Citizenship, Public participation and Democracy



Only study guide for

CPD1501

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PREFACE

1. INTRODUCTION AND ORIENTATION

Welcome to this module titled Citizenship, Public Participation and Democracy – and well done! You are probably wondering why we say "well done". It is because you have made the great decision to invest your time in mastering this module, which deals with an interesting area of the law.

The more you learn and make active efforts to learn, the better your chances of improving our circumstances and creating a better life for yourself and your family. There are so many ways in which we can learn. For example, enrolling for a course like this one is an important way of engaging formally in some kind of learning and development.

We are laying foundations in more than one sense. Hopefully, on completing this module successfully, you will have built a solid foundation for entering the paralegal field in South Africa, as well as for further development in the legal field. The paralegal diploma will enable you to operate effectively within the paralegal working environment, whether it be in the public sector, in community-based advice offices or even in private practice.

This is one of the modules that you have to complete and pass in order to obtain the qualification that you have enrolled for. We are certain that you will enjoy this subject, as it is a fairly new section of the South African law that has been the result of South Africa becoming a democracy in 1994. We have compiled this study guide in a clear and concise manner so that you should find it relatively easy to study.

2. THE PURPOSE OF THIS MODULE

The purpose of this module is to enable you to understand and identify various concepts relating to citizenship, democracy and the Constitution. It will also enable you to evaluate the role played by citizenship, democracy and the Constitution in society by establishing how the public participates in a democratic state like South Africa.

This module will therefore equip you with sufficient theoretical knowledge, skills and competencies to analyse and evaluate situations or scenarios pertaining to citizenship and democracy in South Africa. You will be able to analyse clients' needs and provide them with solutions.

Students who complete this module will be able to apply democratic principles to practical situations that may arise in practice ranging from paralegal, public-sector, community-based advice offices and private practice.

3. PRESCRIBED TEXT BOOK

There is no prescribed textbook for this module; this study guide is all that you require. The case law and the sections of particular pieces of legislation that are mentioned in the study guide are sufficient for exam purposes and you are not expected to do further research on your own. Further reading could, however, help you to understand some concepts in more detail and you are encouraged to read as much as you can for your own interest and to build up your knowledge.

As this is a blended module you also have to log on to MyUnisa once a week to check for updates and to use any of the suggested MyUnisa tools that the lecturer requires you to use.

Please make sure that you read all the tutorial letters carefully, starting with Tutorial Letter 101.

You will need a copy of the 1996 Constitution. You may also use the pocket edition of the Constitution, which was issued free of charge at post offices some years back, or you can download the Constitution from the Constitutional Court website at www.constitutionalcourt.org.za. You can also obtain the Constitution in the other official languages on this website.

4. STUDY GUIDE

This study guide will guide you through the prescribed syllabus; therefore in order to be successful in this module you must understand how the study guide works.

As you will see, this module is divided into two parts, **Part A** and **Part B.**

Part A, which covers citizenship law, contains four study units, namely, study units 1, 2, 3 and 4. At the end of each study unit there are activities that you will have to complete. You must then compare your answers to the feedback given. To be able to determine how much you still need to study in each unit, please ensure that you attempt to answer the activities on your own before comparing them to the feedback given for each activity.

Part B, which covers public participation and democracy, also contains four study units, namely, study units 5, 6, 7 and 8. As in the case of Part A, there are activities that you should complete at the end of each study unit. Again, make sure you attempt to answer the activities on your own before comparing them to the feedback.

Work through the whole study guide carefully, making sure that you take note of the learning outcomes at the beginning of each study unit and complete the activities or self-evaluation exercises. These activities are very important as they are aimed at integrating the work that you have studied in each study unit with the rest of the module.

The following "signposts" have been used throughout the study guide, to help you find your way.

Icon	Description
	**Learning outcomes.** This icon indicates what aspects of the particular topic you have to master and be able to show that you understand.
	**Activity.** This icon indicates activities that you must do in order to develop a deeper understanding of the learning material.
	**Self-assessment.** This icon indicates that you will be required to test your knowledge, understanding and application of the material you have just studied.
	**Feedback.** This icon indicates that you will receive feedback on your answers to the self-assessment activities and questions.
	**Read.** If it is suggested that you should read a certain section, you should take note of the contents because that section will contain useful background information or offer another perspective or further examples.
	**Study.** This icon indicates which aspects of the study material you need to study and internalise.

5. MODULE AND STUDY UNITS' OUTCOMES

You will find a bulleted list of outcomes at the beginning of each study unit. The outcomes provide you with an idea of what you are expected to know after completing each study unit. Always browse through these study unit outcomes before you even attempt to read the study unit. They will also tell you the areas that you need to concentrate on.

The following outcomes have been set for **PART A**, which covers citizenship law**:**

At the end of this section, you should be able to

- discuss the legislative history of citizenship law in South Africa and apply the methods for acquiring citizenship
- explain the loss of citizenship and apply the effect of losing citizenship, as well as the resumption of citizenship in South Africa to practical situations
- apply **the** law pertaining to rights, privileges and benefits of citizenship in South Africa **and** describe the limitation of citizens' rights in South Africa
- apply immigration and refugee laws in South Africa to practical situations

The following outcomes have been set for **PART B**:

At the end of this section, you should be able to

- analyse and apply the principles of democracy and public participation in South Africa to practical situations
- investigate the role that government plays in South African democracy
- discuss the public's role in national, provincial and local government

6. ACTIVITIES AND FEEDBACK

As indicated, each study unit contains activities and feedback on those activities. The purpose of these activities is not only to give you theoretical knowledge but also to determine whether you have acquired sufficient knowledge of citizenship law, public participation and democracy in order for you to be able to apply it to practical situations. The activities are important as they will give you an indication of the types of question you can expect in the examination. As mentioned, please attempt to answer the activities first on your own before referring to the feedback on the activities. This will help you to determine how much you still need to study.

It is important that you master the knowledge contained in one study unit before you move on to the next. The reason for this is that the units follow sequentially and you need to strengthen your knowledge base as you engage more with the study material. You should also actively seek to understand the theoretical knowledge which is embedded in specific contexts. You are required to read the study guide and make summaries so that you gain the required knowledge, develop skills, inculcate attitudes and demonstrate competencies as shown by the study guide.

Good luck with your studies in this module, Citizenship Law, Public Participation and Democracy.

PART A

Citizenship Law

Dear Student

Please take the time to read through this introduction before you start on the rest of the study guide.

Part A, which deals with citizenship law, equips you with sufficient theoretical knowledge, skills, and competencies to be able to analyse and evaluate situations pertaining to citizenship law in South Africa. For the purposes of this module, citizenship law requires you to be familiar with the legislative history of South African citizenship law, the acquisition of citizenship, the loss, consequences of loss and resumption of South African citizenship, citizens' rights, privileges and benefits and the limitation of citizens' rights as well as laws pertaining to immigrants, migrants and refugees.

GLOSSARY OF KEY TERMS

This glossary (see Table 1) contains definitions of key concepts/words/terms that you will encounter while studying a particular study unit. This is important as you need a proper understanding of all these words. Read through the glossary before you start studying and refer back to it every time you come across a word in the study guide that you do not understand.

Hint: We suggest that if you do not understand a word you log on to the internet and use "Google translate" to translate it into your first language (if it is not English). Google translate does not give a perfect translation, so just check that the translation makes sense. If you are familiar with English and you still encounter words you do not understand, use the dictionary to explain these words.

Hint: As a lifelong learner the following is good practice when learning the meanings of new words and terms. Please add to this list below as you revise the study guide again.

Table 1: *Glossary Part A*

LEGAL/LATIN TERM	ENGLISH	ZULU
Act	Legislation e.g. Citizenship Act 88 of 1995	Umthetho wendlu yesish-ayamthetho Act 88 of 1995
Citizenship	Legal relationship between a person and a state	Ubuhlobo phakathi ko-muntu kanye nezwe lakhe
Constitution	System of fundamental principles by which a nation is governed	Umthethosisekelo
Descent	From ancestor or extrac-tion, passing from higher to lower in degree	ubuzwe obutholakala ngobuhlobo phakathi ko-muntu namadlozi akhe.
Extradition	The surrender of an al-leged fugitive from justice or criminal by one state to another	Ukubuyisela umuntu ezweni lakhe nokuy-ilapho asolwa ngokuphula umthetho
Ibid	For the purposes of this guide, this means the same author and the same page number referred to above	Ngezinhloso zalencwadi, lokhu kuchaza ukuthi umbhali noma okufanayo okukhulunywe ngakho ngenhla
Naturalisation	To give a foreigner the rights and privileges of a citizen	Ukuthola ubuzwe ngokuziphatha kahle ezweni olihambele
TBVC states	Former independent home-lands i.e. Transkei, Bo-phuthatswana, Venda and Ciskei	Ohulumeni ababezimele ngaphansi kweningiz-imu ne afrika ngesikhathi sobandlululo i.e Transkei, Bophuthatswana, Venda kanye Ciskein

Study unit 1

Legislative history of South African citizenship law and the acquisition of citizenship

Contents

1.1 Introduction
1.2 Legislative history of South African citizenship law
1.3 The acquisition of citizenship
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1.3.2 Citizenship by descent
1.3.3 Citizenship by naturalisation
1.3.3.1 Certificate of naturalisation
1.3.3.1.1 Certificate of naturalisation under exceptional circumstances
1.3.3.1.2 Certificate of naturalisation in respect of a minor
1.3.3.1.3 Certificate of naturalisation in respect of a foreigner who is a spouse or surviving spouse of a South African citizen
1.3.3.2 Period of residence or ordinary residence
1.4 Documents to be submitted with an application for citizenship by naturalisation
1.5 Conclusion



Study unit outcomes

Once you have completed this study unit, you should be able to:

- discuss the legislative history of citizenship law in South Africa
- apply the methods of acquiring citizenship to practical situations

1.1 INTRODUCTION

This study unit analyses the brief legislative history of South African citizenship law. The purpose of this overview of legislative history is to enable you to understand how citizenship law has developed over the years. It will also provide you with a clearer understanding of the importance of citizenship law, as it not only determines a person's status but also creates a legal relationship between a person and the state. You must always remember that, in terms of the South African Citizenship Act 88 of 1995 (hereinafter referred to as Citizenship Act 1995), there are three different ways of acquiring South African citizenship. These ways will be discussed in section 1.3: The acquisition of citizenship.

We first need to lay the foundation and that is why we will be examining the legislative history of South African citizenship law.

1.2 LEGISLATIVE HISTORY OF SOUTH AFRICAN CITIZENSHIP LAW

Refer to figure 1.1 below which is a graphic representation of the legislative history of South African citizenship law.

Legislative history of South African citizenship law

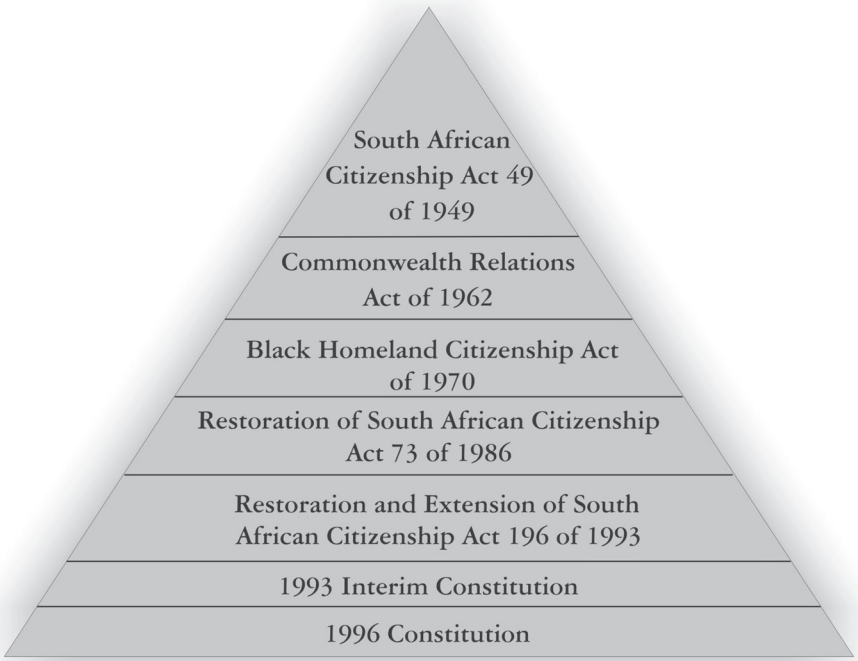


Figure 1.1: Legislative history of South African citizenship law

For the purposes of this study guide, the history of South African citizenship focuses on the legislative history of citizenship rather than the historical context. This means that we only analyse the legislative history and do not look at the other context relevant to citizenship law.

The legislative history of citizenship law may be traced back as far as 1949, when the **South African Citizenship Act 49 of 1949** was passed.

What is crucial for you to note is that before the South African Citizenship Act of 1949, there were no South African citizens, only British subjects and Union nationals (Klaaren 2000:223).

In other words, the South African Citizenship Act 49 of 1949 instituted the status of South African citizenship (Ibid, citing s 38 of the Citizenship Act 1949 which provided that reference in other legislation to Union nationality should be taken as reference to South African citizenship). This

Act extended South African citizenship to citizens of Commonwealth countries by allowing them to register and thereby obtain South African citizenship (Ibid).

However, such an extension of South African citizenship to citizens of Commonwealth was abolished a year after South Africa became a Republic in 1961 (ibid, citing section 19 of the Commonwealth Relations Act of 1962).

You must always remember that the Citizenship Act 1949 did not entitle every South African citizen to the right to vote, as franchise was determined by race. (Klaaren 2000:224). Blacks, for example, did not enjoy full rights of civil and political participation.

Even the **Black Homeland Citizenship Act of 1970** did not resolve this situation of denying black people the right to vote. All it did was to ensure that every African was granted additional status of citizenship on the basis of his or her connection to one of the designated homelands through language, culture or race (Ibid, citing s 2(4) of the Black Homelands citizenship Act). Section 2(4) of the Black Homelands Citizenship Act provided, in part, as follows: "a citizen of a territorial authority area (homeland) shall not be regarded as aliens in the republic and shall … remain for all purposes a citizen of the republic and shall be accorded full protection according to international law by the Republic".

It is worth noting that the citizenship in terms of the Bantu Homelands came to an end when the homelands were granted independence (ibid). Subsequently, the citizenship of the people belonging to independent homelands (TBVC) was restored in 1986, when the **Restoration of South African Citizenship Act 73 of 1986 was passed** (Klaaren 2000:226). Their citizenship was further reiterated by the **Restoration and Extension of South African Citizenship Act 196 of 1993** (Klaaren 2000:228). Hence, Klaaren argues that before constitutional democracy, South African citizenship was based on the statutes and did not count for much (Klaaren 2010:94).

The situation changed for the better in **1993 when South Africa adopted the Interim Constitution**. This Constitution extended South African citizenship to all South Africans and categorically stated that every person who is a South African citizen shall, subject to this Constitution, be entitled to enjoy all rights, privileges and benefits of South African

citizenship. As a result, the **citizenship legislation of the previous homelands was repealed by the South African Citizenship Act 88 of 1995** (Klaaren 2010:95). This Act regulates the acquisition, loss and restoration of citizenship in South Africa.

This position was also retained by the 1996 Constitution which replaced the 1993 Interim Constitution. This is the case because the **1996 Constitution also stresses citizenship for all South Africans (Section 3)**.

It is worth noting that the fact that the South African Constitution uses the term "citizenship" and other countries use "nationality" is of no consequence, as these terms have the same meaning in practice (Rautenbach & Malherbe 2008:57).

This concludes the brief legislative history of South African citizenship law. We will now analyse the ways in which citizenship can be acquired in South Africa.

1.3 THE ACQUISITION OF CITIZENSHIP

The **Citizenship Act 1995** provides for three methods by means of which citizenship may be acquired:

- acquiring citizenship by birth
- acquiring citizenship by descent
- acquiring citizenship by naturalisation

The three methods for acquiring citizenship are summarised in figure 1.2.

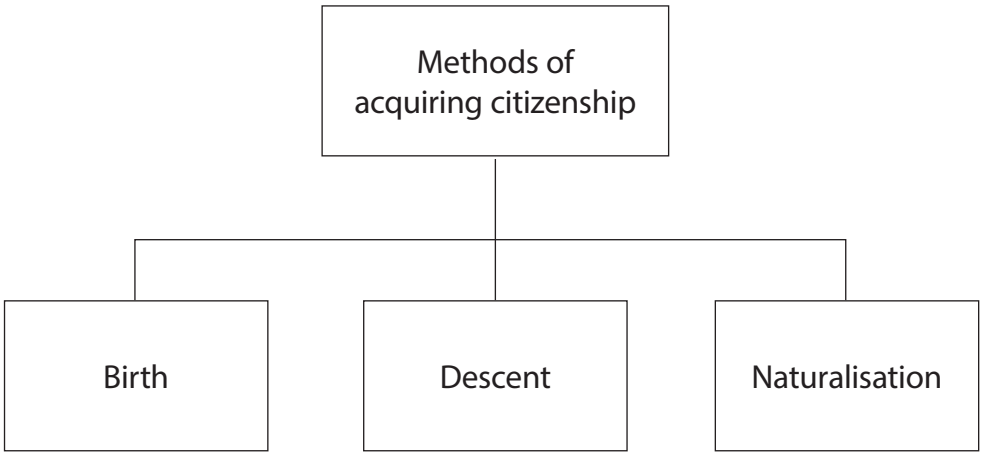


Figure 1.2: Three methods for acquiring citizenship

It is crucial that you not only understand the different ways in which citizenship is acquired but also that you are able to apply them to practical situations. We will start off by examining "citizenship by birth".

1.3.1 Citizenship by birth

Citizenship by birth

We shall now analyse *the **different ways** of acquiring citizenship by birth in South Africa.*

Firstly, a person qualifies for the acquisition of South African citizenship by birth if he or she was a South African citizen by birth immediately prior to 01 January 2013 (the date of commencement of the **Citizenship Amendment Act 2010**).

Secondly, a person qualifies for the acquisition of South African citizenship by birth if he or she was born in or outside the Republic and one of his or her parents, at the time of his or her birth, is a South African citizen.

Worthy of note is that a person born in the Republic qualifies for citizenship by birth even if one of his parents **is not** a South African citizenship if

(a) he or she does not have the citizenship or nationality of any other country, or has no right to such citizenship or nationality and his or her birth is registered in the Republic in accordance with the Births and Deaths Registration Act 51 of 1992
(b) **his parents** are admitted into the Republic for permanent residence status and such a person born in the republic has lived in the Republic from the date of his or her birth to the date of becoming a major (18 years) and his or her birth is registered in the Republic in accordance with the Births and Deaths Registration Act 51 of 1992)

According to Watters (2010), the words "admitted into the Republic for permanent residence" suggest that they intend to benefit only those children whose parents entered South Africa lawfully or have had their residence duly regularised. This means that for those whose parents entered unlawfully will not qualify even if they reach the age of 18 years (ibid).



Activity

This activity is only intended to ascertain whether you are able to apply your knowledge on the acquisition of citizenship by birth. It is also intended to ascertain whether you have understood the brief legislative history of citizenship in South Africa. To complete this activity you should answer the following questions:

(1) Sipho was born in the Republic on 5 June 2014 of two Zambians who have permanent resident status. He has lived in South Africa since his birth. Does Sipho qualify for citizenship by birth in South Africa? Give reason/s for your answer.
(2) Themba was born in the Republic on 5 June 1998 of two Zambian parents who do not have permanent resident status. He has lived in South Africa since his birth. Does Themba qualify for citizenship by birth in South Africa? Give reason/s for your answer.
(3) Themba was born in the Republic on 5 June 1998 of two Zambian parents who have permanent resident status. He has lived in South Africa since his birth.

Does Themba qualify for citizenship by birth in South Africa? Give reason/s for your answer.

(4) Briefly explain the legislative history of South African citizenship law.

(5) Referring to the Citizenship Act 1995, list and discuss the three methods for acquiring South African citizenship.

Write out your answers to the activity. Then only read the feedback below and evaluate your answers.



Feedback on activity

(1) This question requires you to state the law first and then apply it to the facts given. Your answer should be No. Sipho does not qualify for citizenship by birth. Now it is your turn to provide us with a reason as to why the correct answer is No.

(2) Your answer should be "no". Themba does not qualify for citizenship by birth. Please provide us with a reason/s.

(3) Your answer should be "yes". Themba does qualify for citizenship by birth. Please provide us with a reason/s.

(4) Your answer should include the following pieces of legislation: you need to start with the South African Citizenship Act 49 of 1949. It must be followed by the Commonwealth Relations Act of 1962, the Black Homeland Citizenship Act of 1970, the Restoration of South African Citizenship Act 73 of 1986, the Restoration and Extension of South African Citizenship Act 196 of 1993, the 1993 Interim Constitution and the 1996 Constitution, and, lastly, the Citizenship Amendment Act 2010. You need to write a few descriptive sentences about each piece of legislation so that you comply with the requirement to provide an explanation."

(5) Refer to the relevant sections. "List" means you write out the three types. "Discuss" means you have to lay out the facts to clarify the question – please do not learn huge chunks of work word for word. You should summarise the sections and then you should be able to answer the rest of the questions from these summaries. This type of question ensures that you develop a firm foundation of knowledge. Once you know the theory you can apply it to various scenarios as laid out in the questions above.

1.3.2 Citizenship by descent

Citizenship by descent

Unlike citizenship by birth, citizenship by descent involves acquiring citizenship through your ancestry.

A person qualifies for the acquisition of South African citizenship by descent if he or she was a South African citizen by descent immediately prior to the date of commencement of the Citizenship Amendment Act 2010, that is, 1 January 2013.

Citizenship by descent can also be acquired by a person who has been legally adopted by a South African citizen and his birth is registered in terms of section 13 of the Births and Deaths Registration Act 51 of 1992.

It is important to note that, in addition to the above requirement, *a child will have to satisfy the following requirements in order to qualify for citizenship by descent*:

(a) He or she must have entered the Republic for permanent residence before becoming a major and his or her birth must be within one year after the date of issue of such certificate, or such longer period as the Minister in the special circumstances of the case may approve; or
(b) He or she must be a child who is legally adopted by a South African citizen and his birth is registered in terms of section 13 of the Births and Deaths Registration Act 51 of 1992.

A person who acquires citizenship by naturalisation after having ceased to be a South African citizen is prohibited from qualifying for citizenship by descent:

The following documents are required for an application for citizenship by descent:

- Form DHA-24, to register your birth in terms of the Births and Deaths Registration Act, 1992. In the event you were born out of wedlock both parents must sign the birth registration **Form BI-24** to confirm paternity.
- Forms DHA-529 (completed by yourself and your South African parents)
- Your foreign, unabridged birth certificate.
- Yours and your parents' marriage certificate (if applicable) and copies thereof
- If 15 years or older, an application for an identity document **(DHA-9)** with two identity document **photographs** that comply with the passport and ID photograph specifications.
- Proof of your South African parent(s)' foreign citizenship (if they have acquired such) and copies thereof.
- Proof of identity of your South African parent(s).
- If you were adopted by a South African citizen, submit a copy of the adoption order (Department of Home Affairs – available at http://www.home-affairs.gov.za/accessed on 01 May 2016).

1.3.3 Citizenship by naturalisation

Citizenship by naturalisation

Citizenship by naturalisation occurs when a foreigner receives a certificate of naturalisation that gives him or her the rights and privileges of a citizen.

We shall now analyse the ***four different ways*** *of acquiring citizenship by naturalisation in South Africa*.

These are the following:

- **Firstly**, a person qualifies for the acquisition of South African citizenship by naturalisation if he or she was a South African citizen by naturalisation immediately prior to 1 January 2013.
- **Secondly,** in case of an applicant with **dual citizenship**, he or she will qualify for a certificate of naturalisation if he or she is a citizen of a country that allows dual citizenship.
- **Thirdly,** in case of children, a major child of parents who are not South African citizens or who have not been admitted into the Republic for permanent residence, qualifies for citizenship by naturalisation.
- **Fourthly,** a person qualifies for citizenship by naturalisation if he or she has been granted a certificate of naturalisation as a South African citizen on or after 1 January 2013.

Each of the above *four different ways of acquiring citizenship by naturalisation in South Africa* will now be examined in more detail.

- **Firstly**, a person qualifies for the acquisition of South African citizenship by naturalisation if he or she was a South African citizen by naturalisation immediately prior to 1 January 2013 (the date of commencement of the Citizenship Amendment Act 2010).
- **Secondly**, In case of an applicant with **dual citizenship**, he or she will qualify for a certificate of naturalisation if he or she is a citizen of a country that allows dual citizenship.

If he or she comes from a country where dual citizenship is not allowed, he or she must first renounce the citizenship of that country and furnish the Minister with the prescribed proof of such renunciation before his application for a certificate of naturalisation will be considered (s 5(1)(d) of the Citizenship Amendment Act 2010). **The difficulties with this requirement are as follows:**

(a) It would be difficult for refugees from war-torn countries with unstable governments to acquire South African citizenship because it would require foreigners to produce documentation proving that they had renounced their citizenship of their country of origin (Watters 2010).
(b) It would be almost impossible for people from countries like Somalia to produce such documents because they don't have the infrastructure to produce passports or even travel documents (Masondo 2010).

- **Thirdly**, in cases involving children, a major child of parents who are not South African citizens or who have not been admitted into the Republic for permanent residence qualifies for citizenship by naturalisation if:a) he or she has lived in the Republic from the date of his or her birth to the date of becoming a major, and

- b) his or her birth has been registered in accordance with the provisions of the Births and Deaths Registration Act 51 of 2002
- **Fourthly,** a person qualifies for citizenship by naturalisation if he or she has been granted a certificate of naturalisation as a South African citizen on or after the 1 January 2013.

1.3.3.1 Certificate of naturalisation

The following subsection examines the situation where a foreigner is to be issued with a certificate of naturalisation.

For a foreigner to be issued with a certificate of naturalisation, he or she must comply with the following requirements (see points listed (a) to (g) below):

(a) he or she must prove that, he or she is not a minor (the Minister, however, has a discretion to grant certificate of naturalisation to a minor upon application by parents or guardian (s 5(4) of Citizenship Act 1995)
(b) he or she must have been admitted to the Republic for permanent residence and

  (i) must have been ordinarily resident in the Republic for a continuous period of not less than **five years** immediately preceding the date of his or her application and
  (ii) must have been resident in the Republic for a further period of not less than **four years** during the eight years immediately preceding the date of his or her application

(c) he or she must also prove that he or she is of good character
(d) he or she must also intend to continue to reside in the Republic or to enter or continue in the service of the Government of the Republic or of an international organization of which the Government of the Republic is a member or of a person resident in the Republic or of an association established in the Republic
(e) he or she must also be able to communicate in any one of the official languages of the Republic to the satisfaction of the Minister
(f) he or she should also have an adequate knowledge of the responsibilities and privileges of South African citizenship, and
(g) must have made the declaration of allegiance (s 5(6) of the Citizenship Act 1995)

1.3.3.1.1 Certificate of naturalisation under exceptional circumstances

A certificate of naturalisation under exceptional circumstances is issued by the Minister to an applicant who does not comply with the requirements of residence or ordinary residence in the Republic (s 5(9) of the

Citizenship Act 1995 as amended by s 4 of the South African Amendment Act 69 of 1997 and substituted by s 5(1)(g) of the Citizenship Amendment Act 2010).

1.3.3.1.2 Certificate of naturalisation in respect of a minor

A certificate of naturalisation is issued to a minor who is assisted by a major if he or she is permanently and lawfully resident in the Republic (s 5(4) of the Citizenship Act 1995 as substituted by s 5(1)(e) of the Citizenship Amendment Act 2010).

1.3.3.1.3 Certificate of naturalisation in respect of a foreigner who is a spouse or surviving spouse of a South African citizen

Certificate of naturalisation in respect of a foreigner who is a spouse or surviving spouse of a South African citizen is issued if the spouse or surviving spouse has been

(a) admitted to the Republic for permanent residence
(b) ordinarily resident in the Republic for a prescribed period, and
(c) married to such citizen during the period contemplated in paragraph b (s 5(5) of the Citizenship Act 1995 as substituted by s 5(1)(f) of the Amendment Act 2010).

1.3.3.2 Period of residence or ordinary residence

Period of residence or ordinary residence

To be able to give proper advice and to be able to determine whether or not to grant a foreigner with a certificate of naturalisation, it is important to understand what the period of residence or ordinary residence includes.

A period of residence or ordinary residence includes:

(i) any period during which an applicant has been employed outside the Republic in the service of the government of the Republic or on a ship or aircraft or a public means of transport registered or licensed in and operating from the Republic
(ii) any period during which an applicant has been resident outside the Republic with his or her spouse while the latter was so employed
(iii) any period deemed by the Minister, in his or her discretion, to be a period of residence or ordinary residence in case such ship, aircraft or public means of transport was not registered or licensed in the Republic

It should be noted that there are *periods of residence which are not deemed as a period of residence for the purposes of issuing a certificate of naturalisation*. Those periods of residence are listed as follows:

(1) a period when a foreigner is or was confined in a prison or other place of detention in the Republic after being convicted is not deemed as a period of residence, or
(2) a period when a foreigner has sojourned in the Republic, either conditionally, temporarily or in contravention of any law in force in the Republic is not deemed as a period of residence is also not deemed as a period of residence



Activity

This activity is intended to ascertain whether you are able to apply your knowledge on the acquisition of citizenship by naturalisation to practical situations. To complete this activity you should answer the following questions:

(1) Sipho, a foreigner, was convicted of rape and sentenced to nine years imprisonment in 2001. He served his nine-year sentence in Pretoria prison. He tells you that he wants to apply for a certificate of naturalisation after having been in South Africa for ten years. Will he be issued with a certificate of naturalisation? Advise him.
(2) Define the term "citizenship by descent".
(3) Discuss in detail four different ways of acquiring citizenship by naturalisation in South Africa.
(4) What are the requirements that must be complied with for a foreigner to be issued with a certificate of naturalisation?



Feedback on activity

(1) You need to determine whether the period that a foreigner serves in prison is deemed to be a period of residence for the purposes of issuing a certificate of naturalisation. This feedback is merely a guide as you are required to provide a lot of detail garnered from the relevant sections above.
(2) "Citizenship by descent" involves acquiring citizenship through your ancestry.
(3) Refer to section 1.3.3.
(4) Refer to section 1.3.3.1.

We have looked at the section "Citizenship by naturalisation". We will now examine what documents have to be submitted together with an application for citizenship by naturalisation.

1.4 DOCUMENTS TO BE SUBMITTED WITH AN APPLICATION FOR CITIZENSHIP BY NATURALISATION

The following is a list of required documents to be submitted together with an application for citizenship by naturalisation:

- Forms DHA-63 and **DHA-757**, completed by yourself
- your SA non-citizen identity document and copy thereof
- your marriage certificate (if applicable) and copy thereof —- If divorced, your decree of divorce and copy thereof
- an application for the reissue of your identity document, including two identity document **photographs** that comply with the passport and ID photograph specifications
- the prescribed fee for the reissue of your identity document
- proof of permanent residence/exemption and a copy thereof
- form SAP 91 with a full set of fingerprints in order to obtain a police clearance report for applicants 18 years and older
- parents or legal guardian must sign the application form (BI-63) if applicant is under the age of 18
- payment of the prescribed fee of R300-00 in terms of Regulation 2 of the **Fourteenth Amendment of the Regulations made under the South African Citizenship Act 1995** (Department of Home Affairs available at http://www.home-affairs.gov.za/accessed on 01May 2016)

If you have found the activities in this unit difficult, we advise that you restudy the unit thoroughly and attempt the questions again before moving on to the next study unit.

1.5 CONCLUSION

In this study unit we analysed the legislative history of South African citizenship law. We also tackled the manner in which one can acquire South African citizenship. In the next study unit, unit 2, we analyse the loss, consequences of loss and resumption of South African citizenship.

Study unit 2

Loss, consequences of loss and resumption of South African citizenship

Contents

2.1 Introduction
2.2 Methods of losing South African citizenship in terms of the Citizenship Act 1995
2.2.1 Automatic statutory operation
2.2.2 Renunciation of citizenship
2.2.3 Deprivation of citizenship
2.3 Consequences of losing South African citizenship
2.4 Resumption of South African Citizenship
2.4.1 Resumption of South African Citizenship by a minor
2.4.2 Resumption of South African Citizenship by adults
2.5 Documents to be submitted with an application for resumption of citizenship
2.6 Conclusion



Study unit outcomes

Once you have completed this study unit, you should be able to

- distinguish between the different methods/ways of losing South African citizenship
- describe and explain loss of citizenship, the effect of losing citizenship as well as the resumption of citizenship in South Africa and apply to practical situations

2.1 INTRODUCTION

In study unit 1 we analysed the legislative history of citizenship law and the different methods for acquiring South African citizenship. In this study unit, we analyse the different ways in which South African citizenship can be lost. These are listed as automatic statutory operation, renunciation and deprivation. It is particularly interesting for us to see the grounds on which one can be deprived of one's citizenship, since section 20 of the Constitution clearly prohibits the deprivation of citizenship. This study unit also analyses the consequences of loss of South African citizenship and the resumption of South African citizenship.

2.2 LOSING SOUTH AFRICAN CITIZENSHIP

In study unit 1, we saw the different ways in which citizenship may be acquired. It is now important to understand and be able to apply the different instances in which citizenship may be lost to practical situations. Figure 2.1 represents the three ways in which South African citizenship may be lost.

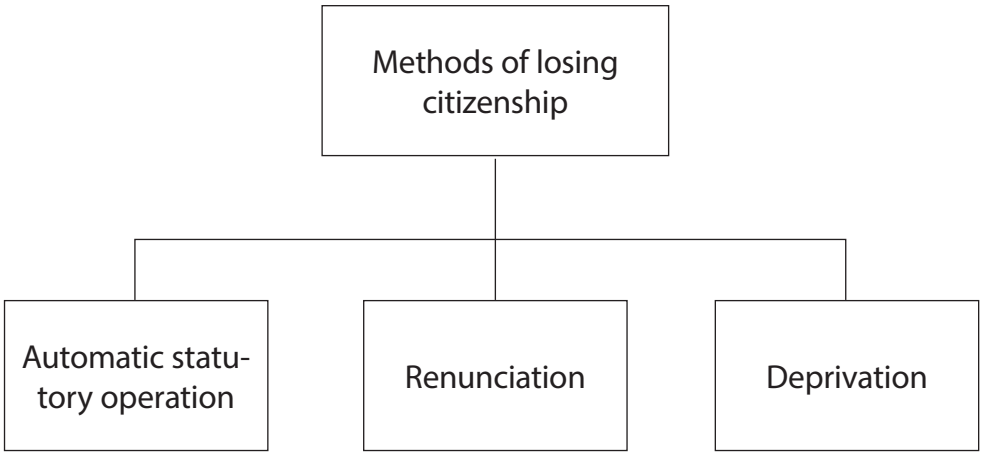


Figure 2.1: Ways in which South African citizenship may be lost

The three ways in which South African citizenship can be lost are

- automatic statutory operation
- renunciation
- deprivation

These three ways in which citizenship can be lost will be analysed in detail below.

2.2.1 Automatic statutory operation

Automatic statutory operation

Section 6 of the Citizenship Act 1995 as amended by section 6 of the Citizenship Amendment Act 17 of 2010 regulates the different ways of losing citizenship as a result of statutory operations:

(i) A person ceases to be a South African citizen *if, whilst not being a minor, by some voluntary and formal act other than marriage, he or she acquires the citizenship or nationality of another country.*

(ii) A person also ceases to be a South African citizenship *if he or she has citizenship or nationality of another country and serves in the armed forces of such country while that country is at war with the Republic*.

(iii) A person who acquired citizenship through naturalisation ceases to be a South African citizen if he or she engages in a war under the flag of a country that the Government of the Republic does not support.

Such a person can, however, prior to his or her loss of South African citizenship, apply to the Minister to retain his or her South African citizenship, and the Minister may, if he or she deems it fit, order such retention (s 6(2) of Citizenship Act 1995).

Application for the retention of South African citizenship requires one to pay the prescribed fee of R300-00 in terms of Regulation 2 of the Fourteenth Amendment of the Regulations No. R.695 13 August 2010.

2.2.2 Renunciation of citizenship

Renunciation of citizenship

Section 7 of the Citizenship Act 1995 regulates the renunciation of citizenship. It involves a situation where a person intentionally cancels his or her citizenship.

It is important to know the following provisions of the Act pertaining to the renunciation of citizenship in order to be able to give sound advice in this regard:

(a) Renunciation of citizenship basically results when a person renounces his or her citizenship by making a declaration renouncing his or her citizenship because he or she intends to accept citizenship or nationality of another country or he or she also has the citizenship of another country.
(b) Children under the age of 18 years and of a parent who renounces his or her citizenship also lose their South African citizenship if the other parent of such children is not or does not remain a South African citizen.

2.2.3 Deprivation of citizenship

Deprivation of citizenship

Let us now analyse the deprivation of citizenship, as regulated by sections 8 and 10 of the Citizenship Act 1995.

(i) The Act requires a person who obtained his or her citizenship through naturalisation to be deprived of citizenship if
    (a) he or she obtained a certificate of naturalisation by means of fraud, false representation or the concealment of a material fact, or
    (b) such certificate was granted in conflict with the provisions of this Act or any prior law

(ii) A person can also be deprived of citizenship if he or she holds citizenship of another country (dual citizenship). Such deprivation will only take place if

    (a) such a citizen has at any time been sentenced in any country to a period of imprisonment of not less than 12 months for

any offence which would also have constituted an offence in the Republic, or

(b) the Minister is satisfied that it is in the **public interest** that such citizen shall cease to be a South African citizen.

(iii) Children under the age of 18 and born outside the Republic can be deprived of their citizenship if their parents have ceased to be South African citizens by voluntarily obtaining citizenship of another country without requesting the retention of South African citizenship or as a result of deprivation.

According to Rautenbach and Malherbe, since section 20 of the Constitution prohibits the deprivation of South African citizenship, deprivation of citizenship constitutes a limitation of a citizen's right to citizenship and as such must comply with the general limitation clause in section 36 (Rautenbach & Malherbe 2008:60). This means that deprivation of citizenship will have to be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.



Activity

This activity aims to determine whether you are able to apply the law on the loss of South African citizenship to practical situations. To complete this activity you should read the following scenario and answer the following question:

- Sipho has both South African citizenship and citizenship of Canada. He has just learnt that he has been deprived of his South African citizenship. He comes to you for an advice – he tells you that the reason for the deprivation of his citizenship is because he was convicted and sentenced to five years' imprisonment for bank robbery in Canada. He wants to know if the deprivation of his citizenship is in accordance with the law. Advise him.



Feedback on activity

Your answer should be yes. Sipho has been deprived of his citizenship in a lawful manner. The reason is because the Citizenship Act allows a person to be deprived of his or her citizenship if he has dual citizenship and has been convicted in another country for a period of not less than 12 months for an offence which is also regarded as an offence in South Africa.

2.3 CONSEQUENCES OF LOSING SOUTH AFRICAN CITIZENSHIP

Consequences of losing South African citizenship

The consequences of losing South African citizenship are regulated by section 11 of the Citizenship Act 1995 as amended by section 6 of Citizenship Amendment Act 69 of 1997 and by section 9 of Act 17 of 2010. They are also regulated by and section 12 of the Citizenship Act 1995 and are as follows:

(i) *Once a person ceases to be a South African citizen, he or she is regarded as having the citizenship or nationality that he had before becoming a South African citizen*.

(ii) *If a person, who acquired citizenship through naturalization, has ceased to be a South African citizen by virtue of the provision of any law; or because he or she has acquired citizenship of another country, or has renounced his or her citizenship or because he or she has been deprived of his or her citizenship he or she shall be deemed to be a foreigner who is not-*

(a) in possession or deemed to be in possession of a visa for temporary sojourn in the republic or permanent residence permit guaranteed by sections 10(2) of the Immigration Act 13 of 2002 as amended by Immigration Amendment Act 13 of 2011and by section 25(2) of the Immigration Act 13 of 2002, respectively; or
(b) exempted or deemed to be exempted from applying for a visa for temporary sojourn in the Republic.

It is worth noting that a person who has ceased to be a South African citizen shall not be discharged from any duty or liability in respect of any act done before he or she ceased to be a South African citizen (s 12 of the Citizenship Act 1995).

According to Currie and De Waal (2013:444), deprivation of citizenship may also result

- In the loss of all rights, privileges and benefits that are reserved for citizens
- in "statelessness", the loss of international diplomatic protection and of the right to a passport

Before we move to the resumption of South African citizenship, please attempt to answer the following question on your own:



Activity

To complete this activity you should answer the following questions:

(1) Explain the consequences of loss of citizenship by children deprived of their citizenship because their parents have ceased to be South African citizens by voluntarily obtaining citizenship of another country without requesting the retention of South African citizenship or as a result of deprivation.
(2) What are the consequences of loss of South African citizenship by a person who acquired citizenship through naturalisation and has ceased to be a South African citizen because he or she has renounced his or her citizenship?



Feedback on activity

(1) Children, born outside the Republic and who have been deprived of their citizenship because their parents have ceased to be South African citizens by voluntarily obtaining citizenship of another country without requesting the retention of South African citizenship or as a result of deprivation, shall be regarded as having the citizenship or nationality they had before becoming South African citizens.

(2) If a person, who acquired citizenship through naturalisation, has ceased to be a South African citizen because he or she has renounced his or her citizenship he or she shall be deemed to be a foreigner who is not –

(i) -in possession or is not deemed to be in possession of a visa for temporary sojourn in the republic or permanent residence permit guaranteed by sections 10(2) of the Immigration Act 13 of 2002 as amended by Immigration Amendment Act 13 of 2011 and 25(2) of the Immigration Act 13 of 2002, respectively; or

(ii) exempted or deemed to be exempted from applying for a visa for temporary sojourn in the Republic.

The Resumption of South African citizenship will now be elaborated on.

2.4 RESUMPTION OF SOUTH AFRICAN CITIZENSHIP

2.4.1 Resumption of South African citizenship by a minor

Resumption of South African citizenship by a minor

This is regulated by section 13 of the Citizenship Act 1995.

Children, born outside the Republic who have been deprived of their citizenship because their parents have ceased to be South African citizens by voluntarily obtaining citizenship of another country without requesting the retention of South African citizenship or as a result of deprivation or because of violating any repealed laws, can resume their citizenship if:

(a) he or she is resident in the Republic or has returned to the Republic for permanent resident and;
(b) has attained the age of 18 years.

2.4.2 Resumption of South African citizenship by adults

Resumption of South African citizenship by adults

This is regulated by section 13 of the Citizenship Act 1995, as amended by section 7 of the South African Citizenship Amendment Act 69 of 1997 and substituted by section 10b of Citizenship Amendment Act 17 of 2010.

An adult person who has lost his or her citizenship because he or she has acquired citizenship of another country without requesting retention of his or her South African citizenship, or has renounced his or her citizenship or because he or she has been deprived of his or her citizenship can resume his or her citizenship if –

(i) he or she is residing in the Republic permanently or returns to the Republic for permanent residence; or
(ii) he or she has been granted a permit for permanent residence after his or her citizenship that he or she had obtained through naturalisation has ceased to exist.

It is worth noting that a person can also resume his or her citizenship if the **Minister** is satisfied that the grounds for the loss or deprivation of his or her South African citizenship no longer exist (s 13(b) of the Citizenship Act 1995).



Activity

Once you have studied the resumption of citizenship by a minor, you should be able to answer the following question. To complete this activity you should read the scenario and answer the question that follows:

Themba is 18 years old. He was born in Senegal and now is residing in South Africa. He lost his South African citizenship in 2016 when he was 17 years old because his mother, Kanyi, ceased to be a South African citizen in 2015 when she voluntarily obtained citizenship of Senegal without requesting the retention of her South African citizenship. Themba comes to you for an advice. He wants to know if it is possible for him to resume his South African citizenship. Advise him.



Feedback on activity

Remember that the resumption of South African citizenship is regulated by section 13(2) of the Citizenship Act 1995. Your answer should be similar to this one. Children, who were born outside the Republic and who have been deprived of their citizenship because their parents have ceased to be South African citizens by voluntarily obtaining citizenship of another country without requesting the retention of South African citizenship, can resume their citizenship if

(a) he or she is resident in the Republic or has returned to the Republic for permanent resident and
(b) has attained the age of 18 years

It is therefore possible for Themba to resume his South African citizenship because he is resident in South Africa and has attained the age of 18.

2.5 DOCUMENTS TO BE SUBMITTED WITH AN APPLICATION FOR RESUMPTION OF CITIZENSHIP

To apply for resumption of South African citizenship by adults, you need to

- complete Forms DHA-175and DHA-52.
- complete an application for identity document Form DHA-9.
- submit two identity document photographs that comply with the Passport and ID Photograph Specifications.
- submit proof that you live in South Africa permanently (municipal account, etc.) and a copy thereof.
- submit your marriage certificate (if applicable) and copy thereof.
- pay the prescribed fee of R300-00 in terms of Regulation 2 of the Fourteenth Amendment of the Regulations made under the South African Citizenship Act 1995 — (Department of Home Affairs — available at http://www.home-affairs.gov.za and accessed on 1 May 2016).

2.6 CONCLUSION

In this study unit we analysed the loss, consequences of loss and resumption of South African citizenship. In the next study unit, we will analyse citizenship' rights, privileges and benefits. We will also deal with the limitation of citizens' rights.

Study unit 3

Citizens' rights, privileges and benefits and the limitation of citizens' rights

Contents

3.1 Introduction
3.2 Citizens' rights, privileges and benefits
3.2.1 Political rights
3.2.2 The right to enter, to remain in and to reside anywhere in the Republic
3.2.3 The right to a passport
3.2.4 Freedom of trade, occupation and profession
3.2.5 Children's rights to a nationality
3.2.6 Citizens' right to diplomatic protection
3.3 The limitation of citizens' rights
3.4 Conclusion



Study unit outcomes

Once you have completed this study unit you will be able to

- give a legal advice on the rights, privileges and benefits of citizens
- describe the limitation of rights in terms of the Constitution 1996

3.1 INTRODUCTION

Citizens of a country possess not only rights but also privileges and benefits which they are equally entitled to (s 3(2)(a) of the Constitution). The rights, privileges and benefits of citizenship which are analysed are the right to live in and to return to the Republic, the right to a passport, to enjoy the protection of its laws, and the right of adult citizens to vote and stand for office. This study unit also analyses freedom of trade, occupation and profession, children's right to a nationality and entitlement to diplomatic protection. Lastly, this unit analyses the limitation of citizens' rights in terms of the Constitution.

Citizens' rights, privileges and benefits

3.2 CITIZENS' RIGHTS, PRIVILEGES AND BENEFITS

The following is a list of South African citizens' rights, privileges and benefits:

- political rights
- the right to enter, to remain in and to reside anywhere in the Republic
- the right to a passport
- freedom of trade, occupation and profession
- children's right to a nationality and
- citizens' right to diplomatic protection

Each of the abovementioned rights will be elaborated on below.

3.2.1 Political rights

Only citizens of South Africa are guaranteed political rights which include the right to form a political party, to participate in the activities of or recruit members for a political party and to campaign for a political party or cause (s 19(1) of the Constitution).

South African citizens are also guaranteed not only the right to vote in free, fair and regular elections, but also the right to stand for public office and if elected to hold office (s 19(3)(a) and (b) of the Constitution). To give effect to citizens' political rights, the Electoral Act 73 of 1998, which also limits this right to citizens, was enacted.

Please note that the right to vote has been extended to prisoners who are South African citizens (*August and Another v Electoral Commission and Others* (CCT8/99) [1999] ZACC 3; 1999 (3) SA 1; 1999 (4) BCLR 363 (1 April 1999).

The question whether South African citizens in other countries are entitled to vote was dealt with in the case of *Richter v Minister for Home Affairs and Others* 2009 (5) BCLR 448 (CC). The Court found unanimously (per O'Regan J) that section 33(1)(e) of the Electoral Act 73 of 1998 and the provisions of the related regulations constituted an unjustifiable limitation of section 19 of the Constitution (which guarantees political rights) in restricting certain classes of registered voters who are absent from the Republic of South Africa (RSA) on election day from participating in elections. In view of this finding the Court made an order extending the period within which those who were abroad on election day might notify the Chief Electoral Officer of their intention to vote.

The effect of the order made by the Court was that all South African citizens registered as voters who would be abroad on election day would be entitled to vote in the election for the National Assembly to be held on that day provided they gave notice of their intention to do so to the Chief Electoral Officer and identified the embassy, high commission or consulate where they intended to cast their special vote.

The right to enter, to remain in and to reside anywhere in the Republic of South Africa will be discussed in the following section**.**

3.2.2 The right to enter, to remain in and to reside anywhere in the Republic of South Africa

Only citizens are guaranteed the right to enter, to remain in and to reside anywhere in the Republic (s 21(3) of the Constitution). In other words, this right consists of the right to move freely and to choose one's place of residence within the borders of the country and the right to leave and to return to the country.

It should be noted that, as much as citizens are entitled to reside or stay anywhere in the country, extradition laws permit the state to deliver an accused or a convicted Individual (who could be a citizen) to the state where he is accused or has been convicted of a crime (Currie & De Waal 2013:453).

The right to a passport will be discussed next.

3.2.3 The right to a passport

Although everyone is entitled to a right to freedom of movement, section 21(4) of the Constitution restricts the right to a passport only to citizens.

This section demands an interpretation which requires both fair procedures to be followed and compelling reasons to be present when the right to use a passport is restricted (Currie & and De Waal 2013:454).

The next section deals with freedom of trade, occupation and profession.

3.2.4 Freedom of trade, occupation and profession

Citizens are also empowered to choose their trade, occupation or profession freely (s 22 of the Constitution).

This right is not just restricted to citizens as it also entitles companies or juristic persons to rely on it where they have sufficient interest in doing so. (Currie & De Waal 2013:464).

As much as citizens are entitled to choose their trade, occupation or profession, this right may be regulated by law. For example in order for a person to be an attorney, over and above obtaining an LLB degree, he or she must pass the attorneys board examination.

Children's right to a nationality is discussed next.

3.2.5 Children's right to a nationality

Section 28(1) guarantees children's citizenship at birth as it provides that every child has the right to a name and nationality from birth.

The term "nationality" in section 28(1) has the same meaning in practice as the term "citizenship". That is because the reference to nationality in the provision on children's rights has no practical implications (Rautenbach & Malherbe 2008:58).

The child's right to a nationality in terms of section 28(1) is essential as it prevents a child from being stateless (Rautenbach & Malherbe 2008: 60). Just like other rights, this right can be limited in terms of section 36 (Rautenbach & Malherbe 2008:61).

Below is a discussion on citizens' right to diplomatic protection.

3.2.6 Citizens' right to diplomatic protection

Diplomatic protection is described as a means for a state to take **diplomatic** action against another state on behalf of its national whose rights and interests have been injured by the other state and to obtain reparation for the internationally wrongful act inflicted (Fraser 2010:31).

This right to diplomatic protection, as guaranteed by International law, entitles the state to protect their own citizens vis-à-vis other states by exercising diplomatic protection on their behalf (Currie & De Waal 2013:447).

The diplomatic protection of citizens happens when the offending state has violated the international minimum standard which a state must apply to foreigners finding themselves within its territory (ibid).

The requirements for diplomatic protection are as follows:

(a) The international minimum standard must have been violated.
(b) The injured person or company must have the nationality of the protecting state.
(c) Local remedies must have been exhausted.
(d) A denial of justice must have occurred.

We have now examined the section on South African citizens' rights, privileges and benefits. The limitation of citizens' rights is examined in the next section.

3.3 THE LIMITATION OF CITIZENS' RIGHTS

The limitation of citizens' rights

All rights, including citizens' rights, can be limited by law of general application if such limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom (s 36 of the Constitution).

Law of general application means that the law is sufficiently clear, accessible and precise and those who are affected by it can ascertain the extent of their rights and obligations (Mcquoid-Mason 2006:127).

Reasonableness and justifiability of the law of general application are measured by the sufficient proportionality between the infringement of a fundamental right and the benefits the limitation is designed to achieve (Currie & De Waal 2013:163).

The balancing process that determines whether the right is limited in accordance with the Constitution takes into account the following limitation factors listed in section 36 of the Constitution, namely

- nature of the right
- the importance of the purpose of the limitation
- the nature and extent of the limitation
- the relation between the limitation and its purpose
- less restrictive means to achieve the purpose

Each of the above factors involved in the balancing process that are listed in section 36 of the Constitution will be discussed below.

(a) Nature of the right

According to Malherbe (2002:409), the nature of a right refers mainly to the importance of a right that is limited.

(b) The importance of the purpose of the limitation

Limitation is deemed reasonable and justifiable if it serves an important purpose in a constitutional democracy, and if all citizens would deem the purpose to be compellingly important (according to Mcquoid-Mason 2006:129).

(c) The nature and extent of the limitation

According to Currie and De Waal (2013:168), with regard to the nature and extent of the limitation, the emphasis is on whether the limitation is a serious or relatively minor infringement of the right.

In other words, the infringement of a right should not be more extensive than is warranted by the purpose that the limitation seeks to achieve (ibid).

(d) The relation between the limitation and its purpose

According to Currie and De Waal (2013:169), this essentially determines whether the law serves the purpose that it is designed to serve.

(e) Less restrictive means to achieve the purpose

Currie and De Waal (2013:170) maintain that less restrictive means essentially means that if other means could be used to achieve the same ends that would either not restrict rights at all or would not restrict them to the same extent, those means must be used.

Malherbe (2002:414) maintains that this also obliges those that limit a right to show that alternative measures to achieve the purpose have been considered

PLEASE whether to answer the following activities on your own in order to determine if you have understood this study unit.



Activity

This activity aims to determine whether you are able to apply the law on citizens' rights, privileges and benefits to practical situations. It also aims to determine whether you are able to discuss the law on the limitation of rights.

To complete this activity you should answer the following questions:

(1) List the rights, privileges and benefits of South African citizens.
(2) Thami is a Zambian citizen who is residing in South Africa. Does he qualify for the right to vote in South Africa? Explain.
(3) Thami, a Zambian citizen residing in South Africa feels that the South African government is unlawfully violating his rights. Can he ask the Zambian government for protection? If so, on what basis?
(4) Describe the 'law of general application' for the purposes of the limitation of rights.
(5) Explain the limitation factors listed in section 36 of the Constitution.



Feedback on activity

(1) Refer to section 3.2.
- *political rights*
- *the right to enter, to remain in and to reside anywhere in the Republic*
- *the right to a passport*
- *freedom of trade, occupation and profession*
- *children's rights*
- *citizens' right to diplomatic protection*

(2) Your answer should be no, Thami does not qualify for the right to vote. The reason for this is contained in section 19 of the Constitution discussed above.

(3) Yes, Thami can ask the Zambian government to intervene by preventing the unlawful violation of his rights by the South African government. This process is referred to as diplomatic protection.

(4) Law of general application entails that the law must be sufficiently clear, accessible and precise so that those who are affected by it can ascertain the extent of their rights and obligations.

(5) The limitation factors listed in section 36 are as follows:

(a) Nature of the right

This refers to the importance of a right that is limited.

(b) The importance of the purpose of the limitation

This entails an important purpose that all citizens would deem as compellingly important.

(c) The nature and extent of the limitation

The emphasis of the nature and extent of the limitation is on whether the limitation is a serious or relatively minor infringement of the right. In other words, the infringement of a right should not be more extensive than is warranted by the purpose that the limitation seeks to achieve.

(d) The relation between the limitation and its purpose

This essentially determines whether the law serves the purpose that it is designed to serve.

(e) Less restrictive means to achieve the purpose

This obliges those that limit a right to show that alternative measures to achieve the purpose have been considered.

3.4 CONCLUSION

In this study unit we discussed the rights, privileges and benefits that are restricted to citizens. We also discussed f**reedom of trade, occupation and profession, children's right to a nationality and entitlement to diplomatic protection.** We concluded by discussing the limitation of citizens' rights in terms of the Constitution. In the next study unit we discuss South African immigration law as well as refugee laws.

Study unit 4

Immigrants, migrants and refugees

Contents

4.1 Introduction
4.2 Immigrants and migrants
4.2.1 Admission and departure of immigrants and migrants
4.3 Permanent residence permit
4.3.1 Instances justifying the issuing of a permanent residence permit to a foreigner
4.3.2 Issuing of a permanent residence permit on other grounds
4.4 Visas for temporary sojourn in the Republic
4.5 Refugees
4.5.1 Refugee status
4.5.1.1 Requirements for refugee status
4.5.1.2 People who do not qualify for refugee status
4.5.1.3 Cessation of refugee status
4.5.1.4 Withdrawal of refugee status
4.5.2 Rights and obligations of refugees
4.6 Conclusion



Study unit outcomes

Once you have completed this study unit, you should be able to

- describe the law on immigrants and migrants and to apply it to practical situations
- discuss refugee law and apply it to practical situations in South Africa

4.1 INTRODUCTION

In study units 1, 2 and 3, we discussed the laws governing citizenship in South Africa, including citizens' rights, privileges and benefits, and the limitation of citizens' rights. In this study unit, we deal with laws on immigrants, migrants and refugees in South Africa. It is important for you to understand immigration and refugee laws in South Africa in order to be able to advise foreigners and the South African government on any issues pertaining to these laws.

4.2 IMMIGRANTS AND MIGRANTS

4.2.1 Admission and departure of immigrants and migrants

Admissions and departures are regulated by section 9 of the Immigration Act 13 of 2002, as amended by the Immigration Amendment Act 19 of 2004 and the Immigration Amendment Act 13 of 2011).

Immigrants and migrants need to enter the Republic of South Africa at a **port of entry, except those exempted by the Minister.**

They need a valid passport to enter or depart the Republic. This requirement also applies to minors.

Minors are also required to be in possession of an unabridged birth certificate (Regulation 12(a) of the Immigration Regulations No. R.413, 22 May 2014).

Foreigners who are not in possession of a permanent residence permit may only enter the Republic if their passports are valid for a prescribed period and are issued with a valid visa.

Those who are issued with visas to sojourn temporarily in the Republic or with a permanent residence permit are deemed to be in possession of a valid port of entry visa.

Further, those who are proceeding from a place outside the Republic to a destination outside the Republic need a transit visa to travel through the Republic unless they are in possession of a transit visa. However, this requirement does not apply to South African citizens and permanent residence permit holders.

Please note that it is an offence, which could be punished by a fine or imprisonment, for a person with dual citizenship to

(a) enter or depart from South Africa using the passport of another country
(b) while in South Africa, make use of their citizenship of another country to gain advantage or avoid duty while in South Africa (s 26B of the Citizenship Act 1995 as inserted by s 2 of the South African Citizenship Amendment Act 17 of 2004)

This means that people with dual citizenship can use their foreign passports outside the Republic of South Africa but not when they are entering or departing South Africa. When entering or departing South Africa, they must use their South African passports.

We will investigate the permanent residence permit next.

4.3 PERMANENT RESIDENCE PERMIT

Permanent residence permit

This is regulated by sections 25, 26 and 27 of the Immigration Act 13 of 2002, as amended by the Immigration Amendment Act 19 of 2004 and Immigration Amendment Act 13 of 2011.

A permanent residence permit allows a person to live permanently in South Africa while remaining a citizen of another country.

This permit can be issued on condition that the holder

(i) is not prohibited (because of disease, outstanding conviction, previous deportation, association with terrorism or possession of fraudulent permits or passport)
(ii) is not undesirable (declared incompetent, unrehabilitated insolvent, fugitive from justice or previous criminal convictions)

4.3.1 Instances justifying the issuing of a permanent residence permit to a foreigner

This permit can be issued if a foreigner

(i) has been a holder of a work visa for five years and has received an offer for permanent employment
(ii) has been a spouse of a citizen or permanent resident for five years and the Director General is satisfied that a good faith spousal relationship exists. **Note:** such a permit will lapse if within a period of two years from the date of issue, the good faith spousal relationship no longer exists.
(iii) is a child, under the age of 21, of a citizen or permanent resident. **Note**: such permit will lapse if such a foreigner does not submit an application for its confirmation within two years of his or her having turned 21 years.
(iv) is a child of a citizen

4.3.2 Issuing of a permanent residence permit on other grounds

Apart from the afore-mentioned instances justifying the issuing of a permanent residence permit to a foreigner, such a permit may be issued by the Director General based on other grounds.

This permit may be issued to a foreigner if the Director General is satisfied that a foreigner of good and sound character

(a) has received an offer for permanent employment provided that

(i) such a foreigner has proven that the position exists, was advertised and that no suitably qualified citizen or permanent resident was available to fill it
(ii) the application falls within the yearly limits of available permits prescribed for each sector of industry, trade and commerce, after consultation with the Departments of Trade and Industry, Labour and Education; and
(iii) the permit may be extended to such foreigner's spouse and children younger than 21 years of age

(b) taking into account any prescribed requirement, has demonstrated that he or she possesses extraordinary skills or qualification

(c) intends to establish or has established a business in the Republic and investing in it

(d) is a refugee who qualifies for an immigration permit because he has been in the Republic for more than five years and has been certified to remain a refugee indefinitely

(e) intends to retire in the Republic and has a right to a pension or irrevocable annuity or retirement account which will give such foreigner a prescribed minimum payment for the rest of his or her life or has a minimum prescribed net worth

(f) has proven that he has a prescribed minimum net worth and has paid a prescribed amount to the Director General, or

(g) is a relative of a citizen or permanent resident within the first step of kinship

Once you acquire a permanent residence permit, as a foreigner, you will be entitled to the rights, privileges, duties and obligations of a citizen, save for those rights, privileges, duties and obligations which a law or the Constitution explicitly ascribes to citizenship.

Permanent resident status also entitles a foreigner to receive social security benefits. This was emphasised by the Constitutional Court in the case of *Khosa and others v Minister of Social Development and others* (2004 (6) BCLR 569 (CC) (4 March 2004).

In this case the applicants challenged the constitutionality of section 3(c) of the Social Assistance Act 59 of 1992 which reserves social grants for aged South African citizens. The applicants contended that the exclusion of all non-citizens from the scheme is inconsistent with the state's obligations under section 27(1)(c) of the Constitution to provide access to social security to "everyone". They also argued that the exclusion limited their right to equality and was unfair under section 9 of the

Constitution and that the limitation was unjustifiable under section 36 of the Constitution.

The court held that the omission of the words "or permanent resident" after the word "citizen" from section 3(c) of the Social Assistance Act 59 of 1992, prior to amendment by the Welfare Laws Amendment Act 106 of 1997, should be declared to be inconsistent with the Constitution.

The court further held that section 3(c) of the Social Assistance Act 59 of 1992 prior to amendment by the Welfare Laws Amendment Act 106 of 1997 is to read as though the words "or permanent resident" appear after the word "citizen".

A permanent residence permit also entitles a foreigner to permanent employment. This was reiterated by the court in the case of *Larbi-Ordam and Others v The Member of the Executive Council for Education* (North West Province) and Another, 1998 (1) SA 745 (CC).

This case concerned some teachers with permanent resident status who were challenging the constitutionality of Regulation 2(2) of the Regulations regarding the Terms and Conditions of the Employment of Educators in *Government Gazette* R1743 of 13 November 1995. This Regulation prohibited the permanent appointment of non-South African citizens as educators. Teachers with permanent resident status argued that the restrictions on their eligibility for permanent appointment amounted to unfair discrimination contrary to section 8(2) of the Interim Constitution. The court held that the Regulation 2(2) constituted an unjustifiably unfair discrimination as regards permanent residents of South Africa. The court's reasoning was as follows: permanent residents have been selected for residence in this country by the Immigrants Selection Board, some of them on the basis of recruitment to specific posts; they are generally entitled to citizenship within a few years of gaining permanent residency, and can be said to have made a conscious commitment to South Africa; and that they are entitled to compete with South Africans in the employment market.

Visas will be examined next in some detail.

4.4 VISAS FOR TEMPORARY SOJOURN IN THE REPUBLIC

Visas to temporarily sojourn in the Republic

This is regulated by section 10 of the Immigration Act 2002 as amended by the Immigration Amendment Act 2004 and the Immigration Amendment Act 13 of 2011.

Visas for temporary sojourn in the Republic entitle a foreigner to enter and sojourn in the Republic for a limited period of time, except where a period has been extended by the Director General.

Visas issued outside the Republic are deemed to be of force and effect only after an admission. **Note:** such visas are issued on condition that the holder is not or does not become a prohibited or an undesirable person.

- Some of the visas for temporary sojourn in the Republic:
- visitor's visa
- diplomatic visa
- study visa
- business visa
- crew visa
- medical treatment visa
- relative's visa
- exchange visa
- asylum transit visa

Each of the above will be briefly elaborated on.

(i) Visitor's visa

This visa is issued to a foreigner who holds a visa or who is a citizen of a foreign state and provides financial or other guarantees in respect of his departure.

This visa cannot exceed three months unless renewed by the Department of Home Affairs.

Further, foreigners who are engaged in the Republic in academic sabbaticals, voluntary or charitable activities, or research may be issued with this visa for a period not exceeding three years.

(ii) Diplomatic visa

This visa may be issued by the Department of International Relations and Cooperation to an ambassador, a minister of *a foreign state,* a career diplomat or consular officer of a foreign government recognised by the South African government, or a representative of an international organisation accepted by the Minister of International Relations and Cooperation.

Members of the immediate family of the above-mentioned people also qualify for a diplomatic visa.

(iii) Study visa

This is to be issued to a foreigner who intends to study in the Republic for longer than three months.

(iv) Business visa

This may be issued to a foreigner who intends to either establish or invest in a business in which he or she may be employed.

His or her immediate family members also qualify for this visa.

(v) Crew visa

This visa is issued to a foreigner who is a member of the crew of a ship and may be issued on condition that the holder agrees to refrain from moving beyond a predetermined area.

(vi) Medical treatment visa

This visa can be issued to a foreigner who intends to receive medical treatment for longer than three months; it does not entitle its holder to work.

(vii) Relative's visa

This visa is issued to a foreigner who is a member of the immediate family of a citizen or a resident, provided that such citizen or resident provides financial assurance that he or she has the means available to support such foreigner for the requested duration of such permit, either personally or through the contribution of such foreigner.

Just like the holder of a crew visa and the medical treatment visa, the holder of a relative's visa is not allowed to undertake work in South Africa.

(viii) Exchange visa

This visa can be issued to a foreigner who participates in a programme of cultural, economic or social exchange organised or administered by an organ of state, or a public higher education institution, in conjunction with an organ of a foreign state.

It can also be issued to a foreigner who is under the age of 25 and has received an offer to conduct work for no longer than one year.

(ix) Asylum transit visa

The Director General may issue this visa to an asylum seeker at the port of entry.

This visa is valid for five days and within this period an asylum seeker is expected to travel to the nearest Refugee Reception Office in order to apply for asylum.

The holder of this visa will be deemed an illegal foreigner if this visa expires without him or her reporting in person at a Refugee Reception Office in order to apply for asylum.

(a) Application for asylum

An application for asylum must be made in person in accordance with the prescribed procedures to a Refugee Status Determination Officer at any Refugee Reception Office.

An unaccompanied child qualifies for an asylum seeker permit if he or she is brought before the Children's Court for the district in which he or she was found and the Children's Court orders that the child be assisted in applying for asylum.

(b) The refusal of an asylum permit

An application for asylum may be refused if it is

(a) a manifestly unfounded application
(b) abusive
(c) fraudulent
(d) an unfounded application

Note: a delay in making an application for asylum does not constitute a ground for refusal of an application for asylum. For a justification of this point, please read the case of *Ersumo v Minister of Home Affairs* (69/2012) (2012) ZASCA 31 (28 March 2012) (paras 15-19).

(c) The confidentiality of asylum applications

The confidentiality of asylum applications and the information contained in them must be ensured at all times.

However, the Refugee Appeals Authority may, on application and on conditions it deems fit, allow any person or the media to attend or report on its hearing if **one or more of the following conditions are met** —

(a) the asylum seeker gives consent; or

(b) the Refugee Appeals Authority concludes that it is in the public interest to allow any person or the media to attend or report on its hearing, after taking into account all relevant factors, including

    (i) the interests of the asylum seeker in retaining confidentiality
    (ii) the need to protect the integrity of the asylum process
    (iii) the need to protect the identity and dignity of the asylum seeker
    (iv) whether the information is already in the public domain
    (v) the likely impact of the disclosure on the fairness of the proceedings and the rights of the asylum seeker, and

(vi) whether allowing any person or the media access to its proceedings or allowing the media to report thereon would pose a credible risk to the life or safety of the asylum seeker or of his or her family, friends or associates

Please read the case of *Mail and Guardian Media Ltd and Others v Chipu, No, Chairperson of the Refugee Appeal Board and Others* case CCT 136/12 (2013) ZACC 32 in order to comprehend the justification for doing away with the confidentiality principle on asylum application.

d) Protection and general rights of asylum seekers

An asylum seeker is entitled to —

(a) a formal written recognition as an asylum seeker in the prescribed form pending finalisation of his or her application for asylum;
(b) the right to remain in the Republic pending the finalisation of his or her application for asylum;
(c) the right not to be unlawfully arrested or detained; and
(d) the rights contained in the Constitution of the Republic of South Africa, 1996, in so far as those rights apply to an asylum seeker."

Note: An application for asylum exempts a foreigner from arrest, detention and deportation for the issue of not having the correct travel documentation. This was affirmed by the court in the case of *Arse v Minister of Home Affairs* (2010) 3 All SA 261 (SCA), when it held that the detention of a refugee was unlawful and impermissible where the refugee had applied for asylum.

Note: A desire to make an application for refugee status entitles a foreigner to be released from custody and to protection against deportation. This was affirmed by the court in a subsequent case of *Bula and Others v Minister of Home Affairs* (2011) ZASCA 209. In this case, the SCA held that Bula and Others were entitled to their release from custody and protection against deportation because they had indicated a desire to make an application for refugee status.

Note: A foreigner who is in the country illegally (who has not made an application for asylum) is entitled to apply for asylum if he or she indicates such an intention and is also entitled to be issued with an asylum permit valid for 14 days. Read the case of *Esrumo v Minister of Home Affairs* (69/2012) (2012) ZASCA 31 (28 March 2012).

The issue of refugees is a sensitive one and you need to take special note of the following section.

4.5 REFUGEES

This part is regulated by the Refugee Act 130 of 1998 as amended by the Refugee Amendment Act 19 of 2004; Refugee Amendment Act 33 of 2008; Refugee Amendment Act 12 of 2011; and Refugee Amendment Act 19 of 2015.

A refugee means any person who has been granted asylum (refugee status) in terms of the Refugee Act 1998.

Refugee status

4.5.1 Refugees status

4.5.1.1 Requirements for refugee status

A person qualifies for refugee status if

(a) he or she is unable or unwilling to avail himself or herself of the protection of his or her country due to a well-founded fear of persecution by reason of his or her race, gender, tribe, religion, nationality, political opinion or membership of a particular social group, or
(b) he or she is compelled to leave his or her place of habitual residence to seeks refugee in another country due to external aggression or other events seriously disturbing public order in his or her country, or
(c) is a spouse or dependant of a person contemplated in paragraph (a) or (b)

4.5.1.2 People who do not qualify for refugee status

People who **do not qualify for refugee status include**

(a) a person who has committed a crime against peace, a war crime or a crime against humanity or
(b) a person who has committed a crime which is not of a political nature and which if committed in the Republic, would be punishable by imprisonment without an option of a fine, or
(c) a person who has been guilty of acts contrary to the objects and principle of the United Nations Organization or Organization of African Unity, or
(d) a person who enjoys protection of any other country in which he or she is a recognised refugee, permanent resident or citizen

The issue of cessation of refugee status is discussed next.

4.5.1.3 Cessation of refugee status

Cessation of refugee status

A person ceases to qualify for refugee status if

(a) he or she voluntarily avail himself or herself of the protection of the country of his or her nationality; or
(b) having lost his or her nationality, he or she by some voluntary and formal act reacquires it; or
(c) he or she becomes a permanent resident or a citizen of the Republic or acquires the nationality of some other country and enjoys its protection; or
(d) he or she voluntarily re-establishes himself or herself in the country which he or she left; or
(e) he or she can no longer continue to refuse to avail himself or herself of the protection of the country of his or her nationality because there are no longer circumstances which justify his or her continued recognition as a refugee. However this is not applicable to a person who can prove previous persecution for refusing to avail him or herself of the protection of the nationality.

The withdrawal of refugee status is looked at next.

4.5.1.4 Withdrawal of refugee status

Withdrawal of refugee status

The refugee status of a person may be withdrawn if it is reasonable and justifiable to do so in terms of section 36 of the Constitution 1996 (s 5(3) of the Refugee Act of 1998). Instances justifying the withdrawal of refugee status in terms of the Refugee Act 1998 are

(a) if a refugee has been recognised as a refugee due to fraud, forgery, a false or misleading information
(b) if he has been recognised as a refugee due to an error, or
(c) he ceases to qualify for refugee status in terms of section 5 mentioned above

A person whose refugee status is withdrawn may lodge an appeal with the Refugee Appeals Authority within a period of 30 days from the date of receipt of the decision.

The rights and obligations of refugees will be looked at below.

4.5.2 Rights and obligations of refugees

Rights and obligations of refugees

Although refugees are not South African citizens, they are entitled to some of the rights to which South African citizens are entitled. This means that the people of South Africa, including its government, cannot treat refugees as they please or in a manner that violates their dignity.

In the case of *Minister of Home Affairs v Watchenuka* and Others (010/2003) [2003] ZASCA 142; [2004] 1 All SA 21 (SCA) (28 November 2003) par 25, the Supreme Court of Appeal reiterated non-citizens' right to human dignity in terms of section 10 of the Constitution. In this case the court held that human dignity has no nationality as it is inherent in all people, including non-citizens, simply because they are also human.

Refugees' rights, as guaranteed by section 27 of the Refugee Act 1998, are as follows:

(a) a formal written recognition of refugee status in the prescribed form;
(b) full legal protection, which includes the rights set out in Chapter 2 of the Constitution of the Republic of South Africa, 1996, except those rights that only apply to citizens;
(c) to apply for an immigration permit in terms of the Aliens Control Act 96 of 1991 as replaced by the Immigration Act 13 of 2002, after five years of continuous residence in the Republic from the date on which he or she was granted asylum if the Standing Committee certifies that he or she would remain a refugee indefinitely;
(d) right to be issued with a refugee identity document containing his or her details
(e) a travel document
(f) seek employment; and
(g) a right to the same basic health services and basic primary education which the inhabitants of the Republic receive from time to time.

Please note that refugees are obliged to abide by the laws of the Republic.



Activity

This activity is intended to determine if you are able to apply refugee laws to practical situations as laid out in the following scenarios. To complete this activity, you must answer the following questions:

(1) List the different types of visa for the purposes of a temporary sojourn in the Republic of South Africa.
(2) Mr T applies for refugee status. On his application he states that he doesn't like his own country anymore. Do you think he qualifies for refugee status in terms of the Refugee Act 1998? Substantiate your answer.
(3) Mr X, a qualified engineer, is given refugee status in South Africa. Two months later he is hired as a manager by the Department of Trade and Industry. Three months after that he receives a letter notifying him that his refugee status has been withdrawn on the basis that he or she is employed by a South African government department. He comes to you for advice on whether the letter withdrawing his refugee status complies with the law on refugees. Advise him.



Feedback on activity

(1) Refer to section 4.4.

Visitor's visa; diplomatic visa; study visa; business visa; crew visa; medical treatment visa; relative's visa; exchange visa; asylum visa

(2) Mr T would not qualify for refugee status on the basis that he doesn't like his country anymore. A person qualifies for a refugee status if

(a) he or she is unable or unwilling to avail himself or herself of the protection of his or her country due to a well-founded fear of persecution by reason of his or her race, gender, tribe, religion, nationality, political opinion or membership of a particular social group; or

(b) he or she is compelled to leave his or her place of habitual residence to seek refugee status in another country due to external aggression or other events seriously disturbing public order in his or her country, or

(c) Is a dependant of a person contemplated in paragraph (a) or (b)

Therefore, Mr T's reason is not good enough to qualify him for refugee status.

(3) The letter withdrawing his refugee status does not comply with the law on refugees. That is so because the Refugee Act 1998 allows refugees to seek employment. In other words, refugees have a right to seek employment in terms of the Refugee Act. The instances justifying the withdrawal of refugee status in terms of the Refugee Act 1998 are

(a) if a refugee has been recognised as a refugee due to fraud, forgery or false or misleading information

(b) if he has been recognised as a refugee due to an error, omission or oversight committed by the Refugee Status Determination Officer in good faith, or

(c) if he ceases to qualify for refugee status in terms of section 5 of the Refugee Act 1998

Therefore Mr X's refugee status should be reinstated.

4.6 CONCLUSION

In this study unit, we discussed laws governing immigrants, migrants and refugees in South Africa.

Looking back at **PART A,** which covered citizenship law, you should have achieved the outcomes listed below:

You should be able to

- discuss the legislative history of citizenship law in South Africa and apply the methods of acquiring citizenship
- describe the loss of citizenship, the effect of losing citizenship and the resumption of citizenship in South Africa and **apply** it to practical situations

- apply **the** law pertaining to rights, privileges and benefits of citizenship in South Africa **and** describe the limitation of citizens' rights in South Africa
- apply the immigration and refugee laws in South Africa to practical situations

This brings us to the end of Part A. We hope you have enjoyed it as much as we have enjoyed writing it. In order for you to be able to pass this module you also need to study Part B that follows, which focuses on democracy and public participation.

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PART B

Democracy and public participation

GLOSSARY (DEFINITIONS) OF KEY TERMS IN THIS MODULE

This glossary contains definitions of key concepts or words that you will encounter while studying a particular study unit. This is important as you need a proper understanding of all these words. Read through the glossary before you start studying and refer back to it every time you come across a word in the guide that you do not understand.

Hint: We suggest that if you do not understand a word that you log on to the internet and use "Google translate" to translate into your first language (if it is not English). Google translate does not give a perfect translation so just check that the translation makes sense. If you are familiar with English and you still encounter words you do not understand, then use a good dictionary to explain these words.

Hint: As a lifelong learner it is good practice to learn the meanings of any new words and terms you come across. Please add to the list below when you revise the study guide again.

Table 2: *Glossary part B*

LEGAL/LATIN TERM	ENGLISH	ZULU
By-law	A rule or law made by a local authority	Umthetho noma umthetho owenziwe omasipala
Constitution	The system of basic laws and principles of a government, society	Umthethosisekelo
Constitutional supremacy	The Constitution is the highest or supreme law	UMthethosisekelo ungumthetho ophakeme kunayo yonke.
Cooperative government	The different levels of government are willing to work together	Amazinga ahlukene kahulumeni asebenzisana ndawonye
Constitutionalism	This is the idea that government derives its powers from the Constitution and that these are limited in terms of the provisions of the Constitution	Ukuphatha kukahulumeni ngendlela elandela umthethosisekelo onciphisa amandla okuphatha kukahulumeni.
Councilor	A member of an elected legislative/advisory body	Ilungu i okushaya imithetho / body sokweluleka yeningi
Democracy	Form of government by the people through elected representatives	Inqubo kahulumeni ephakamisa ukubusa ngentando yeningi
Executive authority	Having the power to put the laws into effect, for example the president	Isigungu sikahulumeni esinikezwe amandla okufezisa imithetho ephasiwe.
Fundamental rights	These rights accrue to any human being in order to protect human dignity	Amalungelo abantu aqinisekiswa umthethosisekelo

LEGAL/LATIN TERM	ENGLISH	ZULU
Government	The exercise of authority over a state, a system of rule	Uhulumeni waseningizimu ne Afrika
Judiciary	Made up of public officials (judges) with the authority to hear and decide cases in a court of law	Isigungu sabehluleli kwezomthetho.
Judicial authority	Having the power to apply the laws to settle disputes, for example judges	Amandla abehluleli bezomthetho okusombulula izinkinga zabantu.
Legislative authority	Having the power to make laws	Ukuba namandla okwenza imithetho
Lobbying	To try to influence legislation to support a particular cause	Ukukhankasela ukuphasiswa kwemithetho
Municipality	A city or town having corporate status and powers of self-government	Omasipala
Policy	A plan embracing the principles and aims of a government	Inqubamngomo okulawulwa ngayo.
Parliament	Legislative assembly made up of representatives of a nation, who make the laws	Indlu yesishaya mthetho
Rule of law	This is the idea that government should only act in terms of the law, which is enforced by impartial and independent courts	Ukubusa kukahulumeni ngokulandela umthetho

LEGAL/LATIN TERM	ENGLISH	ZULU
trias politica/separation of powers	According to this principle, state powers should be divided among several organs to prevent authoritarian rule and protect human rights. The legislative, executive and judiciary have their own powers and function	Ukwahlukaniswa kwaamandla wombuso ezigabeni zikahulumeni ukuvikela ukuvikela amalungelo esintu .
sub judice	Still pending in a court of law	isalinde enkantolo yomthetho

Study unit 5

Introduction to democracy and public participation

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Study unit outcomes

Once you have completed this study unit on democracy and public participation in South Africa, you should

- understand what democracy entails
- be able to distinguish between the different types of democracy
- understand the principle of separation of powers
- understand what judicial review entails
- be able to analyse the role that the Constitution plays in a democratic South Africa and the related principles
- be able to outline the role that public participants play in a democratic country

5.1 INTRODUCTION

This study unit analyses the concept of democracy. It basically examines the forms of democracy, principles of democracy, democracy and judicial review, separation of powers and cooperative government. It also focuses on the form of government that prevails in South Africa.

The South African Constitution provides for a broadly representative constitutional democracy based on universal adult suffrage. However, its emphasis on public participation introduces elements that, in the formal sense at least, distinguish it from many of the longer established democracies.

5.2 DEMOCRACY

Democracy is one of the founding values of the Republic of South Africa. As the preamble to the Constitution puts it, the government must be based on the will of the people. The word "democracy'' is derived from two ancient Greek words: *demos* (the people) and *kratos* (strength). This implies that democracy refers to government by the people. It therefore presupposes free political discussion, the toleration of differences between people, and the right of all citizens to participate in political decision-making.

The opposite of a democracy is a dictatorship or despotic regime where the state is governed by a dictator or despotic ruler who runs the state or country as he sees fit and makes laws as he pleases.

5.2.1 Forms of democracy

There are three types of democracy:

- direct democracy
- representative democracy
- participatory democracy

We will first discuss the concept of direct democracy.

Direct democracy

Direct democracy means that all major political decisions are taken by the people themselves. This form of democracy may work in a very small political community, where people can get together on a regular basis (eg in the town hall) to discuss and decide matters of common interest.

However, direct democracy is hardly an option in the modern state, which is usually too populous to allow for the direct participation, on a regular basis, of all citizens in the affairs of the nation. Modern democracies therefore follow a system of representative democracy.

Representative democracy

Representative democracy demands that all the inhabitants of the state (i.e. all those above a certain age, for example 18 years, and who are not disqualified for another reason) should, via direct representation, have a say in the way in which the state is governed, usually by being represented in the legislature. Note that a representative democracy is created via the process of elections. These elections should be held at regular intervals, and reasonably frequently.

Representative democracy is indirect democracy, as the power is based on the will of people expressed through their elected representatives. This is political democracy, which entails the recognition of political rights, and free and fair elections.

This means that representatives are elected to office and must make decisions on behalf of the electorate. In other words, the elected representatives must directly represent the views of those who voted them into power.

Representative democracy is therefore characterised by elections conducted on a regular basis. This system is most suitable for the populous communities that characterise the modern state. It is, however, criticised for its failure to provide an opportunity for meaningful political participation by the people, as it is argued that political parties depend on big business to finance their election campaigns and are extremely reluctant to do anything that may alienate their sponsors.

Those in favour of representative democracy argue that it is the best system since elections are still a powerful mechanism to keep a government accountable to the people. That is the case because if the government loses sight of the concerns and aspirations of the broader population, it is likely that it won't be re-elected at the end of its term of office.

They also argue that freedom of the press, freedom of information and freedom of association and the principle of separation of powers can prevent any single group or institution from becoming too strong, and that it promotes democratic debate and competition.

Next we examine participatory democracy.

Participatory democracy

This is the form of representative democracy where individuals or institutions representing the people should participate in politics or in decisions that affect them.



Activity

(1) Define the term "democracy".
(2) Discuss the three types of democracy in detail.
(3) Would you say a country like South Africa is democratic or autocratic? Discuss in detail.



Feedback on activity

(1) Democracy is a system of government, by the people, through elected representatives. It ensures political, social and legal equality. The government is based on the will of the people
(2) Refer to section 5.2.1: Forms of democracy.
(3) Since 1994, South Africa has had a democracy. A democracy is a form of government that takes place through the will of the people. In a democracy, a government is elected by means of elections. A dictatorship is the opposite of a democracy. It is a form of government with a ruler who has complete authority or power, which was often acquired by force. Examples of dictatorships are Cuba and North Korea.

There is a relationship between democracy and power. What you need to realise is that under a democracy and constitutional order, which exists today, the government and its citizens have legitimate (legal) power, as the government has a mandate to rule. But this is always subject to the Constitution. During apartheid, in South Africa, no one actually had legitimate power. Both the government and its citizens possessed illegitimate (illegal) power, as they had no mandate from the people to govern.

The principles of democracy will be examined next.

5.2.2 Principles of democracy

Even though the political institutions of modern democracies differ in important respects, there are a number of features which are common to most democratic societies. The following features are widely regarded as indispensable to democratic government:

- free and regular elections (usually once every four or five years)
- a multiparty system
- universal suffrage, which means that all citizens above a certain age have the right to vote

- the protection of minorities
- mechanisms to ensure the accountability of government to the electorate
- We will briefly discuss what the benefits of democracy are.

5.2.2.1 Benefits of democracy

There are a number of benefits to a democratic society, some of them being that people have a say in government and feel a part of society.

Let us look at some of the losses or risks associated with democracy.

5.2.2.2 Losses or risks of democracy

There are also some disadvantages to a democracy, however, in that sometimes the minority must go along with the majority, even if minorities do not want to. Some freedoms are then lost. Democracy and free-market economics could also result in greater inequality of wealth.

A democracy can also It can be disorganised and inefficient; and it may raise unrealistic expectations of the people from government, which if not fulfilled will result in disappointment.

We will now specifically discuss democracy in South Africa.

5.2.3 Democracy and the Constitution 1996

Democracy constitutes one of the founding values of the South African Constitution 1996. Its significance is captured in the preamble which reiterates that government must be based on the will of the people. Democracy also features in many other parts of the Constitution such as sections 1, 7(1), 36(1), 39(1), 57(2)(b), 61(3), 70(1)(b), 70(2)(b)–(c), 116(1)(b), 160(8)(b), 181(1), and 195(1)) of the Constitution).

You must please read the above-mentioned sections of the Constitution in order to understand the importance or the role played by democracy in South Africa.

Note that as much as democracy plays a crucial role in our constitutional order it is not defined in the Constitution. In the South African context, "democracy" takes the form of representative democracy where every adult South African citizen is entitled to cast his or her vote for a representative of his or her choice in free and fair elections, and to express his or her will in Parliament, a provincial legislature or municipal council.

The principle of separation of powers will be examined next.

5.2.3.1 The principle of separation of powers

You must always bear in mind that South Africa, in addition to being a representative democracy, is a constitutional democracy. This means that people's representatives in Parliament, in the provincial legislatures and in municipal councils are not free to make whatever laws they wish as they are bound by the norms and values embodied in the Constitution. This is the case because the Constitution is the supreme law of the country and any law that is inconsistent with it will be declared invalid.

Our Constitution also provides for the principle of separation of powers. The doctrine of separation of powers entails the *trias politica* principle, which refers to the division of governmental power into the three branches of activities, being the

- legislative
- executive
- judiciary

Each of these terms is explained below.

The **legislature** is empowered to create, amend and repeal legal rules. These powers are vested in **Parliament**.

The **executive** is empowered to execute and enforce legal rules. These **powers** are vested in the **President**.

The **judiciary** is empowered to interpret legal rules**,** and to apply such rules to concrete situations. These **powers** are vested in the **courts**.

The separation of powers, or *trias politica* doctrine, is a term of art (a word or phrase that has special meaning in a particular context) and refers only to the decision of state authority between the legislature, executive and judiciary

Figure 5.1 is a flow chart summarising the branches of government mentioned above.

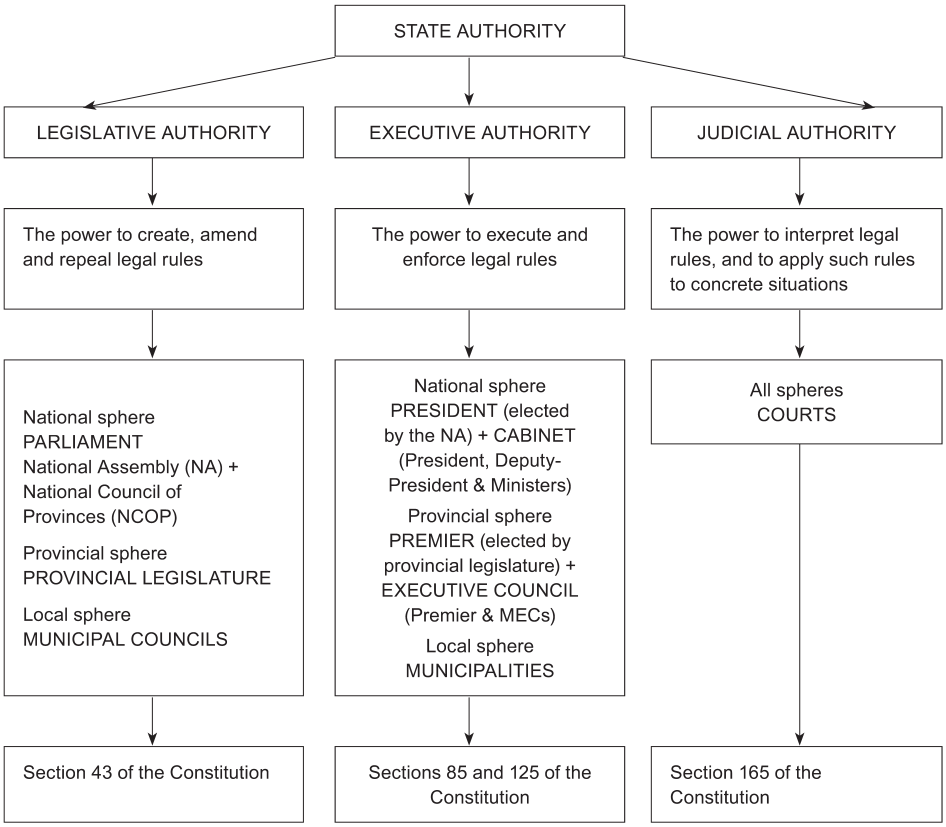


Figure 5.1: Flow chart summary of the branches of government

The separation of powers or *trias politica* doctrine can mean any or all of the following:

(1) The formal division of state authority among the legislative, executive and judiciary as represented visually in Figure 5.1.
(2) The separation of personnel, so that one person should not perform in more than one branch of government at the same time.
(3) A separation of functions so that one branch of government cannot usurp the functions and powers of another.
(4) Checks and balances, with each branch of government given powers to restrain the other branches and thus to achieve the desired balance among the three components of government authority.

Briefly, the principle of separation of powers represents the separation of powers between the legislature, the executive and the judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.

In Ex Parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa 1996 (4) SA 747 (CC), the court found that there is no universal model for separation of power and that this is not absolute.



Activity

Briefly discuss the separation of powers doctrine or *trias politica* in South Africa.



Feedback on activity

Trias politica or the separation of powers is used to divide state authority between the legislative, executive and judicial authority.

The separation of powers is very necessary in order for a democracy to function effectively. It prevents abuse of power by one branch of government. For political freedom in a country, there must be separation of powers.

Next we look at judicial review and democracy.

5.2.3.2 Judicial review and democracy

The South African Constitution also provides for a number of checks and balances. The most important of these is the power of **judicial review** which empowers the court or judiciary to act as a watchdog over the legislative and executive, and ensures that all laws and conduct of the legislative and executive are valid and consistent with the Constitution.

This means that the court is empowered to declare unconstitutional any legislative or administrative action that is unconstitutional. As mentioned, judicial review empowers the court or the judiciary to act as a watchdog over the legislative and executive, and ensures that all laws and conduct of the legislative and the executive are valid and consistent with the Constitution. In other words, the court has powers to declare invalid any unconstitutional legislation or administrative actions.

Some people may argue that it is undemocratic that the judiciary (which is not an elected body) has the power to declare legislation enacted by Parliament (which is an elected body) invalid. However, the following arguments can be made to defend judicial review against the charge that it is undemocratic:

- The South African Constitution was itself made by the representatives of the people, assembled in the Constitutional Assembly. In fact, the Constitution had to be adopted by a two-thirds majority of the members of the Constitutional Assembly, and was the product of a lengthy process of negotiation and democratic deliberation. This explains, to some extent, why the Constitution enjoys precedence over ordinary legislation.

- Democracy presupposes a vigorous political debate, in which citizens feel free to state their views and to challenge widely accepted beliefs. Judicial review may contribute to this result: by protecting people's political rights, or freedom of expression, judges may help to ensure a free and uninhibited public debate.
- Judges may inquire into the constitutionality of legislation, but this does not mean that they can simply substitute their own views for those of the legislature. When a judge strikes down a law as unconstitutional, he or she does not make a new law or tell the legislature what a new law should look like. The discretion to amend a law that has been struck down belongs to the legislature; the only condition is that the amended law must be constitutional.



Activity

Read the following scenario and answer the question that follows.

(1) A person you meet at a party enters in to a debate with you upon hearing that you are a law student. The person claims that "judicial review is undemocratic".

You must defend your position by stating that there are a number of arguments to counter this claim. Elaborate on them in detail.

(2) Read the following passage based on a hypothetical case/scenario and answer the question that follows:

The majority of people in the country have brown eyes. In the national elections, therefore, the majority of people voted for the Party for Brown- Eyed People and this party now has the majority of seats in the National Assembly. Parliament enacts legislation declaring that people with blue eyes are no longer allowed to buy property in certain areas. Blue-eyed people are outraged and approach the Constitutional Court to declare the Act unconstitutional on the grounds that it discriminates against blue-eyed people.

Counsel for the government argues that the will of the majority of South Africans is represented by Parliament and that it would be undemocratic to declare the Act invalid. The Constitutional Court declares the Act invalid. Adamant that the will of the people should prevail, Parliament passes an Act in terms of which the decision of the Constitutional Court can be reviewed by Parliament.

Now answer the following question:

- Do you agree with the argument put forward by counsel for the government? Explain your answer in detail. (10)



Feedback on activity

(1) You should state that there are a number of arguments to counter this claim, as mentioned below:

- *The South African Constitution was itself made by the representatives of the people, assembled in the Constitutional Assembly. In fact, the Constitution had to be adopted by a two-thirds majority of the members of the Constitu-*

tional Assembly, and was the product of a lengthy process of negotiation and democratic deliberation. This explains, to some extent, why the Constitution enjoys precedence over ordinary legislation.

- *Democracy presupposes a vigorous political debate, in which citizens feel free to state their views and to challenge widely accepted beliefs. Judicial review may contribute to this result: by protecting people's political rights, or freedom of expression, judges may help to ensure a free and uninhibited public debate.*
- *Judges may inquire into the constitutionality of legislation, but this does not mean that they can simply substitute their own views for those of the legislature. When a judge strikes down a law as unconstitutional, he or she does not make a new law or tell the legislature what a new law should look like. The discretion to amend a law that has been struck down belongs to the legislature; the only condition is that the amended law must be constitutional.*

(2) In answering this question, you have to do the following:

- *Discuss representative democracy.*
- *Discuss constitutional democracy.*
- *Define and discuss the doctrine of the separation of powers.*
- *Link and explain the importance of these concepts to the separation of powers.*
- *Refer to the "counter-majoritarian" dilemma.*
- *Assess whether the existence of a supreme, justiciable Constitution is incompatible with democracy.*

Next we will look at democracy and the South African electoral system.

5.2.3.3 Democracy and South African electoral system

An electoral system is the mechanism through which the electorate exercises its right to vote for the representative of its choice. It basically sets out the procedures for the election of political representatives: that is, the way in which the votes cast are translated into seats in the legislature.

Section 46(1) of the Constitution provides that members of the National Assembly must be elected in terms of an electoral system that is prescribed by national legislation and which results, in general, in proportional representation.

See also section 105(1) of the Constitution which contains a similar provision in relation to provincial legislatures, and section 157(2) which deals with the election of municipal councils.

The system of proportional representation means that parties get a certain number of seats in Parliament according to the percentage of votes that they get in an election.

For example, if your party gets 15% of the votes in the country, then it gets 15% of the seats in parliament. Only members of parties can stand for elections. People vote for the party they like, not for a person they

like. Each party chooses its own list of candidates for Parliament. The party holds all its seats in Parliament. Parties have central control over the selection of members of parliament (MPs).

Proportional representation can be regarded as the most inclusive system of representation, because both majority parties and minority parties are given the right to represent their constituencies in the legislative authority

Next we look at how you as a South African citizen can participate in our democracy.

5.3 PUBLIC PARTICIPATION IN A DEMOCRACY

Do you know how you can participate in your country's public affairs as a South African citizen? Let's examine this issue in more detail starting with the importance of public participation.

5.3.1 The importance of public participation

The South African Constitution provides for a broadly representative constitutional democracy based on universal adult suffrage. However, its emphasis on public participation introduces elements that, in the formal sense at least, distinguish it from many of the longer established democracies. Public participation does the following:

- It encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of government and become familiar with the laws as they are made.
- It enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of.
- It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice.
- It strengthens the legitimacy of legislation in the eyes of the people.

Finally, because of its open and public character it acts as a counterweight to secret lobbying and influence peddling. Participatory democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist (*Doctors for Life International v Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) at para 115).

It is important to note that public participation should not be seen as being in conflict with the representative element of democracy but rather they should be seen as mutually supportive. For example, general elections, the foundation of representative democracy, would be meaningless without massive participation by the voters (ibid).

In a South African context, public participation is crucial because it forms part of a democratic government that is accountable, responsive and transparent as it allows the public to participate in the law-making process. Therefore our democracy includes the fundamental principle of participatory democracy which means that South African democracy is partly representative and partly participatory.

Public participation includes the following:

- standing for elections
- becoming informed
- holding and attending community meetings
- joining civil and political organisations
- protesting and petitioning
- paying taxes
- lobbying decision-makers and participating in decision-making processes such as serving on parliamentary committees
- making written/verbal submissions to committees

In the case of Doctors for Life (*Doctors for Life International v Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC)), the court held that the international law right to political participation encompasses a general right to participate in the conduct of public affairs and a more specific right to vote and/or be elected into public office.

The general right to participate in the conduct of public affairs also includes engaging in public debate and dialogue with elected representatives at public hearings and the duty to facilitate public participation in the conduct of public affairs by ensuring that citizens have the necessary information and effective opportunity to exercise the right to political participation.

Referring to one of the actions listed above, we will now examine the term "lobbying" in more detail.

5.3.1.1 Lobbying

Lobbying means persuading people who make laws, such as Parliament, to support a position you believe is right.

One can lobby by

- holding meetings with decision-makers such as members of parliament for your area;
- making submissions and petitions to committee meetings/public hearings
- writing formal letters in which you state your views
- speaking to the media
- holding news conferences, and
- helping reporters with stories, and public letter-writing campaigns

We have seen that lobbying is a very active process aimed at garnering support for a position you believe is right. This leads us to look at public participation and the Constitution.

5.3.2 Public participation and the Constitution

Public participation is guaranteed in the preamble of the Constitution, which states that the Constitution lays "the foundations for a democratic and open society in which government is based on the will of the people" (Doctors par 110).

This means that we, as citizens, have a constitutional right to be involved and participate in government processes on an ongoing basis to ensure that the people we vote for carry out their duties as promised.

The founding values of our constitutional democracy include as part of those values "…a multi-party system of democratic government, to ensure accountability, responsiveness and openness". (s 1 of the Constitution) Commitment to principles of accountability, responsiveness and openness shows that our constitutional democracy is not only representative but also contains participatory elements".

It is also expressed in constitutional provisions that require national and provincial legislatures to facilitate public involvement in their processes (ss 59, 72 and 118).

The factors affecting meaningful public participation will be discussed in the following section.

5.3.3 Factors affecting meaningful public participation

As can be seen, the public's participation is an essential part of a democracy, as well as a constitutional right. There are, however, certain factors that could affect meaningful participation. Some of them are discussed here:

- Limited access to media, low education levels and geographic isolation from the centres of government, and problems with time and money all affect meaningful participation by much of society.
- Disinterest is one of the main reasons for non-participation.
- Persons who enjoy higher socio-economic status and higher education will be more involved in politics and will feel a civic duty to participate in politics. Also, persons who identify with a certain group participate more actively. If a person feels alienated by the political system and that government is not in touch with the needs of the people, he/she will be less inclined to participate. Social and outgoing personalities will participate more.
- Physical factors such as proximity, weather and terrain can affect participation.
- Regional difference, that is the distance from the central position, affects participation.

These factors suggest that the government needs to work proactively to ensure that the voices of the widest public possible are heard. The participation of citizens to make their voices heard has both advantages and disadvantages.

5.3.4 The advantages and disadvantages of citizen participation

Public participation has its advantages and disadvantages, some of which are discussed here:

5.3.4.1 Advantages of citizen participation

The following advantages of public participation are listed and are elaborated in the paragraphs that follow:

- reduction of psychological suffering and apathy
- it is a positive application of citizen powers
- willingness to sustain deprivation
- restraining the abuse of authority
- information dissemination

Reduction of psychological suffering and apathy

Citizens should feel that they have the ability to influence government in its decision-making.

Positive application of citizen powers

Citizen participation can convert dependency into independence; that is, converting the poor from passive consumers of the services of others into producers of those services. If citizens get involved in citizen delivery service delivery, for example refuse collection, is enhanced.

Willingness to sustain deprivation

Citizen participation may make citizens willing to accept the fact that government may not be able to render certain services.

Restraining the abuse of authority

Citizen participation can be a good check on government power. This is why it is not always encouraged by governmental authorities.

Information dissemination

Effective distribution of accurate information is essential for citizen participation.

5.3.4.2 Disadvantages of citizen participation

The following disadvantages of public participation are listed and then each is elaborated in the paragraphs that follow:

- supporting the goals of public management
- low citizen participation levels
- threat to professional image of public administration
- potential for conflict
- lack of government response
- time, costs and benefits
- representativeness
- participation mechanisms
- attitude of public managers
- lack of information
- corruption

Supporting the goals of public management

Often when government sponsors citizen participation activities, it does it to try and achieve its own ends.

Government will favour citizen participation activities that support, rather than disrupt, government goals. In terms of this view, citizens must be docile and are merely notified of government plans.

Low citizen participation levels

Most citizen participation activities do not lead to greater participation. Unless people have the resources and feel motivated to participate, participation remains low.

Threat to professional image of public administration

To many public officials citizen participation is a nuisance, as it may challenge the expertise of officials.

Potential for conflict

Citizen participation can cause conflict between citizens and public officials. This is due to the different groups having different goals with regard to what they want to achieve through citizen participation.

Lack of government response

There is little evidence that shows that government responds to citizen participation contacts.

Time, costs and benefits

Citizenship participation costs time and money. High costs versus low benefits and effects on that part of society that needs government services most – the poor and uneducated.

Representativeness

Only a small group of active elites will always be a feature of citizenparticipation programmes.

Participation mechanisms

Many citizen participation activities are inaccessible to the average citizen.

Attitude of public managers

Public officials often dislike citizen participation. This is because politicians feel that they know exactly what the public needs and don't need any public input and also that citizen participation is cumbersome and time-consuming. It also threatens to expose them if they behave badly.

Lack of information

Citizens are provided with insufficient information to participate optimally. A poorly informed public cannot sustain high levels of genuine citizen participation.

Corruption

This occurs when public officials accept a bribe or money in return for fraudulent activities.



Activity

(1) Explain, in your own words, what you think public participation in a democracy means.
(2) Discuss the advantages of public participation in detail.
(3) Discuss the disadvantages of public participation in detail.



Feedback on activity

(1) Public participation in a democracy firstly means that all levels of people take part in the running of the country. In your answer you should mention representative and participatory democracy. Representative democracy is a form of government by a group of people elected by us in elections. These representatives are elected on our behalf and make decisions on our behalf. Representative democracy is provided for in the South African Constitution. South Africa considers public participation in a democracy as important. Participatory democracy is a form of representative democracy in which we (citizens) are actively involved in the decision-making of the government. Participatory democracy strengthens representative democracy by including more participation by society. Public participation takes place by vesting in a general election and in many other ways.
(2) Refer to section 5.3.4.1: Advantages of citizen participation. You should list and elaborate on each advantage.
(3) Refer to section 5.3.4.2: Disadvantages of citizen participation. You should list and elaborate on each disadvantage.

5.4 CONCLUSION

In this study unit, we examined concepts of democracy and public participation. We also discussed the principle of separation of powers, judicial review and cooperative government. In the next study unit we will discuss the government of South Africa as required by the Constitution.

Study unit 6

Government in a South African democracy

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Study unit outcomes

In the previous study unit, we examined concepts of democracy and public participation. We also discussed the principle of separation of powers, judicial review and cooperative government. In this study unit we will discuss the government of South Africa as required by the Constitution.

Once you have completed this study unit, you will be able to investigate the role that government plays in a South African democracy. You should

- be able to describe how the South African government works in a democracy
- be able to define the term "government"
- be able to discuss the three spheres of government briefly and differentiate between them
- be able to differentiate between national, provincial and local government
- be able to discuss briefly the provincial legislature's role in provincial government.(s 104 of the Constitution)
- be able to discuss the provincial executive authority (s 125 of the Constitution)
- be able to discuss the different models of local government

– be able to describe the establishment and functions of municipalities
– be able to explain the role of councillors in local government
– understand what a by-law is

6.1 INTRODUCTION

We have seen what democracy and public participation entail; now it is crucial to see how the South African government is structured in order to comply with democracy. This study unit examines the three spheres of government and the three branches of government. In addition, it critically analyses the form of government in South Africa and the way in which cooperative government is supported by the Constitution.

6.2 STATE AUTHORITY

State authority is divided among the three spheres of government:

- the national sphere
- the provincial sphere and
- the local sphere

The three spheres of government overlap, as shown in figure 6.1.

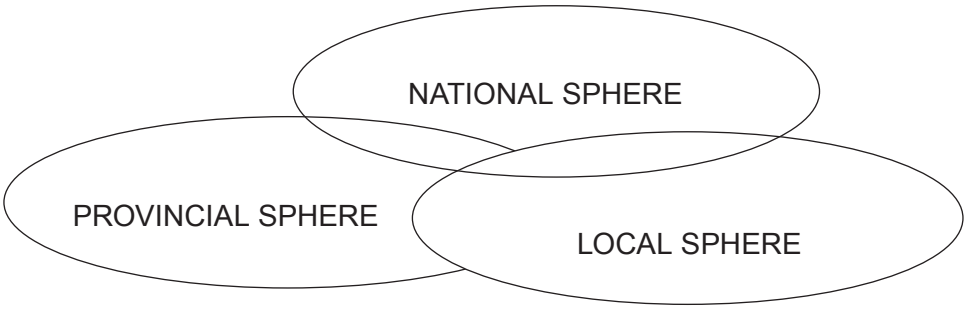


Figure 6.1: The three spheres of government overlap

These three spheres of government used to be called "levels" of government, but because all three spheres are autonomous (independent or self-governing), they are no longer referred to as levels.

These spheres of government are distinctive, interdependent and interrelated, as seen in Figure 6.1 They must cooperate with each other and work together for the common good of the nation as a whole.

Cooperative government is concerned primarily with the interaction between the national, provincial and local spheres of government.

We will now look into the national sphere of government.

6.2.1 National government

The national government makes and carries out laws about issues which affect the whole country, for example issues on economic policy, defence and relationships with other countries. It consists of the national legislature and the national executive.

National parliament makes laws called Acts, which the whole country has to follow. Parliament consists of the National Assembly and the National Council of Provinces.

The executive structure at a national level consists of the president, deputy president, cabinet ministers and interdepartmental committees.

Provincial government is examined next.

6.2.2 Provincial government

Provincial government consists of the provincial legislatures and the provincial executive. Provincial government, like national government, is entitled to conduct its affairs or govern itself without any interference from national government.

Provincial government, through its provincial legislatures, passes laws affecting a particular province, not the whole country. Its legislation must, however, be consistent with national legislation.

The provincial government executive also carries out policies affecting a particular province and not the whole country. Here again, the executive in provinces must perform its function in a manner that complies with the national executive.

Where a province fails to comply with the Constitution, the national government may intervene to ensure that effective government is maintained in that specific province.

Provinces must support municipalities (local government) since a province may assume responsibility for a municipality's duty to maintain essential national standards for the rendering of services.

The provinces can draw up their own constitutions, but these constitutions cannot go against the national Constitution.

Next we examine local government.

6.2.3 Local government

Chapter 7 of the Constitution has had an important effect on local government. For the first time in South African history, provision is made for autonomous local government with its own independence, powers and functions.

This means that local government is regarded as a sphere of government in its own right and is no longer a function or just one of the arms of provincial or national government. In *Fedsure vs Greater Johannesburg Metropolitan Council* 1999 (1) South Africa 374 (CC) the Constitutional Court stated that local government is different from what it was when Parliament reigned supreme. Local governments depended on a superior legislature and could have been terminated at any time. That has all changed. Local governments are committed to making by-laws and imposing them.

Chapter 7 promotes intergovernmental relations between local and provincial government. This is the sphere of government that is the closest to us citizens and renders many services that affect the lives of the inhabitants residing within its area of jurisdiction. Section 151 of Chapter 7 of the Constitution stipulates that local government consists of municipalities.

A municipality has a right to regulate on its own initiative the local government affairs of its own community, but this is subject to national and provincial legislation.

6.2.3.1 The different local government models

There are various local government models. These are listed below and then each is elaborated on:

- metropolitan councils
- district councils
- representative and rural councils
- traditional authorities

Metropolitan councils are found in the larger urbanised city areas of South Africa. They exist in the Cape Town and Durban areas, greater Johannesburg, Pretoria, Vaal Triangle and North East Rand. These metropolitan councils have the most power. Sometimes a strong metropolitan system takes the local out of local government; it distances government from the people and the enforcement of accountability becomes difficult.

District councils. Under apartheid district councils were called regional services councils. These councils have since been restructured as district, services or regional councils.

Representative and rural councils. These are also municipalities but are bodies that make decisions in the more remote areas, which are sparsely populated and where hardly any traditional municipal services are rendered.

Traditional authorities. Section 211 of the Constitution recognises "traditional authorities"/"tribal authorities". Section 212 states that the national legislature may provide for traditional leadership on a local level for matters affecting local communities.

Figure 6.2 presents a flow diagram of the three spheres of government.

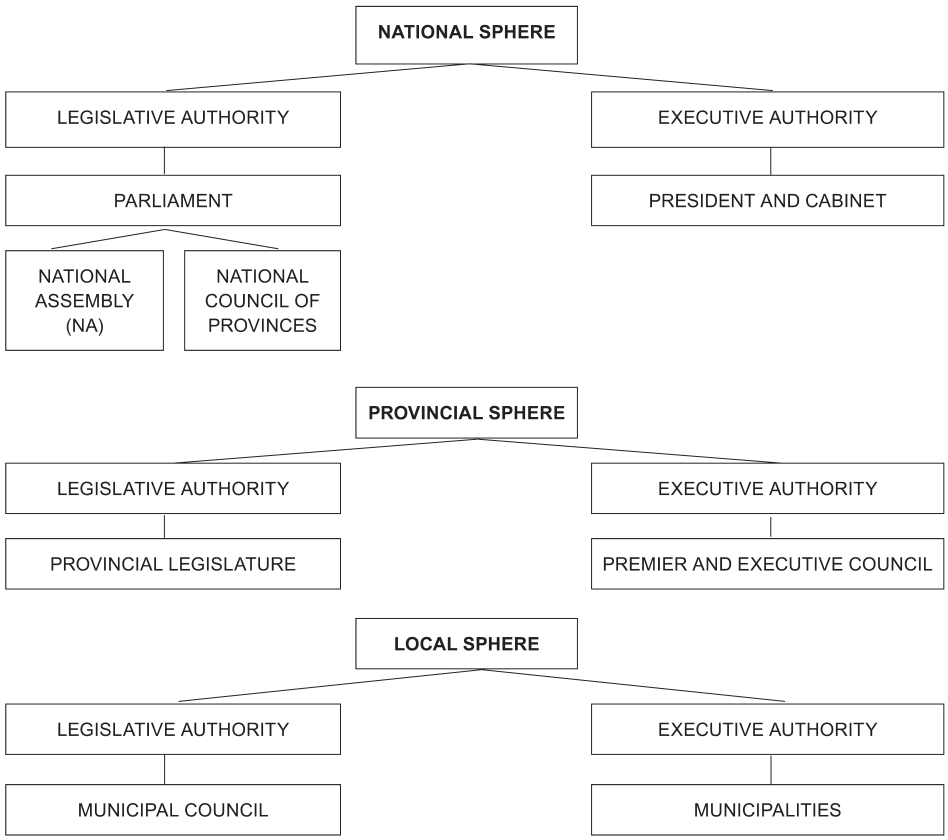


Figure 6.2: Flow diagram of the three spheres of government



Activity

Answer the following questions:

(1) What are the three spheres of government?
(2) What is the difference between provincial and local government?
(3) Why are municipalities established? List their powers and functions.



Feedback on activity

(1) The spheres of government refer to the principle of cooperative government: the local, national and provincial sphere. Cooperative government is another way in which state authority is distributed among the three spheres of government – the national, provincial and local spheres (refer to ss 40 and 41 of the Constitution). This ensures that all three spheres of government work with each other and assist each other in certain matters. They must be able to depend on each other and coordinate each other's functions and activities.

(2) Provincial government regulates matters in a specific province, for example Gauteng or KwaZulu-Natal. Remember that South Africa comprises nine provinces.

Local government is autonomous and regulates matters relating to local affairs. A local government shall make provision for access by all persons residing within its area of jurisdiction to water, sanitation, transport facilities, electricity, primary health services, and so on within a safe and healthy environment. Local government is the closest to the people, for example the Ekurhuleni Municipality consists of various suburbs on the East Rand such as Boksburg and Germiston.

(3) Municipalities (s 155 of the Constitution) are established for local government, to which the public can give their input on a continuous basis. A municipal council must report back continually to its electorate and to its community. Municipalities ensure that certain services such as water and garbage removal are rendered to the community. They also promote social and economic development, for example child welfare services. Municipalities also promote a safe and healthy environment, for example by providing primary health care services. They encourage communities to become involved in matters of local government.

We have looked at the spheres of government. In the next section we are going to look at the branches of government.

6.3 THREE BRANCHES OF GOVERNMENT

Many of you confuse the branches of government with the spheres of government. The branches refer to the judicial, legislative and executive authorities (*trias politica*). The spheres of government refer to the principle of cooperative government: the local, national and provincial spheres, as discussed above.

As discussed in the previous study unit, within each sphere of government there are three branches of government, namely, the legislative, the executive and the judiciary.

Here's a quick reminder of the functions of each branch of government:

- **Legislative authority** is the power to create, amend and repeal legal rules.
- **Executive authority** is the power to execute and enforce legal rules.
- **Judicial authority,** which is the third branch of government and applies to all three spheres of government, is the power to interpret legal rules, and to apply such rules to concrete situations.

In Figure 6.3, the flow chart explains the three spheres of government and the three branches of government and their functions:

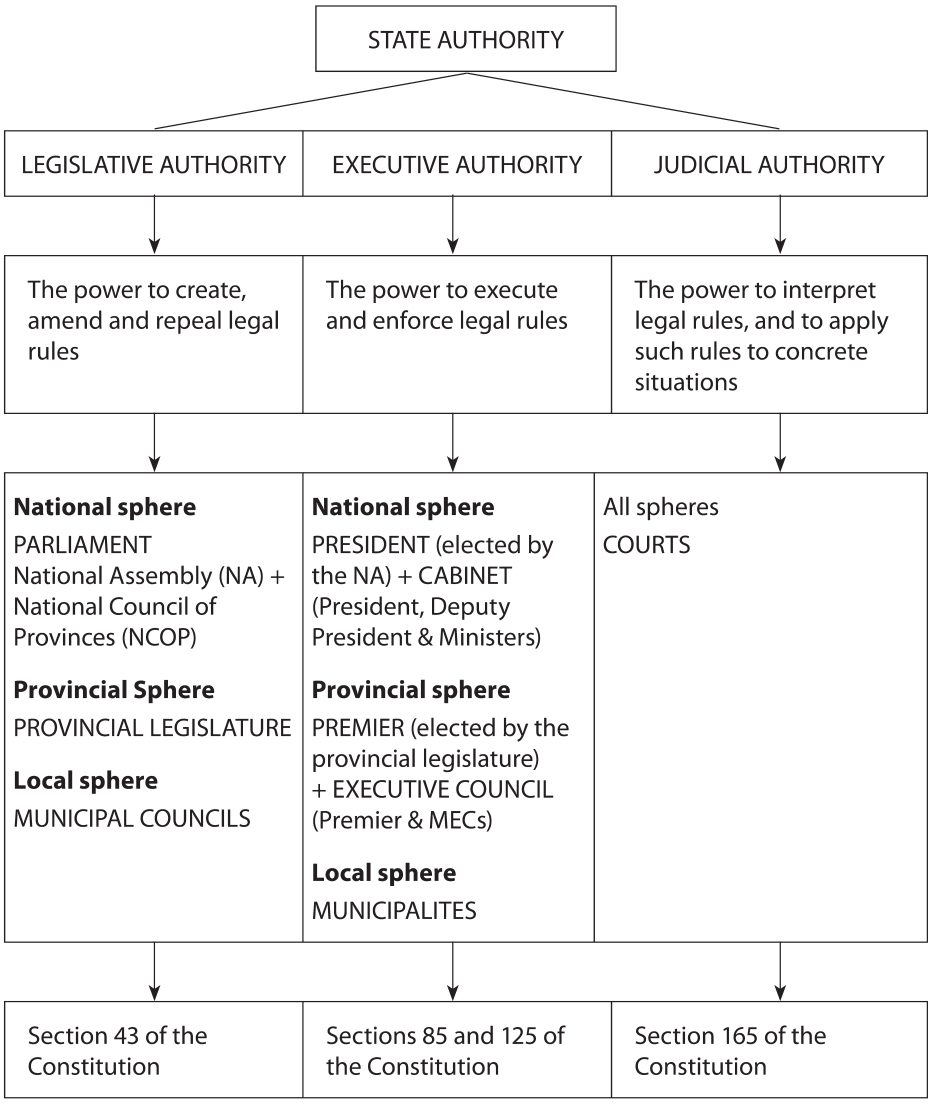


Figure 6.3: Flow chart of the three spheres of government and the three branches of government with their functions

We will now discuss each branch in further detail, as well as how they fit into each sphere of government that is, national, provincial and local level. We will start with the legislature.

6.3.1 Legislature

As you will remember, the function of the legislative authority is to create, amend and repeal legal rules.

6.3.1.1 Legislature at national level

As mentioned, the national legislature for the whole country on a national level is called Parliament, which consists of the National Assembly and the National Council of Provinces.

The legislature at national level is elected by people in national and provincial elections.

The legislature at national level has two main functions (s 1(a) and (b) of the Constitution of the Republic of South Africa, 1996):

(a) The national legislative authority as vested in Parliament confers on the National Assembly the power:

  (i) to amend the Constitution;
  (ii) to pass legislation with regard to any matter, including a matter within a functional area listed in Schedule 4, and
  (iii) to assign any of its legislative powers, except the power to amend the Constitution, to any legislative body in another sphere of government; and

(b) confers on the National Council of Provinces the power

  (i) to participate in amending the Constitution in accordance with section 74;
  (ii) to pass, in accordance with section 76, legislation with regard to any matter within a functional area listed in Schedule 4 and any other matter required by the Constitution to be passed in accordance with **section 76**;

  and

  (iii) to consider, in accordance with section 75, any other legislation passed by the National Assembly.

The provincial legislature will be examined next.

6.3.1.2 Legislature at a provincial level – provincial legislature

The legislatures at provincial level are elected by people in national and provincial elections for a period of five years.

The legislative authority of a province is vested in its provincial legislature, and confers on the provincial legislature the power:

(a) to pass a constitution for its province or to amend any constitution passed by it in terms of sections 142 and 143;
(b) to pass legislation for its province with regard to:

(i) any matter within a functional area listed in Schedule 4;
(ii) any matter within a functional area listed in Schedule 5;
(iii) any matter outside those functional areas, and that is expressly assigned to the province by national legislation; and
(iv) any matter for which a provision of the Constitution envisages the enactment of provincial legislation; and

(c) to assign any of its legislative powers to a Municipal Council in that province.

Matters referred to in Schedule 4 of the Constitution represent concurrent national and provincial legislative powers. Concurrent legislative authority means that both the national and the provincial legislatures may make laws dealing with certain matters.

Exclusive legislative authority, in matters listed in Schedule 5, means that only the provinces have the power to make laws in relation to certain matters, and that the national legislature generally does not have any authority in relation to these matters.

The provincial legislature consists of "standing" or "portfolio" committees which are based on competences allocated to provinces in the Constitution. Their portfolios will correspond with those allocated to members of the Executive Council, which the committees are to "oversee".

Portfolio committees consist of various party members. These parties are represented proportionally.

Here are some of the competencies provided by Schedule 4 and Schedule 5. (There are paraphrased from the originals in the Constitution.) We will list only a few of them.

SCHEDULE 4

CONCURRENT NATIONAL AND PROVINCIAL LEGISLATIVE POWERS

(Local government matters overseen by national and provincial government)

PART A	PART B
Agriculture	Air pollution
Animal control and diseases	Building regulations
Education at all levels, excluding tertiary education	Child care facilities
Environment	Local tourism
Health services	Municipal airports and planning and health services

PART A	PART B
Housing	Municipal public transport
Population development	Municipal public works only in respect of the needs of municipalities
Public transport	
Tourism	
Trade	
Vehicle licensing	
Welfare services	

SCHEDULE 5

EXCLUSIVE PROVINCIAL LEGISLATIVE POWERS

Local government matters overseen by provincial government

PART A	PART B
Abattoirs	Beaches
Ambulance services	Cemeteries and funeral parlours
Liquor licences	Control of public nuisances
Provincial planning	Fencing
Provincial recreation and amenities	Licensing of dogs, food outlets
Provincial sport	Municipal roads
Provincial roads and traffic	Noise pollution
	Refuse removal
	Traffic and parking



Activity

(1) Discuss the two main functions of the legislature at national level.
(2) What is the function of the provincial legislature?



Feedback on activity

(1) Refer to section 6.3.1.1: Legislature at national level.
(2) The provincial legislature is vested with legislative authority and makes the laws for a specific province. Each province has its own provincial legislature (s 104 of the Constitution) with its own rules.

6.3.1.3 Legislature at the local level

The legislative authority at the local level is vested in the Municipal Council.

The Municipal Council consists of the following people:

- Elected members (councillors) – elected members who have legislative powers to pass by-laws and approve policies for their area.
- The mayor – political head of the Council who is elected by Council.
- The executive or mayoral committee – made up of councillors with specific portfolios responsible for overseeing the work of the municipal manager and department heads.
- The municipal manager – head of the administration of the Council.
- Municipal Council officials – people who work for the administration.
- Ward committees – advisory committees with recommendation powers on any matter affecting the ward.

Please note that a ward committee consists of a counsellor and a maximum of ten people from the ward who are elected by the community. Laws written by local governments are called "by-laws". These have to be followed by people in that area. A municipality may make a by-law, but such by-laws may not conflict with national or provincial legislation.

Let us now look at the executive in more detail.

6.3.2 Executive

Refer back to Figure 6.2 to see where the executive fits into the branches of government. We remind you again that the function of the executive is to execute and enforce legal rules. In the section that follows we look at the executive at national level.

6.3.2.1 Executive at a national level

As mentioned, the executive structure at a national level consists of the president, deputy president, cabinet ministers and interdepartmental committees. The president is the head of state and is elected by the National Assembly from among its members.

The president's duties include

- assigning cabinet portfolios
- signing bills into law
- serving as commander chief of the military

The president works closely with the deputy president and the cabinet.

The cabinet is made up of ministers, such as the Minister of Land and Agriculture. Each Minister governs a department, with public servants doing the administration. The Ministers cannot make their own laws although they can draft new laws or change old laws and ask Parliament to pass them.

Ministers must make sure that the policies of the government are followed. Parliament can also ask ministers to explain why they are carrying out a policy in a certain way. In this way, the executive is accountable to the legislature.

Some of the functions of the executive at the national government level include

- initiating laws and policy
- carrying out laws passed by Parliament
- carrying out policies



Activity

(1) What is the executive at national level made up of?
(2) List some the functions of the executive.

Feedback on activity

(1) The executive is made up of the cabinet which consists of the president, deputy president and different ministers. On the national level the president is the head of the executive.
(2) The executive is responsible for the day-to-day running of the country. Some of its functions are to

- *assent, sign and promulgate bills passed by Parliament*
- *refer bills back to Parliament to confirm the constitutionality of the bill*
- *confer honours*
- *convene meetings of cabinet*
- *appoint commissions of enquiry*
- *pardon offenders, etc*

In the next section we look at the executive at the provincial level.

6.3.2.2 Executive at the provincial level

We now proceed to discuss the power to execute and enforce legal rules at the provincial level. Remember to refer back to figure 6.2 to assist you with understanding where the executive at provincial level fits in the structure of government.

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, by

(a) implementing provincial legislation in the province;
(b) implementing all national legislation within the functional areas listed in Schedule 4 or 5, except where the Constitution or an Act of Parliament provides otherwise;
(c) administering in the province national legislation outside the functional areas listed in Schedules 4 and 5, the administration of which has been assigned to the provincial executive in terms of an Act of Parliament;
(d) developing and implementing provincial policy;
(e) coordinating the functions of the provincial administration and its departments;
(f) preparing and initiating provincial legislation; and
(g) Performing any other function assigned to the provincial executive in terms of the Constitution or an Act of Parliament.

A premier is elected by the legislature from amongst its member at its first sitting.

The Premier of a province is responsible for the following duties:

(a) assenting to and signing bills;
(b) referring a bill back to the provincial legislature for reconsideration of the bill's constitutionality;
(c) referring a bill to the Constitutional Court for a decision on the bill's constitutionality;
(d) summoning the legislature to an extraordinary sitting to conduct special business;
(e) appointing commissions of inquiry; and
(f) calling a referendum in the province in accordance with national legislation.

The premier and the MECs are accountable, individually and collectively, to the provincial legislature for the exercise of their powers.



Activity

(1) What is the role of the provincial executive authority?
(2) Discuss the duties that a premier of a province is responsible for.



Feedback on activity

(1) The provincial executive authority (s 125) is vested in the premier of each province, who is appointed by the legislature. Premiers enforce the laws for their specific province, together with the MECs.

(2) The premier of a province is responsible for the following duties:

(a) assenting to and signing bills
(b) referring a bill back to the provincial legislature for reconsideration of the bill's constitutionality
(c) referring a bill to the Constitutional Court for a decision on the bill's constitutionality
(d) summoning the legislature to an extraordinary sitting to conduct special business
(e) appointing commissions of inquiry, and
(f) calling a referendum in the province in accordance with national legislation

6.3.2.3 Executive at the local level

The executive authority of a municipality is vested in its Municipal Council.

Next we look at the judiciary.

6.3.3 The judiciary

Finally, we discuss the role of the judicial authority. Remember to refer back to figure 6.2 to assist you with understanding where the judiciary fits in the structure of government. The judiciary is made up of judges and magistrates who make decisions in court cases based on the law. These decisions then help to explain what the law means in actual circumstances. In this way, the court checks the laws that the legislature makes.

People can take cases to court if they believe the actions of the executive go against the law or the Constitution. In this way, the courts act as a check on the work of the executive. The judiciary must be independent of the executive and the legislature. In this way, it can make decisions that are fair even if this goes against what the legislature and the executive want.

As mentioned in study unit 1, the judiciary is empowered by judicial review to act as a watchdog over the legislative and the executive and to declare invalid any unconstitutional legislation or administrative actions. The courts are bound only by the Constitution as this is the supreme law of the country. This means that they must make sure that they do not go against the Constitution.

The Constitutional Court is the highest court for interpreting and deciding constitutional issues, while the Supreme Court of Appeal is the highest court for non-constitutional matters. Most cases are heard in many of

the High Courts and magistrates' courts. The following are examples of these cases.

EXAMPLES:

(1) Parliament (the legislature) writes a new law that says all children at school must get a free meal at lunch time. The Minister of Education (the executive) gives the department of education instructions to carry out the new law. But when Thokozile Mkhize goes to school she doesn't get a free lunch. Thokozile's father and mother go to court to demand that the school gives their daughter some lunch. The court is entitled to force or tell the school to give Thokozile some lunch in accordance with the new law.

(2) Parliament passes a law that says doctors who are Rastafarians cannot work at state hospitals. The Department of Health gives instructions to all hospitals to dismiss all the Rastafarian doctors. These doctors go to court and say that these laws are unconstitutional because they discriminate against them on grounds of their religion and go against their rights in the Constitution. The court is entitled to tell Parliament to stop dismissing those doctors as that is unconstitutional, if all the necessary facts are proven.

In the next section we look at the form of government and the state.

6.4 THE FORM OF GOVERNMENT AND THE STATE

The application of the principle of separation of powers in South Africa led to the adoption of a system of government with both parliamentary and presidential features. Both the 1993 Constitution and the new 1996 Constitution are prime examples of constitutions with both presidential and parliamentary features. Presidential features are to be found in the fact that the president is both head of state and head of government.

Parliamentary features are that the president is elected by Parliament, and not directly by the voters, and that he/she must also resign if Parliament adopts a motion of no confidence in him or her. Another feature of a parliamentary system of government is that members of the supreme executive (the cabinet) must be members of Parliament.

We look at parliamentary features next.

6.4.1 Parliamentary features

The following parliamentary features can be identified in the South African system:

- Head of state not head of government (this is in contrast to the British system where the prime minister is head of government and the monarch or queen is head of state).
- Head of state and his cabinet are also part of Parliament.
- Head of government is a leader of the political party with a clear majority in Parliament.
- The president is elected by the National Assembly (NA) from amongst its members at its first sitting or whenever there is a vacancy for the position of president, and not directly by the electorate (s 81 of the 1996 Constitution).
- The president and his or her cabinet are individually and collectively accountable to the NA for the exercise of their powers and the performance of their duties (s 92 of the 1996 Constitution).
- In South Africa, since the president is elected by the NA from among its members, he or she must resign if the NA adopts a motion of no confidence in him or her (s 102 of the 1996 Constitution). The NA may be dissolved by the president (s 50 of the 1996 Constitution).
- Save for at most two ministers, cabinet members must be selected from and thus be members of the NA (s 91 of the 1996 Constitution).

Next we look at presidential features of our government.

6.4.2 Presidential features

The following presidential features can also be identified in South Africa with some comparisons to other democratic systems:

- The head of government is elected by the people themselves (as is the US president).
- Unlike in the Westminster system, where the head of state and head of government are separate and distinct (Rautenbach & Malherbe 2003:180), in South Africa the president performs dual functions as head of state and head of government/executive (s 83). This position is similar to that of the United States of America.
- In South Africa, once elected, the president ceases to be a member of parliament (s 87).
- The president of the USA may veto legislation. In South Africa, although the president may not veto legislation, he may refer a Bill back to the NA if he has reservations about its constitutionality (s 79).

As can be seen, the relationship between the legislature and executive determines whether a country has a parliamentary or presidential system of government.

The differences between parliamentary and presidential systems of government have been summarised in table 6.1.

Table 6.1: Differences between parliamentary and presidential systems of government

PRESIDENTIAL SYSTEM	PARLIAMENTARY SYSTEM
(1) The head of government is also the head of state. This is the case in the United States, for instance	(1) The head of state and the head of government are two different persons. For instance, in the Westminster system, which is the archetypal model of a parliamentary system, there is a symbolic head of state (monarch), with the real power of government vesting in the prime minister.
(2) The head of government is not a member of the legislature, and is not responsible to it. For instance, the American President is not a member of Congress, and neither are the members of his cabinet.	(2) The head of government and his/her cabinet are members of the legislature, and are responsible to it. One can therefore conclude that there is often a more complete separation of powers (in the sense of a separation of personnel) in a presidential system than in a parliamentary system.
(3) The head of government (president) is often elected directly by the people. In the USA, for instance, the president is popularly elected and his election is independent of the election of the legislature.	(3) The head of government is the leader of the party with a clear majority in Parliament.

South Africa has both presidential and parliamentary features. The presidential features are that the president is both a head of state and a head of government and is not a member of parliament. The parliamentary feature, on the other hand, is that the president is the leader of the party with a clear majority in Parliament.

It is clear from the above that South Africa has adopted a hybrid form of government characterised by both parliamentary and presidential features of government. However, as indicated, it remains a parliamentary system, as its features prevail over the presidential ones.

Cooperative government is examined next.

6.5 COOPERATIVE GOVERNMENT

This is the second way in which state authority is distributed among the three spheres of government: the national, provincial and local spheres. Refer back to figure 6.1, which clearly shows that the three spheres of government overlap.

The Constitution, through cooperative government, emphasises that the national, provincial and local spheres operate more or less as equal partners in government; cooperative government (in terms of s 40 of the Constitution) emphasises that these three spheres of government should be distinct, interrelated and interdependent.

The system of cooperative government is necessary in order to assist the provincial and local spheres in managing their own affairs and performing their functions. In other words it destroys the rigid hierarchy of power that we used to have in the past, where government power was concentrated in the national government.

The Constitution requires these spheres of government, in terms of section 41of the Constitution, to observe and adhere to the principles of cooperative government which are**:**

(i) all spheres of government and all areas of state within each sphere must preserve the national unity of the Republic,
(ii) secure the well-being of the people,
(iii) provide effective, transparent, accountable and coherent government for the Republic,
(iv) be loyal to the constitution and the Republic,
(v) respect the powers of government in other spheres and not assume any power or function, except those conferred on them,
(vi) exercise their powers in a manner that does not encroach on the geographical or functional integrity of government in another sphere; and
(vii) importantly cooperate with one another in good faith by supporting one another, informing and consulting with one another, coordinating their actions and legislation with one another, etc.

Cooperative government is so strongly protected in the Constitution that if there is an intergovernmental dispute involving organs of state, such organs of state must make every reasonable effort to settle the dispute and must exhaust all other remedies before approaching a court of law to resolve the dispute. If such process has not been followed, the court may refer a dispute back to the organs of state.

Cooperative government also applies on concurrent legislative powers between the legislative bodies of the different spheres of government. This means that in certain areas, the legislative bodies of the different spheres of government might be competent to make laws.

The importance of concurrent legislative powers was reiterated by the court in the case of Premier of the Province of Western Cape v President of the Republic of South Africa 1999 (4) BCLR 382 (CC) where former judge President Chaskalson said that cooperation in the field of concurrent law making is essential.



Activity

(1) Discuss in detail what is meant by cooperative government.
(2) In terms of section 41 of the Constitution, spheres of government are required to observe and adhere to the principles of cooperative government. List the principles of cooperative government.



Feedback on activity

(1) The spheres of government refer to the principle of cooperative government: the local, national and provincial sphere. Cooperative government refers to a form of government that supports political flexibility, negotiation, compromise and less reliance on the rigid distribution of powers between the three spheres of government. It requires coordination of the functions of the spheres to work together for the common good of the nation as a whole.

(2) You should have listed the following principles:

All spheres of government and all areas of state within each sphere must.

- *(i) preserve the national unity of the Republic*
- *(ii) secure the well-being of the people*
- *(iii) provide effective, transparent, accountable and coherent government for the Republic,*
- *(iv) be loyal to the constitution and the Republic,*
- *(v) respect the powers of government in other spheres and not assume any power or function, except those conferred on them,*
- *(vi) exercise their powers in a manner that does not encroach on the geographical or functional integrity of government in another sphere and*
- *(vii) importantly cooperate with one another in good faith by supporting one another, informing and consulting with one another, coordinating their actions and legislation with one another, etc.*

6.5.1 Structures in place to support cooperative government

A number of structures are already in place that allow the national, provincial and local spheres of government to discuss and coordinate their activities. For example, the Constitution created the National Council of Provinces to give the provinces a say in the national legislative process and to provide a forum for public consideration of issues affecting the provinces. The Constitution also establishes a financial and fiscal commission, which reports regularly to parliament and the provincial legislatures.

Please note that some structures supporting cooperative government were established before the Constitution came into operation. What is worth noting is that these structures still exist. One such structure is the

Intergovernmental Forum (IGF) where provincial premiers and national ministers meet to discuss public policy at the provincial level.

Parliament has also adopted legislation to promote cooperation between the three spheres of government on such matters as environmental protection and financial matters.



Activity

Now try and answer the following question:

(HINT: only answer this question once you have completed your study of this study unit and then only if you are convinced that you understand all the material.)

(1) Is the following statement true or false? Give reasons for your answer:

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



Feedback on activity

(1) **FALSE, the reasons are:**

- *The trias politica doctrine deals with the division of state power between the three branches of government, that is, the legislature, executive and the judiciary. The legislature makes, amends and repeals laws. The executive implements and enforces the law. The judiciary interprets and applies the law to concrete situations.*
- *This doctrine is important because it prevents a concentration of power in one body; the principles of cooperative government are embodied in sections 40 and 41 of the Constitution.*
- *According to this principle, the three spheres of government, that is, the national provincial and local spheres of government, must assist and respect each other.*
- *Section 40 provides that the three spheres of government are interdependent, interrelated and distinctive, and section 41 sets out the guidelines in terms of which these spheres must interact with each other.*
- *Cooperation between the three spheres of government is important in order to develop the capacity and infrastructure of the weaker provinces and municipalities.*

6.6 CONCLUSION

In this study unit we examined the manner in which the South African government operates. We did that by examining the three spheres and the three branches of government, as well as their functions.

It remains to be seen whether South Africa will be able to translate the constitutional principles of cooperative government into a political reality.

Although more than twenty years of democracy has passed, it is still too early to determine the success of South Africa's democracy. The success of this form of state authority will depend, ultimately, on the following:

- whether the provinces have the political will, and will develop the institutional capacity to assert their own autonomy
- whether effective machinery can be put into place to coordinate government action in the national, provincial and local spheres
- whether the provinces will be able to inject their interests into the national legislative process through the National Council of Provinces
- the role of the courts in intergovernmental relations

In the next study unit we will discuss public participation at the national level of government.

Study unit 7

Public participation in national government

Contents

7.1 Introduction
7.2 Public participation in the process of making laws
7.2.1 People's Assembly
7.3 Public participation in the process of making policy
7.3.1 Stages of policymaking and law making (and public participation)
7.4 Some of the structures supporting public participation in the executive branch of government
7.5 Conclusion



Study unit outcomes

Once you have completed this study unit, you should

- be able to list some interesting facts regarding public participation during the legislative process
- be able to describe public participation during the policy-making stage
- understand some of the structures supporting public participation in the executive branch of government

7.1 INTRODUCTION

In the previous study unit we examined the concepts of democracy and how the South African government is structured in order to promote democracy.

In this study unit we will analyse the way in which the structure of our government enables public participation at the national level of government. We attempt to achieve this by analysing public participation during the process of making laws and policies in South Africa. Last but not least, this study unit will also discuss some of the structures supporting public participation in the executive branch of government.

Public participation is about access to power and decision-makers. In most systems, certain people or interests have greater access to power and decision-makers than others. Patterns of access will tend to reflect the socio-economic landscape and inequalities of society. Even relatively

well-functioning democratic systems tend to favour the views of the powerful and organised over the poor and disorganised.

The participation of the public in the process of making laws will now be examined.

7.2 PUBLIC PARTICIPATION IN THE PROCESS OF MAKING LAWS

Remember in the previous study units we said that Parliament's function is to draft or to repeal laws at national level. It then becomes crucial to understand not only the importance of public participation during the drafting of laws by Parliament but also the manner in which the public participates during the process of drafting of laws at national level.

Public participation in the law-making process is crucial since it lies at the heart of our constitutional democracy (*Doctors for Life International v Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) (17 August 2006) par 1).

As a matter of fact, public participation during the legislative process at national level is guaranteed by sections 59(1) and 72(1)(a) of the Constitution, which in effect stress the importance of public involvement during the legislative process. The importance of public participation in the law-making process cannot be over emphasised as it permits public debate and dialogue with elected representatives (Doctors case par 106).

It is worth noting that this right can be read together with the right to freedom of expression which includes the freedom to seek, receive and impart information. (Doctors case par 106). It is also crucial to note that the right to public participation can also be read together with political rights, in particular the right to vote guaranteed in section 19 of the Constitution. It creates a constitutional obligation on the legislatures to facilitate public participation in the law-making process (Doctors case par 106). This means that the legislatures must take steps to ensure that the public participates in the legislative process (ibid par 120).

This complies with the democratic government contemplated in the Constitution, that is, representative and participatory democracy which is accountable, responsive and transparent and which makes provision for the public to participate in the law-making process (Doctors par 121).

The following are two aspects of the duty by a democratic government to facilitate public involvement:

(i) The first is the duty to provide meaningful opportunities for public participation in the law-making process.

(ii) The second is the duty to take measures to ensure that people have the ability to take advantage of the opportunities provided (Doctors case par 129).

Public involvement in the legislative process requires access to information and the facilitation of learning and understanding in order to achieve meaningful involvement by ordinary citizens (Doctors case par 131).

This involvement is achieved by the creation of a People's Assembly.

7.2.1 People's Assembly

In order to comply with its obligation of ensuring public participation during the legislative process, Parliament has developed the notion of a People's Assembly, which is a joint venture between Parliament and the provincial legislatures.

The purpose of the People's Assembly is to enable the public to influence decision-making with regard to laws affecting them and give meaning to the notion of a people's Parliament that strives to improve the quality of life of all South Africans and to strengthen democracy.

Some of the objectives of the People's Assembly are as follows:

- to create an opportunity for the public, particularly the most marginalised communities, to engage with Parliament and the provincial legislatures
- to provide a vehicle for people's voices to be heard on issues affecting them

Public participation in the law-making process involves the NA, the NCOP and the provincial legislatures.

The NA, the NCOP and provincial legislatures have the power to:

- summons any person to appear before it to give evidence or produce documents require any institution or person to report to it
- receive petitions, representations or submissions from any interested person or institution
- conduct their business in an open manner and hold their sittings and those of their committees in public
- only exclude the public from the sittings of their committees if it is reasonable and justifiable to do so in an open and democratic society in terms of section 36 of the Constitution
- provide public access to their proceedings and those of their committees (ss 59, 72 and 118 of the Constitution).

Public access to Parliament allows the public to be present when laws are debated and made. That enables members of the public to familiarise themselves with the law-making process and thus be able to participate in the future. It also enables them to submit representations and submissions which ensure that the public has a say in the law-making process. In addition, these provisions make it possible for the public to present oral submissions at the hearing of the institutions of governance.



Activity

(1) Discuss the role of the People's Assembly.



Feedback on activity

In order to comply with its obligation of ensuring public participation during the legislative process, Parliament has developed the notion of a People's Assembly. The purpose of the Peoples' Assembly is to enable the public to influence decision-making with regard to laws affecting them and give meaning to the notion of a Peoples' parliament that strives to improve the quality of life of all South Africans and to strengthen democracy.

Some of the objectives of the Peoples' Assembly are the creation of an opportunity for the public, particularly the most marginalised communities, to engage with Parliament and the provincial legislatures; and to provide a vehicle for people's voices to be heard on issues affecting them.

Public participation in the process of making policy is examined next.

7.3 PUBLIC PARTICIPATION IN THE PROCESS OF MAKING POLICY

The body responsible for making policy is the executive. Before we discuss how the public participates in the making of policy, it is important to differentiate between law and policy.

Law sets out standards, procedures and principles that must be followed. Those who fail to adhere to the law can be taken to court.

A **policy** sets out the goals and planned activities of the government but laws are needed to implement such policy.

Please note that, a policy document is not law. It often identifies a need for new laws in order to be able to achieve its goals.

Public participation in the making of a policy takes the following forms:

- public participate through media pressure
- by alerting government to the need for a new policy
- by meeting with ministers and advisors
- cy alerting parliament to the need for new policy (via parliamentary committees)
- by becoming part of advisory committees or task forces
- by meeting with the relevant department
- by commenting on discussion documents
- by commenting on draft and revised draft policy
- by using media to stimulate public debate

Izimbizo and public meetings are also important methods used for consultation as they enable the public to interact directly with the executive. An imbizo is an initiative of the municipality where questions are answered; concerns are heard and advice is taken from the public about the municipality's programmes and services.



Activity

Differentiate between a law and a policy.



Feedback on activity

Law sets out standards, procedures and principles which must be followed. Those who fail to adhere to the law can be taken to court. A policy sets out the goals and planned activities of the government but it needs laws to implement the policy. Please note that, a policy document is not law. It often identifies a need for new laws in order to be able to achieve its goals.

In the following section we will look at the stages of policymaking and law making (and public participation).

7.3.1 Stages of policymaking and law making (and public participation)

There are four stages involved in policymaking and law making (and public participation).

STAGE 1

A policy is made at a conference of the ruling party. At such a conference, issues are debated and the ruling party then decides on its goals for those specific issues. For example, they may decide that the policy regarding access to education should be that all children must be in school; this concerns compulsory education. The party's members then try to have this policy implemented.

STAGE 2

The executive (one or other minister) draws up policy on an issue. Parliament has to approve such policies and subsequently pass new laws to give legal effect to the policies. This can be a long process, however, during which the policy or law proposed by the ruling party is debated with opposition parties and the public. During this time, the government ministries draft discussion documents called "green papers" and "white papers" on the policy/law, in order to allow for comment.

Opportunities are provided for the public to participate in this debate by attending parliamentary committee hearings. For example, the ruling party has stated its policy of compulsory education for all children under 17 years old. The national Minister of Education informs his or her department of the need for a policy document to be produced on this issue. A green paper is then drawn up (which identifies key issues and suggests alternatives). It is made public and comment is invited from the public.

STAGE 3

The policy is finalised by the relevant department and ministry. A final policy is drawn up and published as a white paper (this is the basis for the actual legislation), which is debated and later adopted by parliament.

STAGE 4

The law is passed. Before a new law is tabled in parliament it is called a draft bill, but once tabled in Parliament it is a Bill. The cabinet must approve the Bill and release it for public comment.

If the public wants any changes to be made to the Bill, the department and relevant ministry will make these changes. The draft Bill is then tabled by the minister in Parliament. Once a Bill has been tabled, it will be given a number, for example B6 of 20047 and go through the processes of becoming a law. If parliament agrees to the Bill, it is sent to the president, who signs it and it becomes an Act and, thus, law in South Africa.

There are many ways in which the public can participate in the legislative branch of government. Refer to the references at the end of this study unit if you wish to do further research.



Activity

(1) Discuss the process of a policy becoming law.



Feedback on activity

(1) Initially, a policy to address specific issues is drawn up by a party. Its members will then propose this policy and the relevant issues will be debated with opposition parties and the public. Because Parliament has to approve policies and pass new laws to give legal effect to the policies, the executive will draft discussion documents called "green papers" and "white papers" on the policy/law to allow for comment. A green paper will be drawn up that identifies key issues and suggests alternatives. This is then made public and comment is invited from the public. The policy is finalised by the relevant department and ministry and the final policy drawn up is published as a white paper (this is the basis for the actual legislation). It is debated and adopted by parliament. Before a new law has been tabled in parliament, it is called a draft bill, but once tabled in parliament, it is a Bill. The cabinet must approve the Bill and release it for public comment. If the public wants any changes to be made, the department and the relevant ministry may make these changes. The draft Bill is then tabled by the minister in parliament. Once a Bill has been tabled, it will be given a number, for example B6 of 20047, and will go through the process of becoming a law. If Parliament agrees to the Bill, it is sent to the President, who signs it and it becomes an Act and, thus, law in South Africa.

7.4 SOME OF THE STRUCTURES SUPPORTING PUBLIC PARTICIPATION AT THE EXECUTIVE BRANCH OF GOVERNMENT

Section 181 of the Constitution provides for the establishment of state institutions to strengthen constitutional democracy in the Republic. These are referred to as "Chapter 9 institutions".

The institutions are independent and subject only to the Constitution and the law (s 181(2)). Other organs of state are required to assist and protect the institutions to ensure their independence, impartiality, dignity and effectiveness. These institutions are accountable to the National Assembly, and must report on their activities and the performance of their functions to the Assembly at least once a year.

Here are some examples of the structures supporting public participation

- **The Public Protector** investigates any conduct of the government that is alleged to be improper. He or she reports and takes any remedial action on that improper conduct. The Public Protector reports to the National Assembly annually.

- **The Auditor General** audits (inspects) and reports on the accounts and financial management of state departments. He or she submits audit reports to any legislature (e.g. Parliament).
- **Commissions of inquiry** inquire into those matters relating to the executive and these reports are considered by parliament.
- **Special investigating units and special tribunals (**Act 24 of 1996). The president has the power to appoint special investigating units and tribunals to investigate allegations of corruption and unlawful conduct by employees of the state.
- **The media** (newspapers, radio, television, internet, et.) report on the performance of politicians. The media act as a public watchdog.
- **Political parties** serve as a link between the government and its citizens. Political parties educate us citizens and act as watchdogs over government. In other words, political parties in South Africa are the means by which the majority of citizens participate and express themselves in the political process. Therefore, political party structures can be used to ensure that citizens' views and grievances filter up through the system as well as providing channels for the distribution of information on the ground.

We should also not forget that the **general public** can exercise control over the executive through public debate and criticism and through many interest groups such as trade unions and churches. This is made possible by the people's right to freedom of access to information (s 32 of the Constitution) and freedom of speech (s 16).

7.5 CONCLUSION

In this study unit, we focused on public participation in the national government. In the next and final study unit we will examine public participation in provincial and local government.

Study unit 8

Public participation in provincial and local governments

Contents

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8.2 Public participation in provincial government
8.2.1 Public participation in the provincial legislative process
8.2.2 Public participation in the policy-making process at provincial level
8.3 Public participation in local government (s 151 of the Constitution)
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8.3.5 Other legislation emphasising public participation at local level
8.4 Conclusion



Study unit outcomes

Once you have completed this study unit, you should be able to

- describe public participation in the provincial legislative process
- describe public participation in the local legislative process
- explain the role that traditional leaders play in public participation in local government

8.1 INTRODUCTION

As much as it is important to analyse public participation in the national government, as was done in the previous study unit, it is equally important to analyse public participation in provincial and local government. This study unit intends to analyse public participation at both the provincial and local government levels.

The aim of public participation in legislative and policy-making activities is to offer poor people the opportunity to make their circumstances known and to express their needs and grievances. The government has

made a commitment to public participation by the poorest sectors of society and has stated that the transformation of Parliament and the legislatures has taken place within a framework that seeks to encourage public participation in the making of laws and policies, through public hearings on all Bills and policies.

Past experience has shown, however, that these processes are used mainly by those who have access to resources and who are better organised. The main limitation to public participation is a lack of capacity and resources among the poor and the marginalised, while it is their participation that is most desired. Hence, while public participation is frequently viewed as a form of empowerment, the danger is that only the already empowered may be able to enjoy its benefits.

We will examine public participation in provincial government first.

8.2 PUBLIC PARTICIPATION IN PROVINCIAL GOVERNMENT

8.2.1 Public participation in the provincial legislative process

Public participation in the provincial legislative process is guaranteed by section 118(1)(a) of the Constitution, which requires a provincial legislature to "facilitate public involvement in [its] legislative and other processes ... and [those of] its committees".

The above section imposes a duty on the **provincial legislatures** to facilitate public involvement in their respective legislative processes. (*Doctors for Life International v Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) (17 August 2006).

Public participation in the provincial law-making process is the same as public participation in the national legislative process, as the provincial legislatures have the power to**:**

- summon any person to appear before it to give evidence or produce documents and require any institution or person to report to it
- receive petitions, representations or submissions from any interested person or institution

The provincial legislatures must also conduct their business in an open manner and hold their sittings and those of their committees in public. Provincial legislature can only exclude the public from the sittings of their committees if it is reasonable and justifiable to do so in an open and democratic society in terms of section 36 of the Constitution. They must

also provide public access to their proceedings and those of their committees (s 118 of the Constitution).

Please note that the conduct of meetings where the public is not allowed to be present is known as "in camera" (behind closed doors) and would occur in the following circumstances:

- events that matters deemed *sub judice* (still pending in a court of law) are presented before committees, or
- around the provincial budget, before the responsible member announces the actual budget publicly or
- matters connected with public safety that would need to be withheld from the public for a time



Activity

(1) Discuss what the aim of public participation is and whether all people in the country are able to use its processes.
(2) Under what circumstances is the provincial legislature entitled to exclude the public from its sittings?



Feedback on activity

(1) The aim of public participation in legislative and policy-making activities is to offer poor people the opportunity to make their circumstances known and to express their needs and grievances. However, these processes are used mainly by those who have access to resources and who are better organised. The poor and the marginalised are unable to access them owing to a lack of capacity and resources. Hence, while public participation is frequently viewed as a form of empowerment, the danger is that only the already empowered may be able to enjoy its benefits.
(2) The public can only be excluded from the sittings of the provincial legislature committees if it is reasonable and justifiable to do so in an open and democratic society in terms of section 36 of the Constitution. Meetings will be held in camera, that is, behind closed doors, in the event that matters that are deemed to be sub judice (still pending in a court of law) are presented before committees, or matters that concern the provincial budget before the responsible member announces the actual budget publicly, or matters connected with public safety that would need to be withheld from the public for a time.



Read

Read the following summary of the case of Doctors for Life as it is pertinent to this section:

> The importance of public participation in the provincial legislative process has been reiterated by the court in the case of *Doctors for Life International v Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) (17 August 2006).
>
> In the case study, the applicant's complaint was that during the legislative process leading to the enactment of these statutes, the NCOP and the provincial legislatures did not comply with their constitutional obligations to facilitate public involvement in their legislative processes as required by the provisions of sections 72(1)(a) and 118(1)(a) of the Constitution.
>
> An order was made by the court declaring that Parliament had failed to comply with its constitutional obligation to facilitate public involvement before passing the legislation, as required by section 72(1)(a) of the Constitution. The court held that as a consequence those statutes had been adopted in a manner that was inconsistent with the Constitution and those statutes were declared invalid. The orders of invalidity were suspended for a period of 18 months to enable Parliament to re-enact those statutes in a manner that was consistent with the Constitution.
>
> In its judgment the court stated that the phrase "facilitate public involvement" was a broad concept, which related to the duty to ensure public participation in the law-making process. The key words in this phrase were "facilitate" and "involvement". To "facilitate" meant to "make easy or easier", "promote" or "help forward". The phrase "public involvement" was commonly used to describe the process of allowing the public to participate in the decision-making process (p 1403 2006 (12) BCLR 1399 (CC)).

Next we look at the involvement of the public in the policy-making process at provincial level.

8.2.2 Public participation in the policy making process at provincial level

As a member of the public you or your organisation can participate in the policy-making process in the following ways:

- attend parliamentary committees where policy is being discussed
- make a written submission to a committee
- send a petition and a letter or a document signed by many people

We move from examining public participation at the provincial government level to the local government level.

8.3 PUBLIC PARTICIPATION IN LOCAL GOVERNMENT (S 151 OF THE CONSTITUTION)

8.3.1 Public participation in the making of by-laws

A by-law is a rule or law made by a local authority.

The public can participate in the making of by-laws, by a municipality (s 156(2)).

No by-law may be passed unless all the members of the municipal council have been given reasonable notice of an envisaged by-law. When a by-law is published for public comment, such comment must be considered by the council and after consideration, passed by the council. In terms of section 162, a municipal by-law may only be enforced after it has been published in the official gazette of the relevant province.

These municipal by-laws must be accessible to the public as required by section 32 of the Constitution, which guarantees people's right of access to any information held by the state.



Activity

(1) Explain how the public participates in the making of by-laws.



Feedback on activity

(1) We, the public, participate in the making of by-laws, by a municipality (s 156(2)). No by-law may be passed unless all the members of the municipal council have been given reasonable notice of an envisaged by-law. When a by-law is published for public comment, such comment must be considered by the council and after consideration, passed by the council. In terms of section 162 of the Constitution, a municipal by-law may only be enforced after it has been published in the official gazette of the relevant province. These municipal by-laws must be accessible to the public as required by section 32 of the Constitution, which guarantees people's right of access to any information held by the state.

Next we look at ways the public can participate in local government.

8.3.2 Ways of participating in local government

The public participates at the local level through ward councillors and ward committees, which serve as a direct link between the local council and the public. The councillor is responsible for ensuring that people are informed about council decisions, development and budget plan any council programme that will affect them (Paralegal Manual, chapter 3: Democracy and public participation).

Section 16 of the Municipal Systems Act requires some of the following key areas to have community participation:

- assessing and approving of budgets
- planning and developing the Integrated Development Plan
- monitoring council activities on a regular basis
- performance management to ensure targets are met
- direct advice and support on matters referred to councillors
- lobbying; attend public meetings and hearings called by ward councillor.

In terms of section 17 of the Municipal Systems Act, the following systems should be in place for communities to participate in the local government decision-making process:

- processes for receiving, processing and consideration of petitions
- procedures for notifying the public of issues being considered by the council and a process that allows for public comment
- procedures for public meetings and hearings by councillors and municipal officials regular sharing of information on the state of affairs of the municipality through consultation with community organisations and traditional leaders.



Activity

(1) How does the public participate in local government?



Feedback on activity

The Public participates at the local level through ward councillors and ward committees which serve as a direct link between the local council and the public. The councillor is responsible for ensuring that people are informed about council decisions, development, budget plan any council programme that will affect them

Next we look at institutions supporting democracy. This section focuses on institutions that have a wide scope of influence from national to local level.

8.3.3 Institutions supporting democracy

Chapter 9 of the Constitution provides for a number of independent "state institutions supporting constitutional democracy".

The following chapter 9 Institutions are listed:

- Public Protector
- Human Rights Commission
- Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities
- Commission for Gender Equality
- Auditor-General
- Electoral Commission

We will look at just one of these, namely, the **Public Protector**.

From the point of view of public access and participation, the most significant of these is the Public Protector, whose role it is to investigate, report on and act against "any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice" (s 182 of the Constitution).

Crucially, "the Public Protector must be accessible to all persons and communities" (s 182 (4) of the Constitution).

There is no doubt that the work of the Public Protector represents an important advance in the promotion of the ordinary person's access to government and their ability to obtain redress.



Activity

(1) Name some the institutions supporting democracy in terms of Chapter 9 of the Constitution.



Feedback on activity

(1) Chapter 9 of the Constitution provides for a number of independent "state institutions supporting constitutional democracy", namely, the Public Protector, the Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Commission for Gender Equality, the Auditor-General and the Electoral Commission.

We will examine traditional leadership next followed by a focus on the stages of development of traditional authorities.

8.3.4 Role of traditional leadership in public participation in local government

Consider the following introductory questions: Do you know of any traditional leaders in your community? In your opinion what role do they play in community development?

8.3.4.1 Stages in the development of traditional authorities in South Africa

Before we discuss the role that traditional leaders play in our communities today, it is interesting to see how their role has changed over the years. We will have a brief discussion about their history after which we will concentrate on their role in the new democratic South Africa – this part is important for the purposes of your studies.

In colonial times, in the eyes of his people the chief was the most important and powerful member of his nation. He was expected to judge disputes fairly, to govern wisely, to provide for the needy and to tend to the welfare of his people. The ruler also had a range of powers and privileges of a more secular nature. He could order his subjects to work on his lands and provide labour for public works; he could levy taxes and demand tribute from the harvest or the hunt; he was entitled to choose the best land for his homesteads and he could demand that subjects plough and harvest his fields (Bennett 2004:103).

This form of government obviously differed markedly from a modern democracy. Traditional leaders needed no special training; they were qualified for office by their ancestry alone. The all-inclusive powers of government were not differentiated in the western manner into judicial, administrative and legislative categories and rulers were not subject to the scrutiny of an independent judiciary. What seems an alarming concentration of power in one person was circumscribed normatively only by a duty to consult councillors and always to act for the benefit of the people (Bennett 2004:104).

The more significant limitation on the power of traditional rulers came from the reality of day-to-day politics. Rulers kept in touch with their people through councillors. As might be expected, the status and function of these officials varied, as did the composition and tasks of the councils they formed. All rulers tended to rely on their senior kinsmen for advice. These individuals constituted a close knit council that generally met in private. A similar, more representative unit, which also met in private, consisted of members of the family council together with leaders of the community, notably, the warheads. These meeting of the ruling aristocracy should be distinguished from popular assemblies, where

all (male) adults in the realm were called together for the discussion of nationally important matters, such as the imposition of new legislation or levies, the organisation of collective labour parties or, occasionally, the resolution of national disputes.

No important decision could be taken without discussion in council; therefore, the councils were in a position to check self-interested or capricious action and to give voice to public opinion (ibid).

Therefore, the pre-colonial relationship between traditional authorities and their followers is often portrayed as a dynamic process of mediation between rulers and followers. Decisions were taken in consultation with various councils at different levels.

Under the onslaught of colonialism and capitalism however, the relationship between traditional rulers and their followers was seriously undermined. The colonial policy of indirect rule (in SA, the Black Administration Act 38 of 1927) transformed traditional rulers into government functionaries. Their positions were from then on guaranteed by the colonial state and were no longer dependant on the support of their followers. Traditional institutions of government were subjected to statutory rules which introduced a legislative superstructure over traditional structures. Traditional rulers were recognised and appointed by government and their positions were no longer determined in terms of indigenous laws and procedures.

However, this was all before the new democratic dispensation in South Africa. Our Constitution today recognises the institution, status and role of traditional leadership.

8.3.4.2 The Constitution and traditional authorities in South Africa

Because the South African indigenous people consist of a diversity of cultural communities and because our Constitution recognises these, the state recognises the need to provide appropriate support and capacity building to the institution of traditional leadership. Traditional leaders and councils also have an important role to play in local government development programmes and service delivery. The government regards traditional leaders as partners in the implementation of its programmes.

Section 211 of the Constitution recognises traditional leaders as follows:

(1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.
(2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which include amendments to, or repeal of, that legislation or those customs.

(3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

Section 212 envisaged a role for traditional leaders as follows:

(1) National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities.
(2) To deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law

    (a) national or provincial legislation may provide for the establishment of houses of traditional leaders, and
    (b) national legislation may establish a council of traditional leaders

We will next examine legislation dealing specifically with traditional leadership.

8.3.4.3 Legislation dealing specifically with traditional leadership

(i) Numerous pieces of legislation have been passed and a variety of programmes implemented to ensure that traditional leadership makes an important contribution to the development of society.

    The purpose of the **Traditional Leadership and Governance Framework Act 41 of 2003** was to set out a national framework to define the place and role of traditional leadership within the new system of democratic governance.

    Further, the institution of traditional leadership must be transformed to be in harmony with the Constitution and the Bill of Rights. In terms of section 2(3) of the Act, the community must transform and adapt the relevant customary law and customs so as to comply with the relevant positions contained in the Bill of Rights especially by

    (a) preventing unfair discrimination
    (b) promoting equality
    (c) seeking to progressively advance gender representation in the succession to traditional leadership positions

(ii) This Act has now been amended by the **Traditional Leadership and Governance Framework Amendment Act, 2009**. The Amendment Act aims to, among other things, amend the 2003 Act so as to substitute or insert definitions, as well as to regulate the election of members of local houses of traditional leaders. It also regulates the roles of traditional leaders.

(iii) The **National House of Traditional Leaders Act, 2009,** paves the way for the establishment of the National House of Traditional Leaders. The legislation sets out how the institution is to be structured. The law declares that at least one-third of the members must be women. Members are elected within each provincial house from the ranks of senior traditional leaders.

The powers and duties of the house are also outlined. It must promote, among other things, nation-building, stable communities, the preservation of culture and traditions, and socio-economic development and service delivery. The house is also tasked with adapting customary law to comply with the provisions of the Constitution's Bill of Rights.

Parliament may also refer Bills to the house for consideration. The house also has the power to advise and make recommendations to government on issues within its area of jurisdiction, and to advise Cabinet ministers on traditional matters. The house will be consulted on development projects that impact directly on rural communities.

As can be seen from the above, cooperative relations and partnerships with national government are to be established in the interests of development and service delivery. Also, the recommendations made by the traditional houses to government force the houses to involve the public and to obtain their views.

In terms of accountability, the house is expected to submit a report to Parliament every year detailing its activities and programmes of action.

(iv) In terms of legislation and the Constitution, the following institutions are therefore created to recognise traditional leaders and customary law:

- traditional councils
- houses of traditional leaders

Traditional councils

Legislation has transformed the composition of traditional councils to provide for elements of democracy (40% of members must be elected) and gender representivity (one-third of members must be women).

Legislation has also opened up an opportunity for municipalities and traditional councils to achieve cooperative governance. Traditional councils have been given a strong voice in development matters and may now enter into partnerships and service-delivery agreements with government in all spheres.

Houses of traditional leaders

The Constitution mandates the establishment of houses of traditional leaders by means of either provincial or national legislation.

The Traditional Leadership and Governance Framework Act, 2003, provides for the establishment of local houses of traditional leaders.

The national and provincial houses of traditional leaders enhance the cooperative relationships within national and provincial government, while the establishment of local houses of traditional leaders will deepen and cement the relationship between municipalities and traditional leaders in customary law and development initiatives.



Activity

(1) Discuss critically traditional leadership under the following headings:

- role of traditional leadership in public participation at local government
- stages in the development of traditional authorities in South Africa
- the Constitution and traditional authorities in South Africa
- legislation dealing specifically with traditional leadership



Feedback on activity

(1) Refer to sections 8.3.4 and 8.3.4.1 and 8.3.4.2 and 8.3.4.3.

We next look at other legislation that emphasises public participation at local level.

8.3.5 Other legislation emphasising public participation at local level

The purpose of section 4 of the Promotion of Administrative Justice Act of 2000 is to remedy the past position – where the general public had little or no input prior to the promulgation of delegated legislation, or before administrative decisions of general application were taken (i.e. decisions affecting the public in general and not only one person) – and to provide the general public with a right to be heard on issues of public concern, through a public hearing or notice and comment procedure.

Section 4 applies to the general administrative law relationship and provides for situations where the rights of the public are affected by administrative action.

All legislation that provides for public participation, for example the provisions of the South African National Environmental Management Act 107 of 1998 (NEMA) on the environmental impact assessment (EIA) process, must comply with the provisions of the Promotion of Administrative Justice Act 3 of 2003 (PAJA). During the EIA process, individuals who are affected by the proposed action are informed by individual notice, and the general public is notified through notice on the property concerned, notice in a local/provincial/national newspaper or in the relevant *Gazette*. The notice must indicate that an application will be submitted to the competent authority in terms of the EIA regulations. It must state the nature and location of the activity, where further information on the proposed activity can be obtained and the manner in which representations in respect of the application can be made. The following is an example of an official notice of a public participation process where people are alerted to specific developments so that they can comment, object or make other inputs. In this case it concerns the allocation of fishing sources.

An example of administrative action that may have an impact on the public is found in the Marine Living Resources Act 18 of 1998, which provides for the allocation of fishing quotas. The grant or refusal of such quotas has a general impact on the fishing industry (a group or class of the public) as such.

In these instances – where the rights of the public are involved – an administrator must decide whether

- to hold a public hearing (s 4(1)(a))
- to follow a notice and comment procedure (s4(1)(b))
- to adopt a combination of the two (s 4(1)(c))
- where the administrator is empowered by any empowering provision to follow a procedure which is fair, but different, to follow that procedure (s 4 (1)(d))
- to adopt another appropriate procedure which gives effect to section 4 (s 4(1)(e))

8.4 CONCLUSION

As can be seen, it is imperative that the public participates in the provincial legislative process, as was reiterated in this study unit. We focused on public participation in both provincial and local government, as well as the role that traditional leaders play at local government level.

This brings us to the end of PART B and the module. Make sure you know and understand the outcomes of Part B:

(1) or analyse and the principles of democracy and public participation in South Africa and apply them to practical situations
(2) to investigate the role that government plays in a South African democracy
(3) to discuss the public's role in national, provincial and local government

We trust you enjoyed this section and the module and we wish you all the very best in your studies.

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We hope you have enjoyed this module as much as we have enjoyed presenting it.