by the Constitution in order to protect the interests of society. It upholds the notion of limited government, as opposed to arbitrary rule. The principle of limitation applies in two areas: firstly, it restricts the range of things which a government can do, and secondly, it prescribes the procedures it must follow in implementing those things within its competence.

Constitutional Court

The highest court which can hear and decide on constitutional matters. The judgements of this court are available on the Internet at www.law.wits.ac.za/archive.html

Conventions

Rules of political conduct and morality that are binding on political role-players in a system of responsible government.

Co-operative government	Government by partnership among the three spheres of government in the national interest. This includes the alignment and integration of legislation, government activities and policies, and a duty to avoid conflict.
Delegation of power	When powers are assigned, the authority and duty to exercise them, and the responsibility for their exercise, is transferred in full. A less complete transfer of powers is <i>delegation</i> , where one public authority authorises another to act <i>in its stead</i> . Though the practical necessity of delegation is consistently recognised, the power to delegate does not automatically exist: it must be provided for, either expressly or by implication. There are limits to how much power can be delegated, for example, Parliament cannot delegate its responsibility to make law to the President. (see <i>Executive Council, Western Cape Legislature and Others v President of the Republic of South Africa and Others</i> [all cases referred to can be found in the addendum at the back of the handbook]).
Code of ethics	The code of ethics as envisaged in section 96(1) of the Constitution. The code to be proclaimed by the President will be binding on members of the executive.
General notice	A notice concerning any matter published in the Government Gazette for general information, such as white papers, or invitations for public comments on policy issues, but not necessarily in terms of any specific statutory requirement.
Government Gazette	In its ordinary sense, the official publication of the Government published by the Government Printer in which matters required by law to be published in a Gazette are published. In a legal sense, the Government Gazette, in the case of laws, regulations, notices or other documents published after the commencement of the Constitution and required under any law to be published in an official Gazette, pertains to either the Government Gazette of the Republic or a relevant Provincial Gazette. This is determined by whether the administration of the law concerned or the law conferring the power to make or issue such a proclamation, regulation, notice or other document, vests in, or in a functionary of, the national government or a provincial government.
Government notice	A notice published by the Government in the Government Gazette providing official notice of a matter, such as regulations, announcements, determinations and conventions, as required by law or under authority of a competent executive functionary.
‘In consultation/ in concurrence with’	Where the member of the executive acts “in consultation” with or “in concurrence with” another functionary or body when his or her decision shall require concurrence, or affirmation of that functionary or body. In such a case it

must be stated that the necessary concurrence has been obtained or received.

Intergovernmental relations

A general term referring to the set of multiple formal and informal processes, structures and institutional arrangements for bilateral and multilateral interaction within and between spheres of government.

Interim Constitution

The Constitution of the Republic of South Africa, Act 200 of 1993 which has been repealed by the 1996 Constitution. The Interim Constitution remains significant because many of the Constitutional Court decisions were based on it.

Ministerial responsibility

The principle that the minister in charge of a department of state is answerable to Parliament for everything done by his or her department, whether he/she personally instructed or authorised it or not, as well as in circumstances where he/she ought to have known about it.

Medium Term Expenditure Framework (MTEF)

The Financial Framework that requires the formulation of departmental budgets on a rolling three year basis.

Oath or affirmation

The oath as envisaged in schedule 2 of the Constitution.

‘On the advice of’

Where a member of the executive is required to act on the advice of another person or body, the member of the executive is obliged to consider and follow the advice received, unless the member of the executive has a clear discretion to deviate from the advice.

Organised local government

As envisaged in section 163 of the Constitution, means, the formation of forms of municipal associations by municipalities such as the national organisation, the South African Local Government Association (SALGA) and the respective provincial organisations representing municipalities.

Organ of State

As defined in section 239 of the Constitution, means, any department of state or administration in the national, provincial or local sphere of government; or any other functionary or institution –

- (i) exercising a power or performing a public function in terms of the Constitution or a provincial constitution, such as the Human Rights Commission; or
- (ii) exercising a public power or performing a public function in terms of any legislation, but does not

include a court or a judicial officer, such as any parastatal established by government.

Proclamation

An enactment under a law by a competent authority, having the force of law and being required by such law to be published in the form of a proclamation.

Ratification

This term has two related meanings. Firstly, ratification in a domestic context denotes the process whereby a State puts itself in a position to indicate its acceptance of the obligations contained in a treaty. Secondly, ratification in an international context “is the term for the final confirmation given by the parties to an international treaty concluded by their representatives, and is commonly used to include the exchange of the documents embodying that confirmation”. Instruments of ratification establishing the consent of a State to be bound by a treaty take effect when exchanged between the contracting States, deposited with a depository or notified to the contracting States or to the depository, if so agreed. Ratification, being in part a confirmation of a signature already given, must relate to what the signature relates to, and must therefore relate to the treaty in its entirety, and as such, and not merely to a part of it, unless the treaty itself provides that states may elect to become bound by certain part or parts only.

Regulation

Subordinate legislation having the force of law, promulgated by a competent executive authority under a law. Regulations are ordinarily aimed at regulating specific aspects referred to in the law concerned in greater detail.

Representative and participatory democracy

A form of democracy in which public representatives are directly elected regularly, and make decisions on behalf of and with all citizens participating in such a period.

Rule of law

A legal doctrine of fundamental importance which requires government to be conducted according to law, and in disputed cases, in accordance with judicial decisions. Its purpose is to prevent people from taking the law into their own hands. Rule of Law also refers to a body of political opinion about what the detailed rules of law should provide in matters both of substance and of procedure.

Separation of powers

In its classic sense, that judicial, legislative and executive powers are performed by different branches of government so as to ensure that there are effective checks and balances on one branch by another. In practice overlaps arise between branches of government. For example, a Cabinet member is also a member of the legislature. The role of the Constitutional Court is to oversee these overlaps so as to ensure that one branch of government does not unduly intrude on the functions of another (see *Executive Council*,

Western Cape Legislature and Others v President of the Republic of South Africa and Others)

State


In international law, the State is an independent, political, organised community identified with a defined territory. In political science it is used to refer to the institutions of government and organised political power. A classic sociological definition identifies the state as a human community that claims the monopoly of the legitimate use of physical force within a given territory.

Supremacy of the Constitution

All authority is derived from and exercised in accordance with the Constitution.

The Constitution

The Constitution of the Republic of South Africa , Act No. 108 of 1996.



INTRODUCTION

The Republic of South Africa is one, sovereign, democratic state founded on the following values:

- a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
- b) Non-racialism and non-sexism.
- c) Supremacy of the Constitution and the Rule of Law.
- d) Universal adult suffrage, a common national voters' roll, regular elections and a multiparty system of democratic government, to ensure accountability, responsiveness and openness.

The country's legal system has evolved over time. Members of the executive and legislature have to acquaint themselves not only with the Constitution and constitutional principles, but also with a number of laws which have been introduced by Parliament over many years, in order to be able to discharge their responsibilities.

To lighten their burden, this user-friendly guide has been drafted. It seeks not only to define their constitutional responsibilities, but also summarises the constitutional provisions, laws and principles which govern or relate to their responsibilities. The handbook seeks to serve as a guide which a newly-appointed political office bearer would need before wading through a mass of information which has proved so challenging to the most experienced lawyers. This handbook attempts to do exactly that but is limited to the responsibilities of the executive.

The Constitution sets out the structure of government, separating it into executive, judiciary, and legislative branches. It provides for the appointment of members of the executive, together with a President, a Deputy President and provincial Premiers. It establishes a National Cabinet and nine Provincial Executive Councils. Members of these executive bodies must, after appointment, swear or affirm faithfulness to the Republic of South Africa and obedience to the Constitution in accordance with the provisions of the Constitution.

The role of members of the executive is multifaceted in nature. They are politicians, legislators and leaders of our citizens and supervise administrations. When discharging these functions they act as political heads of departments, serve in party structures, occupy leadership positions within their own political parties, introduce laws, appear before legislative committees, are members of party caucuses and also handle a number of other matters flowing from their membership of a legislature.

In carrying out their responsibilities members of the executive have to be mindful of the vision which the Constitution prescribes for the country.

Chapter 3 of the Constitution explains the concept of co-operative government. The chapter starts by providing that the government of the Republic is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated (section 40 (1)). It then goes on to provide for certain principles of co-operative government and intergovernmental relations which all spheres of government must observe and adhere to.

In terms of these principles all spheres of government and all organs of state within each sphere must:

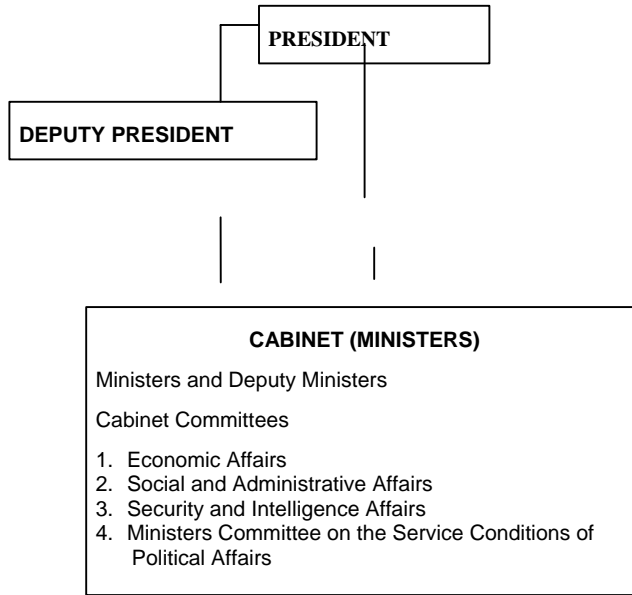
- a) preserve the peace, national unity and the indivisibility of the Republic;
- b) secure the well-being of the people of the Republic;

- c) provide effective, transparent, accountable and coherent government for the Republic as a whole;
- d) be loyal to the Constitution, the Republic and its people;
- e) respect the constitutional status, institutions, powers and functions of government in the other spheres;
- f) not assume any power or functions except those conferred on them in terms of the Constitution;
- g) 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
- h) co-operate with one another in mutual trust and good faith by, *inter alia*, fostering friendly relations, assisting and supporting each other co-ordinating their actions and legislation with one another and avoiding legal proceedings against one another.

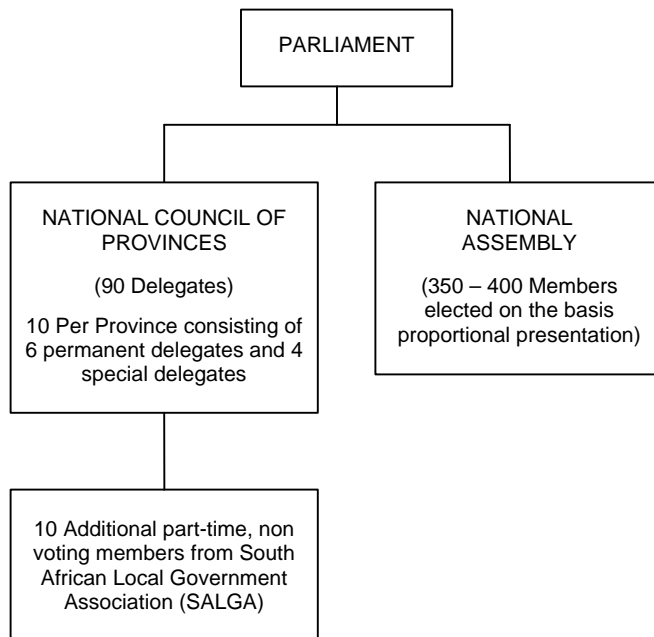
1. Structure of Government

NATIONAL GOVERNMENT

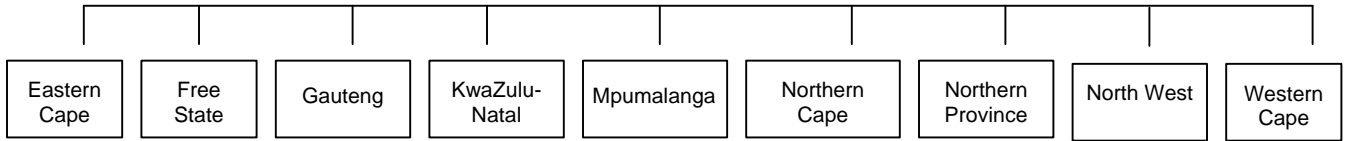
EXECUTIVE AUTHORITY



LEGISLATIVE AUTHORITY



PROVINCES



PROVINCIAL GOVERNMENT

EXECUTIVE AUTHORITY

9 x Premiers

9 x Executive Councils
Members of Executive Councils
(Comprising of not fewer than 5 and
not more than 10 members)

LEGISLATIVE AUTHORITY

9 x Provincial Legislatures
9 x Speaker
- Not less than 30 and not more than 80
members for each Legislature
- Members are elected on the basis of
proportional representation

LOCAL GOVERNMENT

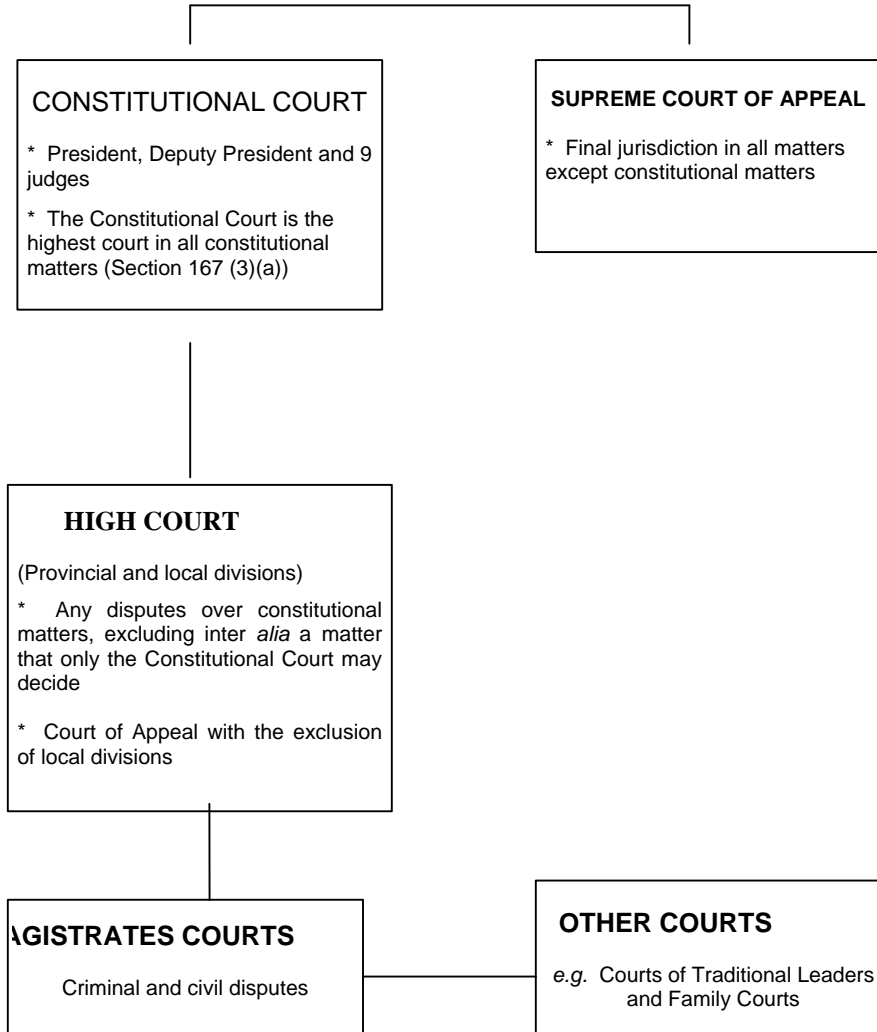
EXECUTIVE AUTHORITY

Municipal Councils

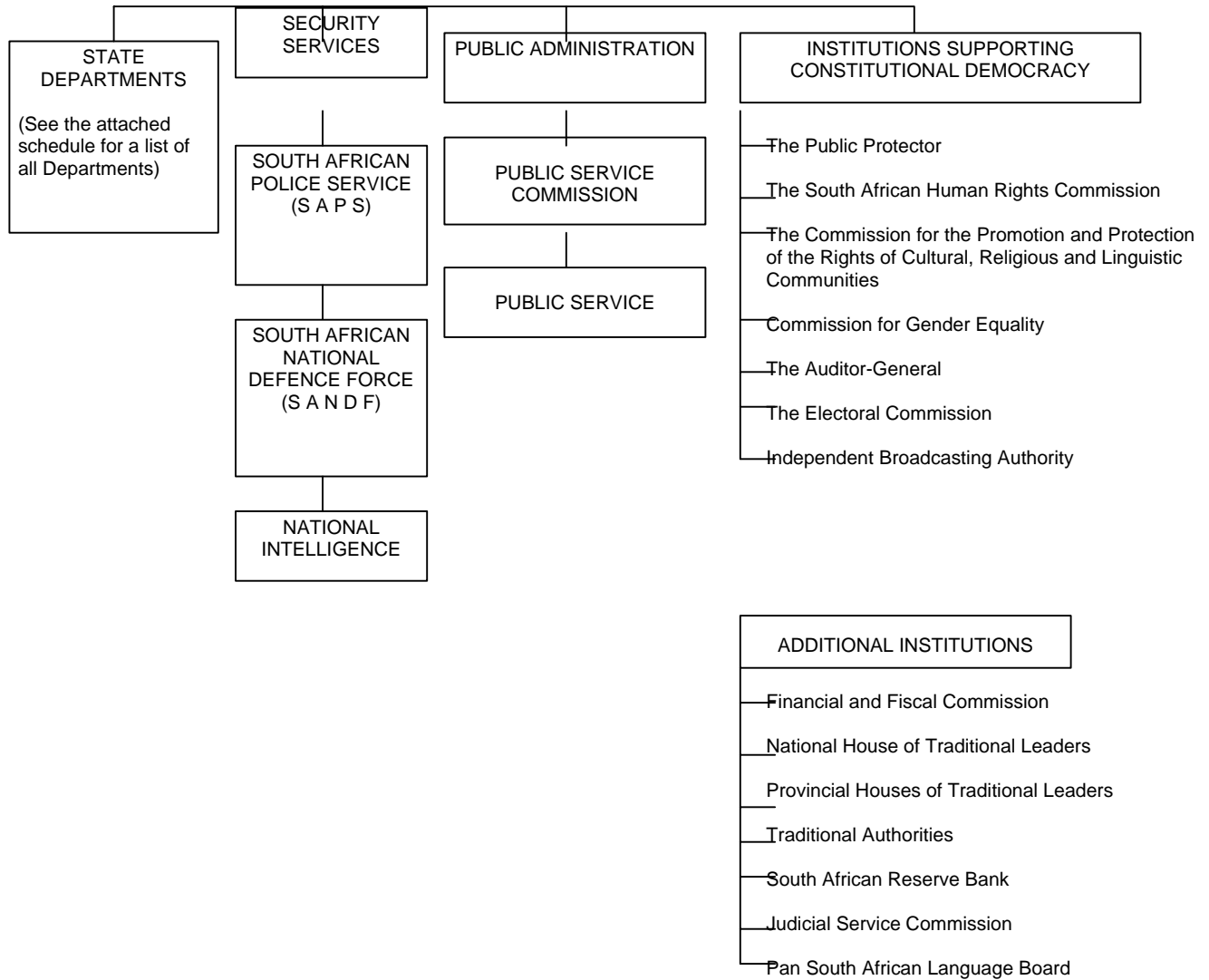
Members are elected by a system

- ❖ of proportional representation based on the municipality's segment of the national common voters roll and which provides for the election of members from party lists; and
- ❖ of proportional representation described above combined with a system of ward representation.

JUDICIAL AUTHORITY AND ADMINISTRATION OF JUSTICE



STATE DEPARTMENTS AND INSTITUTIONS



2. Explanatory notes on the Structure of Government

2.1 National Government

In the Republic, the executive authority is vested in the President who exercises his or her powers together with other Cabinet Ministers. The legislative authority is vested in Parliament, which comprises the National Assembly and the National Council of Provinces (NCOP). Parliamentary sittings are open to the public. Parliament must make laws for the country in accordance with the Constitution.

National Executive

The national executive consists of the President, who is elected by the National Assembly, and Cabinet, the members of which are appointed by the President at his/her own discretion. The national executive may, in terms of section 100 of the Constitution, intervene in provincial affairs by taking appropriate steps to ensure that a province fulfils its obligations.

National Assembly

The National Assembly consists of 400 members elected by a system of proportional representation. Each party has a number of seats based on the share of the votes gained on an election. The National Assembly is presided over by a Speaker assisted by a Deputy Speaker.

National Council of Provinces (NCOP)

The NCOP Council consists of 54 permanent delegates, 36 special delegates and 10 non-voting SALGA delegates. According to the Constitution, the NCOP is responsible for representing provincial interests in the national legislative process.

2.2 Provincial Government

The nine provinces established in terms of the Constitution brought about a new system of provincial and local government. Provincial government is recognised as a separate sphere of government by the Constitution, but may, in terms of section 139 of the Constitution, intervene in local government by taking appropriate steps to ensure that a local government fulfils any of its obligations.

In accordance with the Constitution, each of the nine provinces has its own legislature consisting of between 30 and 80 members, depending on the size of the population in that particular province. Members are elected on the basis of proportional representation. The Executive Council of a province consists of a Premier and a number of members of executive councils. The Premier is elected by the Provincial Legislature.

2.3 Local Government

Local government is recognised as a separate sphere of government by the Constitution and is no longer a function of national or provincial government. Local government has a role in building democracy and promoting socio-economic development.

The Constitution establishes three categories of municipalities. National legislation must define the different types of municipalities that may be established within each category, and provincial legislation must determine the different types of municipalities to be established in the province. A municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution. The

national government or a provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions. However, both National and provincial executives have powers to supervise the activities of the local government.

Organised Local Government has 10 part-time, non-voting representatives in the NCOP.

The judicial authority is vested in the courts which are independent and impartial. The Constitutional Court has power to review the administration acts of the Executive Branch of government.

2.4 State Departments

Schedule 1 to the Public Service Act provides for the following state departments:

- ❖ Department of Agriculture
- ❖ Department of Arts, Culture, Science and Technology
- ❖ Department of Communications
- ❖ Department of Constitutional Development
- ❖ Department of Correctional Services
- ❖ Department of Defence
- ❖ Department of Education
- ❖ Department of Environmental Affairs and Tourism
- ❖ Department of Finance
- ❖ Department of Foreign Affairs
- ❖ Department of Government Communications and Information Systems
- ❖ Department of Health
- ❖ Department of Home Affairs
- ❖ Department of Housing
- ❖ Department of Justice
- ❖ Department of Labour
- ❖ Department of Land Affairs
- ❖ Department of Minerals and Energy
- ❖ Department of Public Service and Administration
- ❖ Department of Public Works
- ❖ Department of Safety and Security
- ❖ Department of Sport and Recreation
- ❖ Department of State Expenditure
- ❖ Department of Trade and Industry
- ❖ Department of Transport
- ❖ Department of Water Affairs and Forestry
- ❖ Department of Welfare
- ❖ National Intelligence Agency
- ❖ Office of the President
- ❖ Office of the Public Service Commission
- ❖ Provincial Administration: Eastern Cape
- ❖ Provincial Administration: Free State
- ❖ Provincial Administration: Gauteng
- ❖ Provincial Administration: KwaZulu-Natal
- ❖ Provincial Administration: Mpumalanga
- ❖ Provincial Administration: Northern Cape
- ❖ Provincial Administration: Northern Province
- ❖ Provincial Administration: North West
- ❖ Provincial Administration: Western Cape
- ❖ South African Secret Service

2.5 Institutions Supporting Constitutional Democracy

Section 181 of the Constitution provides for state institutions aimed at strengthening constitutional democracy:

The Public Protector

The role of the Public Protector is to investigate any conduct in state affairs or in public administration in any sphere of government that is alleged or suspected to be improper or resulting in any impropriety or prejudice.

The Human Rights Commission

The role of the Commission is to promote, protect and respect the culture of Human Rights in the Republic. It must also monitor and assess the observance of human rights in the Republic.

The Commission for the Protection of the Rights of Cultural, Religious and Linguistic Communities

The role of the Commission is to promote and protect the rights of cultural, religious and linguistic communities.

The Commission for Gender Equality

The Commission is to promote respect for gender equality and the protection, development and attainment of gender equality.

The Auditor-General

The Auditor-General is required by section 188 of the Constitution to audit and report on the accounts, financial statements and financial management of national and provincial state departments, municipalities and any other institutions or accounting entity required by national or provincial legislation to be audited by the Auditor General.

The Electoral Commission

The Commission must manage elections of national, provincial and municipal legislative bodies in accordance with national legislation, ensure that elections are free and fair and declare the results of elections within a period prescribed by national legislation.

CHAPTER I: THE PRESIDENT AND THE NATIONAL EXECUTIVE

1. Introduction

The Constitution provides that executive authority is exercised at national, provincial and local spheres of government. The Constitution is the primary source of executive authority.

National executive authority is vested in the President. The President is the head of the Cabinet and exercises the executive authority together with the other members of the Cabinet. The President is also the Head of State with powers specified in the Constitution.

Provincial executive authority is vested in the Premier of the province. The Premier exercises the executive authority together with the other members of the provincial Executive Council.

Local executive authority is vested in each Municipal Council.

The executive is responsible for developing and overseeing the implementation of policy in the country. By so doing, it acts to ensure the advancement of all spheres of government. The executive performs a crucial role in the transformation process to overcome the legacy of apartheid. However, whenever the executive exercises power, it must be able to point to the source of its authority in the Constitution or in other laws of the country. A number of policy instruments have also been developed to facilitate transformation.

While executive conduct will be subject to constitutional scrutiny, the courts are likely to show considerable deference to executive choices, including policy choices, which are of a political nature. The Constitutional Court has already articulated its position vis-à-vis policy decisions by the legislature. It is likely that a similar position would be adopted in respect of executive policy decisions. See *Ferreira v Levin NO*:

Whether or not there should be regulation and distribution is essentially a political question ...It is not for the courts to approve or disapprove of such policies. What the courts must ensure is that the implementation of any political decisions to undertake such policies conforms with the Constitution. It should not, however, require the legislature to show that they are necessary if the Constitution does not specifically require that this be done.

The executive must exercise its powers and functions in accordance with the Constitution, as set out in Chapter 4 of the Constitution. These include the powers and functions of the President, Cabinet Ministers, Premiers and Members of the Executive Councils (MEC's).

2. The President

2.1 Election of the President

The President is elected by the National Assembly in its first sitting following an election. The President remains in office for the five year term of the legislature unless he/she dies, resigns or is removed from office during this period. No President is permitted to hold office for more than two terms. The President may be removed from office by Parliament if the National Assembly passes a motion of no confidence in the President supported by a majority of its members. The President and the other members of the Cabinet, together with any Deputy Ministers, must then resign from office.

2.2 Powers and functions of the President

The President has the powers entrusted by the Constitution and legislation, including those necessary to perform the functions of Head of State and head of the national executive.

Under the Constitution, the President is both the Head of the National Executive and the Head of State. It appears from section 84(1) of the Constitution that a distinction is drawn between the powers that the President exercises as Head of State and those that he exercises as Head of the National Executive. It must be assumed that the powers listed in section 84(2) of the Constitution are those which can be classified as part of the Head of State function. In terms of section 84(2) of the Constitution the President alone and as Head of State is responsible for –

- (a) assenting to and signing Bills;
- (b) referring a Bill back to the National Assembly for consideration of the Bill's constitutionality;
- (c) referring a Bill to the Constitutional Court for a decision on the Bill's constitutionality;
- (d) summoning the National Assembly, the National Council of Provinces or Parliament to an extraordinary sitting to conduct special business;
- (e) making any appointment that the Constitution or legislation requires the President to make, other than as Head of the National Executive;
- (f) appointing commissions of inquiry;
- (g) calling a national referendum in terms of an act of Parliament;
- (h) receiving and recognising foreign diplomatic and consular representatives;
- (i) appointing ambassadors, plenipotentiaries, diplomatic consular representatives;
- (j) pardoning or relieving offenders and remitting any fines, penalties or forfeitures; and
- (k) conferring honours.

The President is not required to consult with or act together with his Cabinet when exercising these 'Head of State' functions.

In relation to the executive authority and functions listed in section 85 of the Constitution, the President is required to exercise his or her authority together with the members of the Cabinet by-

- (a) implementing national legislation except where the Constitution or an Act of Parliament provides otherwise;
- (b) developing or implementing national policy;
- (c) co-ordinating the functions of state departments and administrations;
- (d) preparing and initiating legislation; and
- (e) performing any other executive function provided for in the Constitution or in national legislation.

In the normal course, this would have provided for a simple distinction between President's Minutes, when the President is required to act together with his Cabinet and thus requires the countersignature of a member of the Cabinet, and President's acts. However, section 101(2) of the Constitution require that written decisions of the President be countersigned by another Cabinet member "*if that decision concerns a function assigned to that other Cabinet member*".

The Office of the President has considered whether section 101 applies only to decisions taken when he acts as Head of the National Executive, as suggested by the caption to the section. The purpose and the plain meaning of the section, together with the rules of statutory interpretation, have led that Office to conclude that section 101 applies to *all* decisions of the President. It can be assumed that the purpose of section 101(2) in regard to such decisions is to ensure that the decision, even if taken by the President alone, will have been drawn to the attention of a Minister whose portfolio is affected by that decision.

It follows that even when exercising a Head of State function, the written Presidential decision (Executive Act) may require the countersignature of a Minister even though the President is not required to consult with such Minister. Only occasionally will Executive Acts recording Head of State functions require no countersignature. Only the latter are referred to as "President's Acts".

2.3 The President as head of the national executive

The powers and functions of the President as head of the national executive are set out in section

85(2) of the Constitution. In this capacity, the President acts in cabinet, with his/her Ministers. The President, at his/her discretion, appoints Cabinet Ministers and determines portfolios of Ministers. The President's decision is an executive decision. Departments are organised administratively in accordance with the President's decision and Directors-General are appointed in accordance with the Public Service Act.

2.4 Executive acts of the President

Section 101(1) requires that Presidential decisions taken in terms of legislation or decisions with legal consequences must be in writing. The Presidential decisions are recorded by means of two instruments, namely:

President's Minutes: Where the instrument recording the decision of the President must be countersigned by a Cabinet member if the decision concerns a function assigned to the Cabinet member.

President's Acts: Where the President exercises his powers and functions without consulting the Cabinet and without obtaining the countersignature of a Minister.

When the President exercises his powers as Head of State, the purpose of obtaining the countersignature is to ensure that the relevant Cabinet member is aware of the exercise of a power, by the Head of State, which affects the Cabinet member's portfolio. The purpose of the countersignature is not to allow a Cabinet member to veto a decision by the Head of State. The absence of the countersignature is evidence of the fact that the Minister, and therefore Cabinet, did not concur with the conduct of the President. In such cases therefore, unless it is shown that in fact the relevant Minister concurred, a failure to obtain the countersignature may result in invalidity of the executive act.

2.5 The procedure for obtaining the President's approval of executive acts

Ministers will be constantly required to obtain the President's approval for the executive acts which require the President's signature, such as President's Minutes, Proclamations, Regulations, appointment of Commissions of Inquiries and any other appointment that the Constitution or legislation require the President to make. The Manual on the Executive Acts of the President outlines the precise wording, format and instruments to be used by the department seeking the President's approval of the executive act in question. The Manual provides, among others, the following-

- a) original executive acts must appear on the letterhead of the office of the President;
- b) each page, including annexures, must be initialled by the relevant Minister. Where annexures are lengthy, a certificate may be furnished to substitute initialling;
- c) statutory or other powers in terms of which the President must act, must be set out fully in the executive act. The wording of the proposed action that the President must carry out, must, as far as possible, coincide with the wording of the enabling provision of the statute;
- d) in order to give effect to the consultation requirement between the President and Ministers, all executive acts which are not fully self-explanatory, must be accompanied by a concise explanatory memorandum. The memorandum must set out the motivation or reason, and where appropriate, the background for the action or decision requested of the President.

2.6 The President's role in respect of Parliament

The President is not a member of Parliament. The President is however entitled to convene extraordinary sittings of Parliament at any time for special business. This is done by sending a note to the Speaker in terms of the Rules of Parliament. The President may also address Parliament.

A convention has developed in Parliament that any questions put to the President, as well as interpellations, are answered by the Deputy President who is a member of Parliament.

3. Acting President

A Cabinet member may be appointed as Acting President if the President is out of the country or is temporarily unable to perform his/her duties. One of the most senior members of Cabinet, after the President, is usually appointed Acting President. Any of the persons, in the following order can be appointed as an Acting President:

- (a) The Deputy President.
- (b) A Minister designated by the President.
- (c) A Minister designated by the other members of Cabinet
- (d) The Speaker, until the National Assembly designates one of its members.

A recent constitutional amendment requires a person appointed as Acting President to take the oath of office only on the first occasion he/she acts as President. The Acting President has the same powers and functions as the President. In terms of a convention, the Acting President usually plays a caretaker role and does not take major decisions, such as dismissing or appointing a Cabinet Minister, whilst he or she is in office.

4. Cabinet

The Cabinet consists of the President, as head of the Cabinet, the Deputy President and Ministers. The President appoints the Deputy President and Ministers, assigns them powers and functions, and may dismiss them.

5. The Deputy President

The President appoints the Deputy President from members of the National Assembly and may dismiss him/her at any time. The Deputy President has the powers and functions as assigned to him/her by the President. As a member of Parliament, the Deputy President remains accountable to Parliament and is collectively responsible, with the other members of Cabinet, for executive decisions. The role of the Deputy President is to assist the President in the execution of the functions of government. The role and functions of the Deputy President are therefore determined by the President.

6. Cabinet Ministers

6.1 Appointment

The President appoints Cabinet Ministers at his/her discretion. The President may select any number of Ministers from among the members of the Assembly, and only two Ministers who are not members of the Assembly. Cabinet Ministers are appointed or removed at the discretion of the President acting as head of the executive. The terms and conditions of appointment, together with any benefit of office, remain in force throughout the duration of appointment. The conditions of appointment of Ministers are set out in the Ministerial Handbook. The President is entitled to make acting appointments to Cabinet.

Deputy Ministers are also appointed by the President from the National Assembly. They are not members of Cabinet and do not attend Cabinet meetings. They are appointed to assist Cabinet. They derive their functions from the Minister, but when a Minister is unable to perform his/her functions, the Deputy

Minister does not assume these duties. Instead, another Cabinet minister will be assigned these duties. Deputy Ministers may be dismissed at the discretion of the President.

6.2 Code of ethics

Members of Cabinet and Deputy Ministers must act in accordance with the code of ethics prescribed by national legislation. They may not, in terms of section 96 of the Constitution, undertake any other paid work, act in any way which is inconsistent with their office or expose themselves to any conflict of interests. Ministers may also not use their position or any information entrusted to them to enrich themselves or improperly benefit another person. (As referred to in the Ministerial Handbook).

6.3 Powers and functions of Ministers

The President assigns powers and functions to Cabinet Ministers. The powers assigned to an individual Minister relate to a particular portfolio or functional area. The departments that administer portfolios are set out in the Public Service Act. Portfolios may be changed by the President at any time. The President may assign to a Cabinet member any power or function of another member who is absent from office or is unable to exercise that power or perform that function. The President may also, by proclamation, transfer the administration of legislation or any statutory power or function from one member of the Cabinet to another. If a Minister is appointed to administer one or more state departments, then the Minister has a so-called portfolio. A portfolio comprises all the statutory and other functions and powers pertaining to the department(s) for which a person has been appointed. Portfolios are subject to changes (a “cabinet reshuffle”) at the discretion of the President. A Minister’s administrative functions under a specific portfolio can be shifted to another minister, without portfolios being changed.

The Constitution details few specific powers to be exercised by the Deputy President or individual Ministers. Ordinary legislation, however, does confer many powers on individual Ministers rather than on the Cabinet as a whole. Ministers are, for example, authorised by statute to promulgate regulations, to make certain decisions or appointments or to formulate policy. In respect of such powers, it is accepted that Cabinet, by approving the law, authorised the Minister to exercise the power. Therefore, Ministers have no common-law powers. All powers and functions are exercised and performed in terms of the Constitution or other form of legislation. In particular Ministers obtain their executive authority from, among others-

- (i) The Public Service Act, 1994.
- (ii) The Public Service Regulations, 1998.
- (iii) The Exchequer Act, 1975.
- (iv) The Treasury instructions and Financial Regulations issued under the Exchequer Act.
- (v) The Public Finance Management Act, 1999.

6.4 Political/administrative interface between Ministers and Directors-General

Cabinet Ministers discharge functions that are political and administrative. The Departments they administer are listed in schedule 1 of the Public Service Act, 1994. Whilst Ministers are responsible for formulation of policy and for overseeing the administration of Departments, the day to day management of Departments is the responsibility of Directors-General. Directors-General discharge their functions under the supervision of Ministers. The functions of Directors-General are spelt out in section 7 of the Public Service Act. The *formulation* of policy is the responsibility of a Minister. Directors-General are responsible for the *implementation* of the policy. The Director-General provides the Minister with all the support in these processes.

The Minister may, in addition to the staff complement he/she is entitled to, also appoint an Adviser who may play a leading role in policy formulation. The Minister’s power to formulate policy is restricted to the portfolio for which he/she is responsible.

The Treasury instructions and section 64 of the Public Finance Management Act outline the process of decision-making where the Minister and the Director-General disagree on matters with financial implications. In this instance, the Minister’s view will prevail, but the Minister’s decision must be in

writing.

State resources may not be used for an unofficial purpose. In terms of regulation 7 of the Financial Regulations, any person in the employ of the State may not use any State moneys or other State property for personal or any unofficial purpose, unless, in the case of State property, but excluding State moneys, he is authorised thereto by the Treasury.

6.5 Accountability

Section 92 of the Constitution provides that the Deputy President and Ministers are responsible for the powers and functions of the executive assigned to them by the President. Members of the Cabinet are accountable both collectively and individually to Parliament for the exercise of their powers and the performance of their functions. Cabinet members are required to act in accordance with the Constitution and to provide Parliament with full and regular reports concerning matters under their control. When a Minister exercises powers individually, he/she is individually responsible to Parliament. However, a Minister may refer any matter to Cabinet for a decision.

The Deputy President is responsible and accountable to Parliament as are other Ministers of the Cabinet. Section 92 makes Ministers responsible individually and collectively to Parliament. This doctrine of ministerial responsibility allows members of Parliament to ask Ministers questions, and Ministers have a duty to answer and provide Parliament an opportunity to scrutinise their policies.

6.6 Relationship with Parliament

Leader of Government Business

The President must appoint a member of Cabinet to be the Leader of Government Business in the National Assembly. The Leader of Government Business serves as a link between the executive and the legislature. He/she ensures that the legislative programme of government is carried through in Parliament.

The Leader of Government Business becomes a member of the Joint Programme Committee. It has the following functions and powers:

- (a) prepare and, if necessary, from time to time, adjust the annual programme of Parliament, including the legislative programme;
- (b) monitor and oversee the implementation of Parliament's annual legislative programme and may set deadlines for the introduction of Bills;
- (c) implement the Joint Rules regarding the scheduling or programming of the business of Parliament, as well as the function of joint committees, joint subcommittees and other joint structures;
- (d) take decisions and issue directives and guidelines to prioritise any joint business of the Houses;
- (e) set time limits for completing any steps in the legislative process or extend any such time limits; and
- (f) take such steps as are necessary for the fast tracking of a Bill, including those steps provided for in Joint Rules 214 and 215; and must perform any other function or may exercise any other power as may be assigned to it, i.e. The Joint Programme Committee, by resolutions adopted in the Assembly and in the Council.

The role of Ministers in the legislative process

Bills may be introduced in Parliament by the Cabinet, by a committee of Parliament or by individual members of Parliament. In practice however, most bills are initiated by Cabinet.

A Bill is the result of a new government policy or the reformulation of existing policy. The process of formulating policy may be done either with or without public consultation. Normally policy is formulated in a document called a Green Paper which is basically a discussion document which is published for public comment. The final policy drafted is submitted to Cabinet for approval. If Cabinet approves the policy, it is published for public information in a document called a White Paper. A White

Paper sets out government's policy on a particular subject, and usually indicates its intentions with respect to passing new legislation or amending existing legislation. For legislation of a more routine nature, the Minister of the relevant department will obtain Cabinet approval to introduce the bill in Parliament.

Legislation is drafted by the government department concerned. The draft is then taken to Cabinet by the Minister. If approved by Cabinet, the draft Bill is submitted to the State Law Advisors for technical redrafting to ensure that the draft is ready for parliamentary consideration.

Draft legislation is handed to the Speaker of Parliament by the Minister. It is at this stage that the draft becomes known as a Bill. Most Bills are introduced into the Assembly by being "tabled". Bills dealing with matters falling within provincial functional areas may be introduced in the NCOP. A short debate may then be held in Parliament during which the Minister introduces the Bill and other parties state their positions on the Bill. The Bill is then deemed to have been read a first time. The Bill is then referred to the portfolio committee concerned for detailed consideration.

6.7 Concurrent and exclusive competencies and the power of intervention

Schedule 4 of the Constitution specifies the areas in which national and provincial government have concurrent, or shared, competence. This means that both national and provincial government are permitted to legislate in these specified areas. When a conflict emerges between national and provincial legislation, section 146 of the Constitution sets out the circumstances under which national legislation will prevail over provincial legislation. If these circumstances do not exist, provincial legislation prevails over national legislation.

Part A of Schedule 5 of the Constitution lists the areas where provinces have exclusive power, or the power to legislate alone. Part B of Schedule 5 lists the areas where both provincial and local government can legislate. National government is not permitted to pass laws in areas that fall within Schedule 5, as these areas are reserved exclusively for provinces, or provinces and local government together. Parliament may only intervene legislatively in the areas listed in Schedule 5 in terms of section 44(2) of the Constitution. That is, when it is necessary to maintain national security, economic unity, essential national standards or to establish minimum standards required for the rendering of services or to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole. This means that a delegated legislator, such as a Minister, may not make use of the intervention power. The law passed by Parliament when it intervenes is a national law which may be executed by provincial or national government (*see the Certification case of the Constitution of the Republic of South Africa Act, 1996*).

6.8 Parliamentary oversight of the Executive

Questions and interpellations

Questions put to Ministers by members of Parliament, and interpellations or mini-debates during which Ministers justify their actions, are two significant ways in which Parliament holds the Executive authority accountable.

Questions are put orally or in writing and are made available to Ministers beforehand. A Minister normally prepares the answers to the questions with the assistance of the officials of his or her department. Answers must be provided as expeditiously as possible. Questions on the specific programmes of the

department are normally prepared by the component responsible for the programme concerned and submitted to the Minister for approval. Parliamentary questions of a political nature are normally prepared by the Minister personally with the help of his or support staff. Answers must be brief and to the point. Only what has been requested must be provided, nothing more. The answers must be factually accurate and must be consistent with answers given in respect of similar questions in the past. The formal answers by Ministers are recorded in Hansard, the verbatim report of parliamentary proceedings.

However, Ministers do not have to answer questions which do not relate to their portfolios, or are irrelevant or undermine the integrity and security of the Republic.

6.9 Responsibilities towards intergovernmental structures

Chapter 3 of the Constitution is aimed at promoting a co-operative form of governance in the division of government tasks between central and regional government. This system requires that in all spheres of government, programmes and steps taken to transform and develop the country are integrated and co-ordinated. A number of structures have been established in order to achieve the goals of this Chapter. These include the Inter-Governmental Forum (IGF) and MINMECS.

The IGF facilitates the meeting of Premiers with representatives from the national government. MINMEC's are informal structures. They are not intended to be decision-making but rather consensus-seeking bodies. The MINMECS consist of the line function Ministers at national level and their provincial counterparts.

These structures aim to affirm the distinctiveness, interdependence and interrelatedness of the three spheres of government by resolving disputes, harmonising the legislative processes as well as relations with provincial legislatures. The role of the executive within such structures is a crucial one.

There is an Inter-departmental Constitutional Liaison Forum comprising legal advisers of national departments, which meets periodically to discuss and share information regarding, among other things, court cases and legal opinions which affect departments. The meetings of this forum are co-ordinated by the Department of Constitutional Development.

6.10 Relationship with caucus

Ministers are members of the parliamentary caucus of the political party. Decisions of a political party often directly impact on the programmes of parliament.

6.11 Role of the State Attorney

The State Attorney is established in terms of the State Attorney Act No.56 of 1957 and its functions are the following:

- (a) it performs work on behalf of the National and Provincial Government that by law, in practice or according to custom is performed by Attorneys, Notaries and Conveyancers.
- (b) it performs work on behalf of statutory bodies in which government has financial or other interests.

Chapter W of the Treasury Instructions, specifies the role of the State Attorney in handling claims against and by the State and against persons in its service. In terms of the Instructions, the State accepts liability for all claims arising from the acts or omissions of persons in its employ instituted against the State or against the said persons unless the State Attorney, after consultation with the accounting officer, is of the opinion that the said person, during the act or omission that gave rise to the claim-

- a) was not acting in execution of his or her official duties;
- b) exceeded his or her powers;

- c) made use of excessive liquor or drugs which may have resulted or contributed to liability;
- d) without prior consultation with the State Attorney made an admission of guilt that was detrimental to the State's case;
- e) acted recklessly or wilfully; or
- f) failed to comply with or ignored standing instructions of which he/she was aware or could reasonably have been expected to be aware.

Where the State was compelled to disburse any amount as a result of any of the above, the amount may be recovered from the said person in terms of the Exchequer Act or by instituting a legal process.

6.12 Role of State law advisers

State law advisers are employed by the Department of Justice and their primary functions are-

- a) to certify Bills before they are submitted to Parliament; and
- b) to give legal advice in accordance with the directives of the Department of Justice.

Chapter X of the Treasury's instructions outlines procedures which government departments must follow in obtaining legal advice. The department seeking legal advice must, among others-

- a) formulate the problem and state the facts briefly;
- b) state the standpoints of both parties in the submissions to the State law advisers should there be a conflict of opinion between two parties; and
- c) refer to all relevant statutes, regulations, directives, by-laws, related or consequential directives in other statutes and known decided cases.

The legal advice of statutory boards and other bodies whose operations and activities are financed wholly or mainly out of funds paid out of the Exchequer Account, is directed to the State law advisers via controlling departments.

6.13 Relationship with the electorate

The political party of which a Cabinet Minister is a member may allocate constituencies for all its Members of Parliament with which they are required to have close ties. This is aimed at ensuring that elected representatives remain accountable to the people who have voted for them.

As Heads of administrations, Ministers are guided by the values and principles governing public administration which are stated in section 195 of the Constitution. These values and principles are-

- a) a high standard of professional ethics must be promoted and maintained;
- b) efficient, economic and effective use of resources must be promoted;
- c) public administration must be development-oriented;
- d) services must be provided impartially, fairly, equitably and without bias;
- e) people's needs must be responded to, and the public must be encouraged to participate in policy-making;
- f) public administration must be accountable;
- g) transparency must be fostered by providing the public with timely, accessible and accurate information;
- h) good human resource management and career development practices, to maximise human potential, must be cultivated;
- i) public administration must be broadly representative of the South African

people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.

The transformation of the Public administration is to be judged by the practical difference people see in their everyday lives. It is for that reason that meeting the basic needs of all citizens is identified as one of the five key programmes of the Government's Reconstruction and Development Programme (RDP). It is also the reason why the Government's macro-economic strategy called Growth, Employment and Redistribution (GEAR) calls for reduction in unnecessary government consumption and the release of resources.

To give effect to the values and principles contained in section 195, a White Paper on Transforming the Public Service Delivery (commonly called "Batho-Pele" translated as "people first") has been published for general information. The White Paper states eight principles for transforming public service delivery, namely-

- a) Citizens must be consulted about the level and quality of the public service they receive;
 - b) Citizens must be told what level and quality of services they will receive so that they know what to expect;
 - c) All citizens must have equal access to services;
 - d) Citizens must be treated with courtesy and consideration;
 - e) Citizens must be given full, accurate information about services they are entitled to receive;
 - f) Government must be run openly and in a transparent manner and citizens must be told how government is run;
 - g) If the promised standard of redress is not delivered, citizens must be offered an apology, a full explanation and a speedy and effective remedy; and
 - h) services must be provided economically and efficiently to give citizens the best possible value for money.
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CHAPTER TWO: FINANCE

1. Introduction

The Constitution provides for the establishment of a National Revenue Fund into which all money received by national government must be paid, except for money reasonably excluded by national legislation. Money may only be withdrawn from the National Revenue Fund in terms of an appropriation by an Act of Parliament or through a direct charge in terms of the Constitution. The Constitution also provides for the establishment of Provincial Revenue Funds for each province. The Constitution requires national legislation to provide for the equitable division of revenue raised nationally amongst national, provincial and local spheres of government.

2. Treasury

In terms of section 216 of the Constitution, national legislation must establish a national treasury and prescribe measures to ensure transparency and expenditure control in each sphere of government. This must be achieved through generally recognised accounting practices, a uniform system of classifying expenditure and uniform treasury norms and standards.

The national treasury, with agreements from the Cabinet member responsible for national financial matters, may stop the transfer of funds to an organ of state in event of a serious and persistent material breach of the above practices.

Until 1 April 2000, financial matters of government are regulated in terms of the Exchequer Act No. 66 of 1975. From 1 April 2000 the Exchequer Act will be repealed by the Public Finance Management Act, 1999. Only chapter 11 and 93(4) of the Public Finance Management Act has come into operation, while the rest of the Act will come into effect on 1 April 2000. Chapter 11 provides for the establishment of the Accounting Standards Board while section 93(4) provides that the provisions of the Revenue Funds Interim Arrangements Act, 1997, despite the fact that they have lapsed, must be regarded as forming part of this Act until 1 April 2000. Chapter 2 provides for the establishment of the National Treasury which must-

- a) promote the national government's fiscal policy framework and the co-ordination of macro-economic policy;
- b) co-ordinate intergovernmental financial and fiscal relations
- c) manage the budget preparation process;
- d) exercise control over the implementation of the annual national budget, including any adjustments budgets;
- e) facilitate the implementation of the annual Division of Revenue Act;
- f) monitor the implementation of provincial budgets;
- g) promote and enforce transparency and effective management in respect of revenue, expenditure, assets and liabilities of departments, public entities and constitutional institutions; and
- h) perform the other functions assigned to the National Treasury.

3. The Auditor-General and the Committee on Public Accounts

The Constitution provides for the appointment of the Auditor-General, who must be a South African citizen with specialised knowledge of, or experience in auditing, state finances and public administration. The primary function of the Auditor General is to audit and report on the accounts, financial statements and financial management of:

- a) all national and provincial state departments and administrations;
- b) all municipalities; and
- c) any other institution or accounting entity required by national or provincial legislation to be audited by the Auditor-General.

All reports of the Auditor-General must be made public. The Auditor-General has an important role to play in facilitating effective accountability through auditing on behalf of the South African taxpayer. The Auditor-General should therefore promote clean and transparent administration, the efficient and effective utilisation of resources and good governance.

Rule 205 of the Rules of the National Assembly establishes a Committee on Public Accounts. The Speaker of the Assembly determines the number of members with the agreement of the Rules Committee. The Committee on Public Accounts:

- a) must consider -
 - i) the financial statements of all executive organs of state and constitutional institutions when those statements are submitted to Parliament;
 - ii) any audit reports issued on those statements that are submitted to Parliament;
 - iii) any reports issued by the Auditor-General on the affairs of any executive organ of state, constitutional institution or other public body; and
 - iv) any other financial statements or reports referred to the Committee in terms of these Rules;
- b) may report on any of those financial statements or reports to the Assembly;
- c) may initiate any investigation in its area of competence; and
- d) must perform any other functions, tasks or duties assigned to it in terms of the Constitution, legislation, the Rules of the National Assembly, the Joint resolutions of the Assembly, including functions, tasks and duties concerning parliamentary financial oversights or supervision of executive organs of state, constitutional institutions, or other public bodies.

The Speaker must refer the financial statements and reports of the Auditor-General to the Committee when they are submitted to Parliament.

The Public Accounts Committee is the mechanism through which a Legislature exercises control over the expenditure of public money which it has appropriated through the budgeting process to meet the needs of the country. The Committee strives to assure the public that the government is receiving value for money and that public money and assets are being managed in a proper way.

In a non-partisan and apolitical fashion, the Committee conducts rigorous scrutiny of all financial administration. It holds the executive authority accountable for spending and overseeing taxpayers' money and public assets. This is to ensure regular, economical, efficient and effective spending.

4. The Financial and Fiscal Commission

Section 220 of the Constitution provides for the establishment of the Financial and Fiscal Commission which must be independent, impartial and subject only to the Constitution. In terms of the Financial and Fiscal Commission Act No. 99 of 1997, the Commission acts as a consultative body for, and makes recommendations and gives advice to organs of state in the national, provincial and local spheres of government on financial and fiscal matters. The Commission performs its functions on its own initiative or on request by an organ of state. The national annual budget is normally referred to the Commission before it is tabled in Parliament.

Members of the executive or organs of state may not interfere with the function of the Commission. The Commission must submit, for tabling, copies of all its recommendations made in terms of the Constitution to both Houses of Parliament and to provincial legislatures.

5. The South African Reserve Bank

Section 223 of the Constitution provides for the establishment of the South African Reserve Bank, which is the central bank of the Republic. The primary object of the South African Reserve Bank is to protect the value of the currency in the interests of balanced and sustainable economic growth in the Republic. It must perform its functions independently and without fear, favour or prejudice and it must be in regular consultation with the Cabinet member responsible for national financial matters.

The South African Reserve Bank Act No.90 of 1989 provides among others, the following powers and functions of the South African Reserve Bank-

- a) to issue bank notes and coins, or cause bank notes or coins to be issued for use in the Republic;
- b) to destroy bank notes and coins or cause them to be destroyed;
- c) to grant loans and advances provided that unsecured loans and advances to the government of the Republic may be granted only with the approval of the Board of Directors established in terms of the Act; and
- d) to buy, sell, discount or re-discount bills of exchange drawn or promissory notes issued for commercial, industrial or agricultural purposes, or exchequer bills of the government of the Republic or of the government of any other country, or securities of a local authority in the Republic.

6. Budgetary Processes

The Constitution requires that national, provincial and municipal budgets and budgetary processes must promote transparency, accountability and the effective financial management of the economy, debt and the public sector. National legislation must:

- (a) prescribe the form of such budgets;
- (b) determine when national and provincial budgets must be tabled; and
- (c) require that the sources of revenue be detailed.

Chapter 1 of the Exchequer Act and Chapter 4 of the Public Finance Management Act outline the budget process. Section 27 of the Public Finance Management Act requires the Minister responsible for financial matters to table, in the prescribed form, the annual budget for a financial year in the National Assembly before the start of that financial year or as soon as possible after the start of the financial year. When the annual budget is introduced in the National Assembly, the accounting officer of each department must submit to Parliament measurable objectives for each main division within the department's vote. The treasury may co-ordinate these submissions and consolidate them in one document.

The appropriation of the national budget is made in accordance with the Medium Term Expenditure Framework process which is outlined in the Manual on the Financial Planning and Budgeting System of the State. The system seeks to-

- a) identify the aims and objectives of Departments in broad outline and subjects these policy objectives to close scrutiny with a view to the allocation of means. It should therefore take into account: the needs to be satisfied, the problems to be dealt with, the benefits or results to be achieved as well as the outcomes that are expected;
- b) identify the executive programmes by which these objectives are being pursued or are to be pursued;
- c) emphasise the determination of policy priorities and the consideration of alternative possibilities for the allocation of the means;
- d) integrate objectives and their executive programmes into the budget. It therefore associates and connects specific policy aims directly with their financing by means of a separate budget for the executive programme associated with each objective;
- e) strive for multi-term financial planning of executive programmes for the achievement of specific objectives by associating such planning with the means that that will be needed over a long term; and

- f) facilitate the development of analytical and evaluation techniques by which it may be ascertained whether spending is thrifty and effective.

7. Financial responsibilities of executive authorities

Chapter 7 of the Public Finance Management Act states the financial responsibilities of the members of the executives, namely-

- a) they must perform their statutory functions within the limits of funds authorised for the relevant vote; and
- b) in performing their statutory functions they must consider the monthly reports submitted to them by the accounting officers.

The executive authority responsible for a public entity under the ownership control of the national executive must exercise that executive's ownership control powers to ensure that that public entity complies with the Act and the financial policies of that executive.

Any directive by the member of the executive to the accounting officer of the department having financial implications for the department must be in writing. If the implementation of the directive is likely to result in unauthorised expenditure, the accounting officer will be responsible for any resulting unauthorised expenditure unless the accounting officer has informed the member of the executive in writing of the likelihood of that unauthorised expenditure. Any decision of the member of the executive to proceed with the implementation of the directive as well as the reason for the decision, must be in writing, and the accounting officer must promptly file a copy of this document with the National Treasury and the Auditor-General.

8. Procurement

The Constitution provides in section 217 that procurement must be done in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. Organs of state or institutions may establish a procurement policy in accordance with a framework set out in national legislation.

CHAPTER THREE: BILL OF RIGHTS

The Bill of Rights contained in Chapter 2 of the Constitution provides the constitutional framework for the transformation of society and the improvement of lives of all citizens. It is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

In terms of section 7 of the Constitution, the state is obliged to respect, protect and fulfil the rights entrenched in the Bill of Rights. The provisions of Section 7 are very important. The Bill of Rights is not merely a negative enforcement mechanism shielding subjects against the abuse of government power, but also imposes a positive duty on the state to protect, promote and fulfil the entrenched rights. This gives the South African Bill of Rights a positive dimension which has considerable significance for the process of transformation.

The following rights are provided for in the Bill of Rights:

- Equality (Section 9)
- Human dignity (Section 10)
- Life (Section 11)
- Freedom and security of the person (Section 12)
- Right not to be subjected to slavery, servitude and forced labour (Section 13)
- Privacy (Section 14)
- Freedom of religion, belief and opinion (Section 15)
- Freedom of expression (Section 16)
- Assembly, demonstration, picket and petitions (Section 17)
- Freedom of association, political rights (Section 19)
- Citizenship (Section 20)
- Freedom of movement and residence (Section 21)
- Freedom of trade, occupation and profession (section 22)
- Labour relations (Section 22)
- Environment (Section 24)
- Property (Section 25)
- Housing (Section 26)
- Health, food, water and social security (Section 27)
- Children (Section 28)
- Education (Section 29)
- Language and Culture (Section 30)
- Cultural, Religious and Linguistic Communities (Section 31)
- Access to information (Section 32)
- Just administrative action (Section 33)
- Access to courts (Section 34)
- Arrested, detained and accused persons (Section 35)

The following rights in particular are important to the members of the executive:

2. Equality

The right to equality is recognised and protected in section 9 of the Constitution. Subsection (1) deals with equality before the law. Subsection (2) relates to the meaning of equality and measures often referred to as “affirmative action”. Subsections (3), (4) and (5) deal with the prohibition of discrimination:

subsection (3) states that the state may not unfairly discriminate, while (4) states that no other person may discriminate. The second sentence of section 9(4) then clearly demands that national legislation must be enacted to prevent or prohibit unfair discrimination. The Department of Justice, in conjunction with the South African Human Rights Commission has already produced a draft Bill on the Prohibition of Unfair Discrimination. The Bill was drafted jointly with other government departments and other key role players who guided the drafting process through the meetings of the Reference Group. Consultative workshops were held to obtain the views of the members of the public on the content of the draft Bill. The Unfair Discrimination Act must be enacted before 2 February 2000.

The Constitutional Court has defined the right to equality substantively. Substantive equality entails that, in addition to the formal requirements that laws have to apply equally to all, measures must be taken to advance the previously disadvantaged groups or communities. In *Prinsloo v Van der Linde* the court stated that equality before the law means that there is no one who is above or beneath the law. It requires that each person is accorded equal concern and respect both in the formulation and application of the law. It requires equality of representation in all law-making bodies. It requires organs of state and administrative bodies to be even-handed in the application, administration and enforcement of the law and application of policy. *Harksen v Lane* sets out the following stages of inquiry to determine whether an act constitutes discrimination:

- a) whether a differentiation has been made between people? If the answer is yes, the next stage of inquiry becomes relevant, namely:
- b) whether the differentiation amount to discrimination. If the answer is yes, the next question is whether the discrimination is unfair. The discrimination is unfair if it is on any of the grounds of discrimination listed in section 9(3) of the Constitution, or on a ground not specified in the section but objectively analogous to such a listed ground. If the discrimination is held to be unfair then the act in question will be in violation of the equality clause and it then becomes necessary to proceed to the final stage of equity namely:
- c) whether the act can be justified by the limitation clause.

3. Labour relations

Section 23 of the Constitution provides that everyone has the right to fair labour practices. In addition, this provision protects rights of workers to join trade unions, participate in the activities and programmes of trade unions and to strike. Employers equally have rights to form and join employers' organisations. Every trade union, employers' organisation and employer, has the right to engage in collective bargaining. To achieve employment equity, and improve the conditions of work of employees, government has passed several other Acts. Those include the Employment Equity Act, 1998 and the Basic Conditions of Employment Act, 1997.

4. Freedom of expression

Section 16 of the Constitution provides that everyone has the right to freedom of expression. This includes the freedom of the press and other media; freedom to receive and impart information and ideas; freedom to artistic creativity; academic freedom and freedom of scientific research. However, in terms of section 19(2), this right does not extend to propaganda for war; incitement of imminent violence; advocacy of hatred that is based on race, ethnicity, gender or religion; and incitement to cause harm. Freedom of expression is generally regarded as an essential right in a democratic system. To maintain and sustain democracy, citizens must be free to speak and criticise constructively.

5. Political rights

These rights are dealt with in section 19 of the Constitution. It provides that:

- (1) Every citizen is free to make political decisions, which includes the rights:
 - a) to form a political party;
 - b) to participate in the activities of, and to recruit members for a

- political party; and
 - c) to campaign for a political party or cause
 - (2) Every adult citizen has the right:
 - a) to vote in elections for any legislative body in terms of the Constitution and to do so in secret; and
 - b) to stand for public office and, if elected, to hold office.

Most rights enumerated in the Bill of Rights apply both to citizens and non-citizens. But these rights are confined to the citizens of South Africa. As far as public servants are concerned, section 197 (3) stipulates that no employee may be favoured or prejudiced based on that person's support for a political party or cause.

6. Access to information

Section 32 of the Constitution provides that everyone has the right of access to information held by the state; and information held by another person that is required for the exercise or protection of any rights. Subsection 2 requires the enactment of national legislation to give effect to this right. The Open Democracy Bill has been published and public comments on the Bill have been invited. In terms of item 23 of Schedule 6 of the Constitution, the required Act must be passed before 4 February 2000. The objects of the Open Democracy Act are listed in section 3 of the Bill and they are, among others-

- a) to give effect to the constitutional right of access to any information held by the state by providing public access, as swiftly, inexpensively and effortlessly as reasonably possible, to that information without jeopardising good governance, privacy and commercial confidentiality;
- b) to regulate the use and disclosure of personal information held by governmental or private bodies; and
- c) to promote transparency and accountability of all organs of state by providing the public with timely, accessible and accurate information and by empowering the public to effectively scrutinise, and participate in, governmental decision making that affect them.

7. Just administrative action

Section 33(1) of the Bill of Rights provides that everyone has a right to just administrative action. This is defined as an action which is lawful, reasonable and procedurally fair. Subsection 2 provides that everyone whose rights have been adversely affected by administrative action has the right to receive written reasons. Subsection 3 requires national legislation to be passed to give effect to the rights to just administrative action and to provide for the review of the administrative action by the courts.

The envisaged legislation will regulate the manner by which written reasons will be furnished to everyone adversely affected by the administration action and grounds upon which the administration action could be reviewed by courts. The executive authority, in taking an administrative action, is required to act lawfully, reasonably and in a procedurally fair manner. For the decision-maker this involves applying his or her mind to the matter before him or her and considering all relevant facts before coming to a decision (see *SARFU v President of the RSA and Others*)

The South African Law Commission has already published the second draft of the Administrative Justice Bill which must be enacted before 4 February 2000. Once enacted, the Administrative Justice Act will oblige all organs of state to give effect to the right to administrative justice. It will, among others, codify judicial review and provide mechanisms to regulate publication of notices and comments procedures.

8. Socio-economic rights in the Bill of Rights

Section 184 (4) of the Constitution empowers the South African Human Rights Commission to require relevant organs of state to provide the Commission with information on the measures that they have


taken towards the realisation of the rights in the Bill of Rights. This concerns housing, health care, food, water, social security, education and environment.

9. Limitation of rights

Human rights are not absolute although there is general international consensus that the right not to be tortured and the prohibition against slavery are absolute. They are subject to limitations in accordance with the law. The rights in the Constitution may be limited by the general limitation clause contained in section 36 and by additional qualifications contained in some of the rights themselves (such as the right to demonstrate and picket which is qualified by the inclusion of the words “peacefully” and “unarmed”). The general limitation clause provides that the rights in the Bill of Rights may only be limited in terms of law of general application to the extent that the law is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The word “law” as used in this sense includes legislation, common law and customary law. To determine whether limitations are reasonable and justifiable all relevant factors must be taken into account, including-

- a) the nature of the right;
- b) the importance of the purpose of the right;
- c) the nature and extent of the limitation;
- d) the relation to the limitation and its purpose; and
- e) less restrictive means to achieve the purpose.

The limitation of rights as sanctioned by section 36 of the Constitution involves a process of weighing up of competing rights, societal and ethical values using an assessment based on proportionality. In the case of *S v Makwanyane* in which the Constitutional Court found the death sentence to be unconstitutional, the court had to weigh for example, the right to life against the right to freedom and security of the person.



CHAPTER FOUR: PROVINCIAL EXECUTIVES**1. Introduction**

The executive authority of a province is vested in the premier of that province. The premier exercises the executive authority together with the other members of the executive council. A province has executive authority to the extent that the province has the administrative capacity to assume effective responsibility. The national government, by legislation and other measures, must assist provinces to develop administrative capacity. This is set out in the Constitution.

2. Premier

2.1 Appointment

The provincial legislature elects the Premier from among its members at the first sitting after its own election. The Premier's term of office ends when a vacancy occurs or when the person next elected Premier assumes office. No person may hold office as Premier for more than two terms.

Provision is made for an Acting Premier with the same responsibilities, powers and functions of the Premier. Any of the following persons, in the order below, acts as an Acting Premier in the absence of the Premier-

- (a) a member of the Executive Council designated by the Premier;
- (b) a member of the Executive Council designated by the other members of the Council;
- (c) the Speaker, until the legislature designates one of its other members.

2.2 Powers and functions

The Constitution and legislation grant powers and functions to a Premier. The Premier of the Province exercises powers alone and together with the Executive Council.

The Premier is solely responsible for: assenting to and signing Bills; referring a Bill back to the provincial legislature for reconsideration of the Bill's constitutionality; referring a Bill to the Constitutional Court for a decision on the Bill's constitutionality; summoning the legislature to an extraordinary sitting to conduct special business; appointing commissions of enquiry; and calling a referendum in the province in accordance with national legislation.

2.3 Formal requirements for executive decisions

The decisions of a Premier must be in writing if they are taken in terms of legislation or have legal consequences. A decision must be countersigned by another executive Council member if that decision concerns a function assigned to that other member. Subordinate legislation must be accessible to the public. The Provincial legislation must specify the manner and extent to which subordinate legislation ought to be tabled and approved by the provincial legislature.

3. Executive Councils

3.1 Composition

The Executive Council of a province consists of the Premier, as head of the Council, and no fewer than five and no more than ten members appointed by the Premier from among the members of the provincial legislature. The Premier of a province appoints the members of the Executive Council, assigns their powers and functions, and may dismiss them.

3.2 Powers and functions

Members of the Executive Council are accountable collectively and individually to the provincial legislature for the exercise of their powers and performance of their functions. They must provide the legislature with full and regular reports on matters under their control. Members of the Executive Council are responsible to the Premier for the function of the executive assigned to them. A member of the Executive Council may assign any power or function that is to be exercised or performed in terms of an Act of Parliament or a provincial Act to a Municipal Council. Such an assignment must be by agreement with the Municipal Council. It must also be consistent with the legislation in terms of which the power or function is exercised or performed. Such an agreement takes effect upon proclamation by the Premier.

Provincial executive authority includes responsibility for the implementation of provincial legislation. The Premier, together with the other members of the Executive Council, is responsible for

developing and implementing provincial policy; co-ordinating the functions of the provincial administration and its departments; preparing and initiating provincial legislation; and performing any other function assigned to the provincial executive in terms of the Constitution or an Act of Parliament. In terms of section 125, all national legislation within the functional areas listed in Schedule 4 or 5 (except where the Constitution or an Act of Parliament provides otherwise) must be implemented by the provinces.

The execution of provincial laws is an “exclusive” provincial executive power. To the extent that the province has the administrative capacity to assume effective responsibility, it also implements all national legislation within the functional areas listed in Schedule 4 or 5. The province further administers national legislation outside the functional areas listed in Schedules 4 and 5 if the administration of the Act has been assigned to the provincial executive in terms of an Act of Parliament.

A Cabinet member may also assign any power or function that is to be exercised in terms of an Act of Parliament to a member of a provincial Executive Council or to a Municipal Council. A Minister may also delegate any power or function that is to be exercised or performed in terms of legislation to any other executive organ of state, provided that the delegation is consistent with the legislation in terms of which the power is exercised or the function is performed.

4. National supervision of provincial government


The national executive may intervene when a province does not fulfil an executive obligation provided for in national legislation or the Constitution. When intervening, the national executive may take appropriate steps in accordance with section 100 of the constitution to ensure that the province’s obligation is fulfilled.

5. Provincial supervision of local government

When a municipality cannot or does not fulfil an executive obligation, the relevant provincial executive may, in terms of section 139 of the Constitution, intervene. National legislation may also further regulate the process of intervention. The intervention must end unless it is approved by the Cabinet member responsible for local government affairs within 14 days after the intervention. Notice of the intervention must also be tabled in the NCOP and the provincial legislature and the intervention must end, unless it is approved by the Council, within 30 days after its first sitting after the intervention began.

6. Provincial constitutions

Section 142 of the Constitution allows a provincial legislature to pass a constitution for the province if at least two thirds of its members vote in favour of the Bill. A provincial constitution may not be inconsistent with the national Constitution. It must be certified by the Constitutional Court. To date it is only the Western Cape which has a provincial constitution, certified by the Constitutional Court.



CHAPTER FIVE: INTERNATIONAL AGREEMENTS

1. Introduction

An international agreement includes any written agreement between South Africa and another state or states. Agreements are negotiated and entered into by South Africa on a regular basis and may need ratification or accession in order to be brought into effect.

2. Negotiation and signing of international agreements

International agreements may be concluded as follows:

- (a) by *ratification or accession*, or
- (b) by the signature of a duly authorised representative of a contracting state party to come into effect.

3. Ratification and Accession in International law

Many international agreements, usually bilateral agreements, do not envisage any *ratification or accession* procedures and are simply concluded by the signature of the contracting parties.

Many multilateral agreements, such as conventions, may be signed by the negotiating states at the time at which its text (or any amendments to it) is settled or agreed upon by the many representatives. This does not mean that the country is bound by it. Thereafter, the agreement will usually have to be *ratified* by the signatory states in accordance with each state's own procedure. Many multilateral agreements are inoperative until a minimum number of states, as set out in the treaty, have ratified the agreement. Only then does it "enter into force".

If a state has not been involved in negotiating and signing an agreement or treaty, but later wishes to become bound by the treaty, it can *accede* to the treaty by depositing an instrument of accession at the institution specified in the treaty.

4. "National or "Domestic" approval

The methods of agreement described above should be distinguished from the two constitutional procedures to obtain domestic approval. This entry into international agreements is envisaged in Section 231 of the Constitution. It distinguishes between the following categories of international agreements for the purpose of obtaining such approval:

- a) Agreements which require only Executive approval but must be tabled in Parliament within a reasonable time thereafter;
- b) Agreements which require both Executive and Parliamentary approval before binding South Africa.

5. Agreements requiring approval by Parliament

Section 231(2) of the Constitution provides that all international agreements shall bind the Republic only after they have been approved by resolution of both houses of Parliament. The exceptions are (1) agreements of a technical, administrative or executive nature, or (2) those which do not require accession or ratification. The result is that Parliament is required to approve only agreements which require 'ratification or accession' and which are not of a technical administrative or executive nature.

Technical, administrative and executive agreements are not specifically defined and it will be for the department responsible for processing the agreement to determine, (in conjunction with the Law Advisors of Justice and Foreign Affairs), whether an agreement falls within this category. These include agreements which are:

- departmentally specific;

- of major political or other significance;
- have no financial consequences; and
- do not affect domestic law.

These are agreements flowing from the everyday activities of government departments and are often drafted in a simplified form. Although there is no rule as to which types of agreement require ratification or accession, this requirement is generally stated in the text of the agreement. As a general guideline, this applies normally to multilateral agreements. However, in some cases, such a procedure could also be required for bilateral agreements.

After the Cabinet has agreed to the submission of the agreement to Parliament, the agreement will be tabled together with a draft resolution and an explanatory memorandum by way of a notice of motion by the Department concerned. The memorandum is to set out the history, purposes and consequences of the agreement and whether its incorporation into domestic law is sought in terms of section 231(4). The rules of the National Assembly and the National Council of Provinces will apply in regard to how the notice of motion will be dealt with. The Houses sit separately for the purposes of approving any international agreement.

Parliament is not in a position to negotiate or re-negotiate the terms of international agreements but may insist on a reservation or on referring the agreement back to the Executive. The filing and formulation of a reservation is the function of the executive.

Once the agreement has been ratified by Parliament, the responsible department is required to submit an instrument of ratification for signature by the Minister of Foreign Affairs. He/she will deposit it with the relevant body specified in the international agreement. This second stage of the ratification concludes the process.

6. International agreements which may be negotiated and signed by the National Executive

The National Executive, consisting of the President and the Cabinet, has the responsibility to negotiate and sign international agreements.

In the case of agreements which are of an administrative, executive or technical nature or which do *not* require ratification or accession, the mere signing of the agreement by a person authorised by the National Executive will be sufficient to bring the agreement into effect, provided the signature is intended to indicate consent to be bound. The prior approval of the signing of the agreement by the National Executive will constitute the necessary formal authority to bind the Republic to the agreement, although the agreement will still need to be tabled in the Assembly and the Council within a reasonable time of its signing [section 231(3)]. The National Executive ‘assumes responsibility’ for such agreements. Such responsibility includes determining the arrangements by which negotiation and signing takes place.

Line function Ministers must ensure that international agreement do not conflict with the domestic law or government policy and that it will not have adverse financial consequences.

Where the international agreement does not deal with a routine departmental matter, for example where it impacts on our domestic law or involves financial expenditure, the matter cannot be dealt with by a single Minister and should be remitted to the Cabinet by way of a cabinet memorandum for the approval of the agreement and for the authorisation of a particular person to represent the Republic in concluding the necessary formalities.

7. Authority to sign a series or set of agreements

In routine agreements concluded within a specific framework and that are concluded with a high

frequency, such as development aid agreements within a co-operation accord, the National Executive may, *by a decision of the Cabinet*, delegate the authority to negotiate and sign the individual agreements within such a specific category of agreements to a specific Minister. However, the responsible Minister must inform the National Executive of the conclusion of such agreements. The President and the Minister of Foreign Affairs must also be supplied with a copy of the agreement and proof of Ministerial approval for record purposes.

CONCLUSION

This Handbook provides a broad overview of the role of executive members, their powers, functions and responsibilities. It has attempted to detail the multifaceted nature of executive responsibilities, distinguishing between the political, legislative and administrative role of executive members. It is hoped that the Handbook will assist members of the executive in tackling challenges they could face in the execution of their functions.

The Handbook provides a source of references which include publications, relevant Constitutional Court cases, Acts of Parliament and policy documents and the Constitution itself. This document should be read in conjunction with them to empower and equip members of the executive to be able to execute the tasks associated with their portfolios.

ADDENDUM OF SELECTED CONSTITUTIONAL COURT CASES
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1. Certification of the Amended Text of the Constitution of the Republic of South Africa

Question: Whether the Constitution of the Republic of South Africa, 1996 complied with the 34 Constitutional Principles.

Answer: The Constitutional Court analysed all sections of the Constitution and found that some of them did not comply with the Constitutional Principles. The offending sections were amended and the Constitution was duly certified. The following Parts of the judgement are important for members of the executive:

- The entrenchment of the rights in the Bill of Rights (paragraphs 68-71 of the judgement);
- Intervention of the National sphere of government in the provincial sphere of government (paragraphs 111-127). The court went at length to interpret the words “appropriate steps” as used in section 100 of the Constitution, and held that these words include procedures established for the promotion of intergovernmental relations and the settlement of intergovernmental disputes and the exercise of treasury control powers (see paragraph 124).
- The division of powers between the national and provincial spheres of government (paragraphs 145-161).

2. Hugo v State President of South Africa and another

Question: A Presidential act was challenged on the grounds that in remitting sentences of mothers of children under 12 years the President acted without authority and that the act was discriminatory in that it discriminated against male prisoners.

Answer: The court held that the President derived the power to pardon convicted persons from section 82k of the Interim Constitution. The applicant had contended that the President had exceeded the powers conferred by the Constitution and acted out of his prerogatives. This judgement confirms the principle that the executive authority must derive its power from the Constitution or other legislation. Regarding the challenge on the ground of discrimination, the judge found that the Presidential act had discriminated against the applicant and granted judgement in his favour. However, in the subsequent appeal, the Constitutional Court held that the Presidential act was discriminatory, but found that the discrimination was justified in terms of the limitation clause.

3. S v Makwanyane

Question: Limitation of rights in terms of section 33 of the Interim Constitution (section 36 in the Constitution). The Constitutional Court had to decide on the constitutionality of the death penalty.

Answer: The court made an extensive research of foreign legal systems on capital punishment. The court found that the death penalty was unconstitutional because it was a form of punishment that infringed a person's right not to be punished in a manner which is cruel, inhuman and degrading. It further stated that in the balancing process, deterrence, prevention and retribution must be weighed against the alternative punishments available to the State, and found that it has not been shown that the death penalty would be materially more effective to deter or prevent murder than the alternative sentence of life imprisonment would be.

4. Executive Council, Western Cape Legislature and Others v President of the Republic of South Africa and Others

Question: The court dealt with the distinct functions of the three branches of government and clarified the role of the court of ensuring that one branch of government does not overstep its boundary. The question that the Constitutional Court had to answer in this case was: How much law-making power can Parliament give to the President?

Answer: The Constitutional Court said that while Parliament was entitled to give the President some law-making powers, in this case Parliament had abdicated its law-making responsibilities by giving the President too much power to make law by means of the proclamations in question. It is always dangerous for democracy if the people who enforce the laws also have wide powers to make these laws.

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