

Section 2

South Africa's Constitutional Landscape and Parliament's role within it

2.1 Separation of powers

In terms of the Constitution, Parliament is the National Legislative authority of our democracy (Section 43), Executive authority is vested in the President [Section 85 (1)] and Judicial authority is vested in the courts [Section 165 (1)].

The Constitution stipulates that the two House of Parliament, the National Assembly (NA) and the National Council of Provinces (NCOP), participate in the **national legislative process** in the manner set out in the Constitution.² National legislative authority vested in Parliament confers, in terms of Section 44 (1)(a), on the **NA the power to:**

- Amend the Constitution;
- Pass legislation with regard to any matter within the functional areas of concurrent national and provincial legislative competence (Schedule 4 of the Constitution), but excluding a matter falling within the functional areas of exclusive provincial legislative competence (Schedule 5 of the Constitution);
- Assign any of its legislative powers, except the power to amend the Constitution, to any legislative body in another sphere of government.

National legislative authority vested in Parliament confers, in terms of Section 44 (1) (b), on the **NCOP the power to:**

- Participate in amending the Constitution in accordance with Section 74 of the Constitution;

- Pass, Ordinary Bills affecting the Provinces (Section 76 of Constitution);
- Consider Ordinary Bills not affecting the provinces (Section 75 of the Constitution) passed by the National Assembly.

Parliament may intervene and pass legislation that fall under the functional areas of exclusive provincial legislative competence, when it is necessary to:

- Maintain national security;
 - Maintain economic unity;
 - Maintain essential national standards;
 - Establish minimum standards required for the rendering of services;
- or
- Prevent unreasonable action taken by a province, which is prejudicial to the interests of another province or to the country as a whole.

Currently Parliament may not amend money Bills, as defined in terms of Section 77 (1). However, the Constitution in section 77 (3) makes provision that an Act of Parliament must provide for a procedure to amend money Bills before Parliament. In terms of the mandate of the Task Team on Oversight and Accountability the task of drafting such legislation is currently being conducted by the Budget Focus Group of the TT (The draft is pending finalisation in the Focus Group).

The President exercises **executive authority**, together with other members of the Cabinet by:

- Implementing national legislation;
- Developing and implementing national policy;
- Co-ordinating the functions of state departments and administration;
- Preparing and initiating legislation; and

- Performing other executive functions provided for in the Constitution or in national legislation. Section 85 (2)

With regards to **judicial authority** the Constitution states:

- The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice;
- No person or organ of state may interfere with the functioning of the courts;
- Organs of state, through legislation and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts; and
- An order or decision issued by a court binds all persons to whom and organs to which it applies. Sections 165 (2-5).

Apart from the legislative authority of Parliament discussed above, a number of additional constitutional provisions detail parliament's joint mandate.

2.2 Parliament's mandate (joint mandate)

As stipulated in Section 42 (1) of the Constitution, Parliament consists of the National Assembly (NA) and the National Council of Provinces. The National Assembly consists of elected representatives, while the NCOP comprises of delegates from the provinces (See figure 2). Each House of Parliament has a distinctive role but the two Houses are also interdependent and interrelated in terms of the overall provision of Section 40 (1). The Constitution also confers joint powers on them, apart from legislating together, as is reflected in the following constitutional provisions:

- A state of emergency may be declared only in terms of an Act of Parliament. Section 37 (1)

- When the defence force is employed the President must inform Parliament promptly and in appropriate detail. Section 201 (3).
- The legislature of a province, by a resolution adopted with a supporting vote of at least two thirds of its members, may request Parliament to change the name of that province.
- National security is subject to the authority of Parliament and the national executive. Section 198 (d);
- To give effect to the principles of transparency and accountability, multi-party parliamentary committees must have oversight of all security services in a manner determined by national legislation or the rules and orders of Parliament. – Section 199 (8)
- A decision to stop the transfer of funds to a province may be taken only in terms of subsection (2) and may be enforced immediately, but will lapse retrospectively unless Parliament approves it following a process substantially the same as that established in terms of section 76(1) and prescribed by the joint rules and orders of Parliament. – Section 216(1);
- Parliament may renew a decision to stop the transfer of funds for no more than 120 days at a time, following the process established in terms of subsection. Section 216 (3);
- Before Parliament may approve or renew a decision to stop the transfer of funds to a province –
 - the Auditor-General must report to Parliament; and
 - the province must be given an opportunity to answer the allegations against it, and to state its case, before a committee. Section 216 (5);
- There is a Financial and Fiscal Commission for the Republic, which makes recommendations, envisaged in Chapter 13 of the Constitution, or in national legislation, to Parliament, provincial legislatures and any other authorities determined by national legislation. Section 220 (1);
- The Financial and Fiscal Commission must report regularly both to Parliament and to the provincial legislatures. Section 222;

- In order to deepen the culture of democracy established by the Constitution, Parliament may adopt Charters of Rights consistent with the provisions of the Constitution. Section 234;
- An international agreement binds the Republic only after it has been approved by resolution in both Houses, unless the agreement is of a technical, administrative or executive nature. Section 231 (2) and Section 231 (3).

2.3 Distinct mandate of the National Assembly

In terms of Section 42 (3) of the Constitution the NA exercises its constitutional mandate by choosing the President, by providing a national forum for the public consideration of issues, passing legislation and by scrutinizing and overseeing executive action. Section 55 (2) also specifically stipulates that the NA must provide for mechanisms

- (a) to ensure that all executive organs of state in the national sphere of government are accountable to it; and
- (b) to maintain oversight of –
 - i. the exercise of national executive authority; including the implementation of legislation; and
 - ii. any organ of state.

2.4 Distinct mandate of the National Council of Provinces

In accordance with Section 42 (3) the NCOP represents the provinces to ensure that provincial interests are taken into account in the national sphere of government. It does this mainly by participating in the national legislative process and by providing a national forum for the public consideration of issues affecting the provinces. Unlike in the case of the NA the Constitution does not explicitly ascribe an oversight role to the NCOP.

Flowing from its role in the passage of legislation and the approval of the budget the NCOP ensures that provincial interests are properly accommodated in the budget and laws are appropriate and responsive to the capacity of provinces. The NCOP also monitors progress in the implementation of legislation to draw on provincial experience with national policy to inform the national government on issues that affect implementation, monitors the implementation of delegated legislation to ensure compliance with constitutional standards and where the possibility arises of conflict between national and provincial legislation (Section 146) to prevent such conflict.³

The NCOP plays a key role to protect the integrity of the spheres of government. These include monitoring national and provincial governments' interventions under Sections 100 and 139 of the Constitution, which allows them to intervene in provinces and municipalities respectively in certain situations to restore them to proper functioning, and in instances when a dispute arises about the administrative capacity of provinces in terms of Section 125 (4).⁴

2.5 Executive Accountability

According to Section 92 (2) of the Constitution members of the Cabinet are accountable collectively and individually to Parliament for the exercise of the powers and the performance of their functions. Furthermore members of the Cabinet must provide Parliament with full and regular reports concerning matters under their control [Section 92 (3) (b)].

2.6 Co-operative Government

South Africa has a multi-sphere political system, comprising of a National, Provincial and Local Government sphere. All spheres of government set up within the ambit of the Constitution must, in terms of Section 41:

- (b) secure the well-being of the people of the Republic;
- (c) provide effective, transparent, accountable and coherent government;
- (d) be loyal to the Constitution, the Republic and its people;
- (e) respect the constitutional status, institutions, powers and functions of government in the other spheres;
- (f) not assume any power or function except those conferred on them in terms of the Constitution.
- (h) co-operate with one another in mutual trust and good faith.

With regards to Oversight and Accountability, the principle of co-operative government is important to keep in mind, as oversight and accountability mandates are located throughout all three levels. In the same manner as Parliament is the national legislative authority Provincial legislatures are the legislative authority on Provincial level and the Municipal councils are the legislative authority on the local sphere of government (Section 43). Concomitantly, executive authority of Provinces is vested in the Premiers and their Executive Councils [Section 125 (1)] and executive authority in the local government sphere is vested in the Municipal councils [Section 151 (2)]. In terms of accountability the Constitution states that Members of the Executive Council of a province are accountable collectively and individually to the Provincial legislatures for the exercise of their powers and the performance of their functions [Section 133 (2)]. Section 114 (2) also stipulates that provincial legislatures must provide for mechanisms

- (a) to ensure that all provincial organs of state in the province is accountable to it; and
- (b) to maintain oversight of
 - (i) the exercise of provincial executive authority in the province, including the implementation of legislation; and
 - (ii) any provincial organ of state.