

# The Constitution and public health policy



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## 2.1 Introducing the Constitution and public health policy

The Constitution of the Republic of South Africa, 1996 (the Constitution) is the supreme (highest) law of the land. It is central to developing and implementing health law and policy, which it regulates in at least five important ways:

- It regulates the structure of government.
- It regulates the way in which various branches of government operate.
- It sets out the framework for raising taxes and allocating revenue.
- It guides the content of all laws and policies, primarily through its Bill of Rights.
- It regulates the role of government and non-state actors (such as private corporations) in realising the right of access to health care services.

This chapter does not aim to deal with each aspect of the Constitution. Instead, its focus is limited to three key issues that together set out the broad framework within which health law and policy is developed and implemented:

- The right of access to health care services and its implications for the development of health policy.
- How public officials can and should exercise the power given to them by law.
- The structure of the government.

Other relevant aspects of the Constitution's reach are explored elsewhere. For example:

- Chapter 3 covers taxation, budgets and state expenditure.
- Chapter 4 explores the legislative drafting process – including amendments to the Constitution – and the duty of law-makers to guide public officials and hold them to account in exercising the powers given to them by law.
- Chapter 8 deals with the rights of users of the health care system.
- Chapter 10 considers the rights of health care workers.

## 2.2 The right of access to health care services

### Introducing the Bill of Rights and access to health care

The Constitution guides the substantive content of all laws and policies through its Bill of Rights, which it describes as “a cornerstone of democracy”. The Bill of Rights regulates the content of health laws and policies in two key ways:

- By recognising a range of fundamental rights that are relevant to the development and implementation of health policy.
- By setting out the state’s positive and negative duties in relation to these rights.

The courts directly enforce the Bill of Rights. They are increasingly having an impact on the way that health laws and policies are devised and put into practice.

### Defining health care duties

Positive duties are obligations that make the state act in certain circumstances and in particular ways (what it must do), while negative duties stop the state from doing certain things (what it must not do).

Among other things, section 27 of the Constitution provides as follows:

- Every person has the right “to have access to health care services, including reproductive health care”.
- No person “may be refused emergency treatment”.

In general, the state’s positive and negative duties are set out in section 7(2) of the Constitution, which requires the state to “respect, protect, promote and fulfil the rights in the Bill of Rights”.

In relation to health care services, this means that government must:

- *Respect* the right of access to health care services by not unfairly or unreasonably getting in the way of people accessing existing health care services, whether in the public or private sector.
- *Protect* the right by developing and implementing a comprehensive legal framework to stop people who get in the way of the existing access of others.
- *Promote* the right by creating a legal framework so that individuals are able to realise their rights on their own.

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- *Fulfil* the right by creating the necessary conditions for people to access health care, by providing positive assistance, benefits and actual health care services.

In particular, section 27(2) says that government must “take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation” of the right. This means taking all reasonable steps to ensure that the right is protected, promoted and fulfilled, and that over time, universal access to quality and comprehensive health care is achieved. This can include – but is not limited to – the passing of laws by Parliament and the provincial legislatures.

Section 27 does not operate alone. It is but one – albeit of central importance – among a collection of rights that deal directly and indirectly with health. These rights, which create entitlements and impose both positive and negative obligations on the state, include “the right to bodily and psychological integrity” (section 12(2)), “the right to privacy” (section 14) and the right “to an environment that is not harmful to their health or wellbeing” (section 24(a)). But the focus of this chapter, however, remains section 27, dealing with “health care services, including reproductive health care”.

### Implications for the development of health policy

Section 27 recognises that access to health care is itself a basic human right. It provides us with a strong tool aimed at ensuring health policy and practice that respond to the needs of all people in South Africa.

But what exactly does the section 27 right mean? What must the state do to enable people to access decent health care? Can government simply say that it is doing its best within the difficult circumstances, or is it required to do something more?

This part of Chapter 2 tries to answer some of these questions by focusing on four key Constitutional Court decisions that have a direct impact on developing and implementing health policy:

- *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 (1) SA 765 (CC) (the *Soobramoney* case)
- *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) (the *Grootboom* case)

- *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC) (the *TAC* case)
- *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 (6) SA 505 (CC) (the *Khosa* and *Mahlaule* cases).

Not all of these cases deal directly with health care. The *Grootboom* case, for example, is about access to adequate housing. But it is nevertheless central to any discussion on the state's positive duties with regard to socio-economic rights. We also do not include all Constitutional Court decisions on the right of access to health care services. Other cases based on section 27, such as the challenge of pharmacists to the medicine pricing regulations in *Minister of Health v New Clicks South Africa (Pty) Ltd* (the *New Clicks* case), are dealt with elsewhere in this handbook.

For more on the *New Clicks* case, see Chapter 14.

### **The Soobramoney case**

The *Soobramoney* case was the first socio-economic rights case to reach the Constitutional Court, and to date, the only one the state has been able to defend successfully. It involved access to renal dialysis in the public sector, which is provided at state expense for those who satisfy strict medical criteria. But not all of those who need access can be accommodated.

#### **BASIC FACTS AND CASE HISTORY**

One requirement for admission to the dialysis programme is medical eligibility for a kidney transplant. Mr Soobramoney did not satisfy the medical criteria and was therefore denied access. After an unsuccessful application to the Durban High Court, he appealed his case directly to the Constitutional Court, challenging the denial of access on the basis of two constitutional rights. These are the right to life in section 11 and the guarantee in section 27(3) that no person may be refused emergency medical treatment.

But the Constitutional Court decided that his claim had to be considered under section 27(2) that sets out the state's positive duties regarding the provision of health care services. In the Court's view, the state had indeed complied with its section 27(2) constitutional duties because the guidelines according to which access to renal dialysis is limited are reasonable, and in Soobramoney's case, had been applied "fairly and rationally". His claim was therefore dismissed. A week later he died from renal complications.

### THE COURT'S DECISION

The decision explains why the claim had to be adjudicated under section 27(2) and not the right to life or emergency medical treatment. Because access to health care services is dealt with expressly in section 27, it is not necessary to see this right as part of the right to life, as courts such as the Indian Supreme Court have done. Instead, the focus should remain on section 27. But why section 27(2) and not section 27(3)? Is access to potentially life-saving health care services not a medical emergency?

The Court disagreed, seeing section 27(3)'s purpose as ensuring that medical treatment is indeed given in an emergency and that bureaucratic requirements and/or other formalities do not frustrate the provision of emergency treatment. It decided that emergency medical treatment does not include chronic treatment for "an ongoing state of affairs resulting from a deterioration of the applicant's renal function, which is incurable" (paragraph 21). While renal dialysis may be needed urgently, it is not considered as emergency treatment.

Splitting hairs or sound constitutional reasoning? The Court's analysis is helpful in understanding why the reasoning is in fact sound. If section 27(3) were to have been interpreted in accordance with Soobramoney's claim, the state's obligation to ensure access to health care services for all would have been severely compromised. Instead of the state taking reasonable measures to ensure the progressive realisation of the right, as section 27(2) requires, it would constantly be forced to provide immediate access to health care services wherever and whenever this was demanded.

### LEARNING FROM THE SOOBARAMONEY CASE

The *Soobramoney* case recognises that the right of access to health care services does not impose a duty on the state to provide everything to everyone at once. There will be times when managing limited resources requires government to see "to the larger needs of society rather than to focus on the specific needs of particular individuals within society" (paragraph 31). In this case, the "available resources" argument meant that the state did not have to provide access to dialysis for people with Mr Soobramoney's medical condition. At another time and in another case, however, this may change.

Importantly, the "available resources" argument could be used to hold the state to account if it allocates a disproportionate share of the budget to a relatively small need, resulting in limiting access to health care services

more broadly. According to a proper reading of the *Soobramoney* case, the state cannot spend vast amounts of money on non-priority areas if the effect is to limit access to essential services.

For example, if there is a great need for a particular service, a decision to focus instead on lesser threats to public health would, in general, be unreasonable and could be challenged legally. In short, the state must prioritise, based on the actual health needs of the population.

Thus the state would struggle to justify not providing certain health care interventions simply because large numbers of people in need would require significant financial resources. While the *Soobramoney* case simply accepted the state's claims regarding "limited resources", later cases have shown a greater willingness to ensure that government proves its claims.

See also the discussion on the *Khosa* and *Mahlaule* cases below.

Finally, the *Soobramoney* case also teaches us that the reasonableness or otherwise of laws, policies and programmes is not just limited to their content. An otherwise reasonable policy may be implemented in an unreasonable manner. Justifiable laws, policies and frameworks are clearly only a starting point, albeit a very important one.

### **The Grootboom case**

The *Grootboom* case was the first Constitutional Court case that decided that the State had breached its duties in respect of a socio-economic right. As the leading socio-economic rights case to date, *Grootboom* sets the basic framework for future claims against the state regarding its positive constitutional duties in respect of all socio-economic rights, including the right of access to health care services.

#### **BASIC FACTS AND CASE HISTORY**

The Cape High Court first heard the case on 3 June 1999 as the urgent case of *Grootboom v Oostenberg Municipality*. As a result of poor living conditions, the applicants had moved to what they – incorrectly – considered to be vacant land. After they were evicted, they found that their original place of residence – an informal settlement – was now fully occupied, meaning they could not return.

Thus they were rendered "truly homeless". But after an inspection of the sports field next to a community centre where they were camping, the Cape High Court ordered the state to make the centre available to them as temporary accommodation, pending the outcome of the main case.

In its final judgment, the Cape High Court relied upon section 28(1)(c) of the Constitution – dealing with a child’s right to shelter – to order the state to provide shelter to the applicants who were children. According to the order, the children’s parents had a right to join them in the state-provided shelter. The court’s decision was based on its finding that the state had not carried out its duties under section 28(1)(c), which, unlike section 26, is apparently an “unqualified constitutional right” (paragraph 72).

For more on children’s rights, see Chapter 11 dealing with the rights of vulnerable groups.

Dealt with as a direct appeal against the Cape High Court decision, the Constitutional Court’s decision in the *Grootboom* case is based on section 26 of the Constitution (dealing with access to adequate housing) rather than children’s rights. In following the *Soobramoney* case, the Court decided that section 26 does not automatically entitle a person to housing at state expense, as of right.

Instead, section 26(2) “requires the State to devise and implement within its available resources a comprehensive and co-ordinated programme progressively to realise the right of access to adequate housing” (paragraph 95). This, the Court decided, had not been done.

The Court did not order any specific relief for Mrs Grootboom and her co-applicants. But this was not strictly necessary. Just before the case was argued in court, they had entered into an agreement with the state about the provision of shelter. The agreement was initially not honoured, leading to a further application to the Constitutional Court that resulted in the settlement becoming an order of court.

#### WHAT ABOUT PEOPLE WITHOUT CHILDREN?

The Cape High Court decision provided no relief to the destitute applicants without children, in effect meaning that access to housing became dependent on having children. With this in mind, the Constitutional Court decided that section 28(1)(c) “does not create any primary state obligation to provide shelter on demand to parents and their children if children are being cared for by their parents or families” (paragraph 77).

Instead, the Constitutional Court decided that the duty arising from the subsection “is imposed primarily on the parents or family” and only “alternatively on the state” when, for example, children “are removed from their families”. While the state still has duties towards children who are in the care of their parents or families, this is largely limited to providing “the legal and administrative infrastructure necessary to ensure that children are accorded the protection contemplated” (paragraphs 77 and 78).

## THE COURT'S DECISION

The *Grootboom* case involved an analysis of the content of the right of access to adequate housing (in section 26(1) of the Constitution), the state's positive duties in respect of that right (in section 26(2)), and the relationship between section 26 as a whole and the right of every child to adequate shelter in section 28(1)(c).

On the issue of homelessness, the Constitutional Court decided that the state's housing programme "must include measures ... to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations" (paragraph 99). To the extent that the housing programme did not make provision for people in this situation, the Court found it to be unconstitutional.

## LEARNING FROM THE *GROOTBOOM* CASE

The *Grootboom* case established the principle that the Constitution imposes an obligation on the state to develop and implement reasonable plans to ensure that rights are realised. But what is a "reasonable plan"?

This seems to depend a lot on the context – the facts and circumstances of any particular case. The Court listed these as examples of relevant elements of developing a reasonable plan:

- Sufficient flexibility to deal with emergency, short, medium and long-term needs.
- Making appropriate financial and human resources available for the implementation of the plan.
- National government assuming responsibility for ensuring the adequacy of laws, policies and programmes, including the clear allocation of responsibilities and tasks, as well as monitoring programmes implemented at provincial and local government level.

The *Grootboom* case notes that, while the needs of the poor – who are particularly vulnerable – require special attention, the state nevertheless has a duty to create the conditions for access to adequate housing for people at all economic levels of our society.

Clearly, the state does not have to provide houses for all. For those who can afford to pay for adequate housing, government's duty is to ensure access to housing stock, to create the legislative framework to facilitate self-built houses and – perhaps most important – to ensure access to finance.

### The TAC case

The *TAC* case is perhaps the most politicised of all the socio-economic rights cases that have reached the Constitutional Court. The case was set against the backdrop of the public challenge to the state response to HIV/AIDS (lead by the Treatment Action Campaign (TAC), South Africa's foremost HIV/AIDS advocacy organisation), President Mbeki's public questioning of the link between HIV and AIDS, and the shady campaign of misinformation against the use of antiretroviral (ARV) medicines. At issue in the case was the Department of Health's policy on the use of ARV medicines to prevent mother-to-child transmission of HIV infection (PMTCT).

#### BASIC FACTS AND CASE HISTORY

The state's PMTCT programme started in early 2001, largely as a response to a well-orchestrated campaign spearheaded by the TAC. Before this, the state had refused to use ARV medicines for this purpose.

The programme, which identified nevirapine as its ARV drug of choice, was limited to two "research and training" sites in each of the nine provinces. This meant that nevirapine was not provided to other public health facilities, with health care workers in these facilities being prohibited from using it even if it was available and they had the capacity to prescribe it safely. In addition, expansion of the programme beyond the sites was not guaranteed.

Government had adopted a wait-and-see approach, having indefinitely postponed a decision on the use of nevirapine beyond the research and training sites. There was no evidence to suggest that the state was taking steps so that it would be in a position to expand the programme if satisfied that it should do this – there were simply no plans for its progressive implementation throughout the country.

The TAC filed its papers in the Pretoria High Court in August 2001. The case was argued at the end of November, with a decision in TAC's favour following in mid-December. Soon after the state had noted its application for leave to appeal (effectively suspending the High Court order), the TAC launched a further application for an order to execute (give effect to) that part of the original judgment allowing for nevirapine to be used where capacity existed for its safe and effective use.

The state opposed the further application and spent the next few months trying to prevent any implementation before the Constitutional Court heard

and decided the appeal. In early April 2002, the Constitutional Court finally allowed the execution order to take effect, a month before it heard the appeal and three months before it handed down its decision in the case.

### THE COURT'S DECISION

The Constitutional Court was faced with two key issues:

- First, was the state entitled to limit the provision of nevirapine for the purposes of PMTCT to the 18 identified sites, “even where it was medically indicated and adequate facilities existed for the testing and counselling of the pregnant women concerned”? (paragraph 135)
- Second, had the state “devised and implemented within its available resources a comprehensive and co-ordinated programme to realise progressively the rights of pregnant women and their newborn children to have access to ... [PMTCT] services”? (paragraph 135)

On the first issue, the Court decided that government’s policy to limit nevirapine to the research and training sites was “an inflexible one” (paragraph 80). Where testing and counselling facilities were available, this “potentially lifesaving drug ... could have been administered within the available resources of the State without any known harm to mother or child” (paragraph 80). The use of nevirapine for PMTCT should thus be both permitted and facilitated if it was medically indicated (paragraph 80), effectively overturning the ban on the use of nevirapine for PMTCT outside of the 18 “pilot sites”.

On the second issue, the Court decided that the state’s inflexibility on the first issue “affected its policy as a whole” (paragraph 95). In short, it said that the state had no reasonable PMTCT plan. The Court ruled that, where testing and counselling services already existed, counsellors should also be trained on the use of nevirapine for PMTCT. In addition, it ordered the state to take reasonable measures to ensure that testing and counselling services were made available progressively throughout the public health system (paragraph 95).

### LEARNING FROM THE TAC CASE

The TAC case, a practical example of the implementation of the *Grootboom* case principles, helps to advance socio-economic rights in three main ways:

- It confirms that the state must prioritise major public health needs.
- It recognises that emergency, short, medium and long-term plans are complementary.

- It clarifies the relationship between a general socio-economic right and the right relating to children in section 28.

We will briefly examine each of these lessons.

#### PRIORITISING MAJOR PUBLIC HEALTH NEEDS

The *TAC* case helps to clarify a principle raised in the *Soobramoney* case: that the state is under a duty to prioritise major public health needs. While noting that it “is but one of many illnesses that require attention”, the Constitutional Court nevertheless recognised in *TAC* that HIV/AIDS is “the greatest threat to public health in our country” (paragraph 93).

HIV/AIDS thus cannot be treated just as any other health matter. Instead, the challenges that it raises must be addressed as a matter of priority, with a corresponding allocation of resources.

#### ADDRESSING EMERGENCY AND OTHER NEEDS

The *TAC* case implicitly recognises that emergency, short, medium and long-term plans are complementary. It effectively ordered the state to address emergency, short, medium and long-term needs:

- *Emergency*: public health facilities with the necessary capacity to prescribe nevirapine (where it was medically indicated) should do this with immediate effect.
- *Short-term*: the state was ordered to make nevirapine available for PMTCT.
- *Medium-term*: the state was mandated to train counsellors on the use of nevirapine for PMTCT.
- *Long-term*: the court order required the nationwide extension of testing and counselling facilities.

#### CLARIFYING THE RELATIONSHIP BETWEEN DIFFERENT RIGHTS

The *TAC* case clarifies the relationship between a general right of access to health care services and the specific health right of a child in section 28. In trying to rely on the *Grootboom* case, the state had argued that the right of every child in section 28(1)(c) to “basic health services” imposes a duty on the child’s parents and not the state.

The Constitutional Court recognised that “the primary obligation to provide basic health care services no doubt rests on those parents who can afford to pay for such services”. However, it decided that in this case, where

parents are unable to provide access to these services themselves, the duty clearly rests on the state (paragraphs 77 to 79).

### **The *Khosa* and *Mahlaule* cases**

The *Khosa* and *Mahlaule* cases, the first access to social security cases to reach the Constitutional Court, consider the constitutionality of various provisions of the Social Assistance Act, 59 of 1992, which restricted access to various forms of social assistance on the basis of citizenship. In short, the two cases deal with whether it is constitutional to limit the grant of social assistance (social grants) on the basis of citizenship, given that the right of access to social security applies to everyone and not just citizens.

With child-support and care-dependency grants, the citizenship requirement related both to the child for whose benefit the grant was made, and the adult taking care of the child. Child-support grants may be claimed by any “primary care-giver of a child”, while only parents and foster parents may claim care-dependency grants. But with care-dependency grants, the citizenship requirement did not apply to foster parents.

### **BASIC FACTS AND CASE HISTORY**

The applicants in both cases were Mozambican citizens, who were granted permanent resident status in South Africa in the early- to mid-1990s. Except for the second applicant in the *Khosa* case, all the applicants fled Mozambique in the early 1980s following the outbreak of civil war. The second applicant had worked for the National Parks Board in South Africa until his retirement in 1992. All parties to the litigation agreed that all the applicants were destitute and would have qualified for social assistance if they had been South African citizens.

The two cases were initially argued in the High Court without opposition from the state. The order made – striking down the citizenship requirement without reasons – was automatically referred to the Constitutional Court for confirmation. Under section 172(2) of the Constitution, an order of invalidity relating to an Act of Parliament, a provincial Act or any conduct of the President is not effective until confirmed by the Constitutional Court.

If confirmed without anything more, the High Court decision would have entitled any person resident in South Africa to the relevant social grants after meeting prescribed conditions – regardless of residency status.

### THE COURT'S DECISION

The *Khosa* and *Mahlaule* cases do not consider whether the state's social assistance programme is sufficient to discharge its positive constitutional duties regarding the right of access to social security. Instead, the cases consider the reasonableness of the statutory limitation on access to an existing social assistance programme, and how this affects the state's positive obligations regarding social security in section 27 of the Constitution.

In examining the relationship between the rights to social security and equality, the Court decided that the "means chosen by the Legislature to give effect to ... its positive obligation under Section 27" were not reasonable (paragraph 45). The relevant provisions were therefore declared unconstitutional to the extent that they excluded permanent residents. The Court said that the words "or permanent resident" should be read into the relevant provisions of the legislation wherever reference was made to a South African citizen (paragraph 89).

### LEARNING FROM THE *KHOSA* AND *MAHLAULE* CASES

Importantly, the decision deals with the costs of extending social security to all, noting "there are compelling reasons why social benefits should not be made available to all who are in South Africa irrespective of their immigration status" (paragraph 58). The *Khosa* and *Mahlaule* cases stress the need for the state to act proportionately.

However, the Court decided that the general exclusion of all non-citizens fails to distinguish between:

- "those who have become part of our society and have made their homes in South Africa, and those who have not"; and
- "those who are being supported by sponsors ... and those who acquired permanent residence status without having sponsors to whom they could turn in case of need". (paragraph 58)

The Court rejected the state's assertion that the extension of the benefits in question to all eligible permanent residents would "impose an impermissibly high financial burden on the state" (paragraph 60). In doing this, it emphasised that the state had failed to provide "clear evidence to show what the additional cost of providing social grants to aged and disabled permanent residents would be". But even if the state's "speculative" calculations could be accepted, the Court ruled that these did "not support the contention that there will be a huge cost in making provision for permanent residents" (paragraph 62).

Until the *Khosa* and *Mahlaule* cases, the Constitutional Court's track record on the issue of "limited resources" was not particularly encouraging. But it is now clear that the state cannot simply plead poverty when it comes to realising socio-economic rights. Instead, it has to make out a case that it is indeed limited by resources. In practice, this should result in better evidence-based decision-making. Programmes will have to be properly costed before being dismissed as unaffordable.

## 2.3 Regulating the exercise of public power

So far, this chapter has considered the right of access to health care services and its implications for the development of health policy. The focus now shifts to broader questions of constitutional control over state action, in particular a consideration of how public officials can and should exercise the power given to them by law.

The Constitution regulates the exercise of public power – the exercise of any power that is given to a person by an Act of Parliament, a provincial statute, regulations or any other law. The Constitution does this to ensure that:

- those who exercise public power are accountable and are able to justify their actions;
- public administration is governed by the democratic values and principles of the Constitution; and
- the rights protected by the Constitution are not violated when laws and policies are implemented.

The Constitution regulates the exercise of public power in four key ways:

- It sets out the powers and functions of the legislative and executive branches in all three spheres of government.
- It directs the conduct of these branches of government through entrenching human rights in a justiciable Bill of Rights that imposes duties on the state (such as those relating to realising the right to have access to health care services).
- It regulates the state's conduct by entrenching other rights, such as the rights of access to information and just administrative action.
- It holds public officials to account on the basis of a number of constitutional principles found in or flowing from various provisions of the Constitution (such as the rule of law, expressly recognised in section 1).

In this section, we will cover three important aspects of regulating the exercise of public power that are relevant to developing and implementing public health policy, law and programmes:

- Key constitutional principles.
- Key constitutional rights.
- Key constitutional structures.

## Key constitutional principles

In the 2000 case of *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) (the *Pharmaceuticals* case), the Constitutional Court said that the “exercise of all public power must comply with the Constitution which is the supreme law” (paragraph 20).

In the course of this and various other cases, the Constitutional Court has identified three key constitutional principles that regulate the exercise of public power: legality; rationality; and accountability.

These principles apply regardless of who exercises the particular power in question, the specific source of the power, and whether or not the case involves any entrenched constitutional rights. In other words, when exercising any power given by law, the Constitution requires everyone – including the President – to act lawfully, rationally and accountably. This applies even in cases where no fundamental rights are involved.

### Legality

In the 1999 case of *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) (the *Fedsure* case), the Constitutional Court decided that “the exercise of public power is only legitimate where lawful” (paragraph 56).

The Court said that it is “central to the conception of our constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law” (paragraph 58).

In other words, the principle of *legality* means that once the scope of a particular public power has been determined, the person empowered to act in terms of that power must not exceed its defined scope.

## Rationality

The principle of *rationality* does not entitle a court to interfere with a decision because it “considers that the power was exercised inappropriately” or “simply because it disagrees with it” (paragraph 90 of the *Pharmaceuticals* case). Instead, it subjects the exercise of the power to an objective test.

This means that there must be a logical connection between a decision and the purpose for which the power was given. Irrational decisions are inconsistent with the “requirement of the rule of law ... that the exercise of public power should not be arbitrary” (paragraph 85).

It is important to distinguish between rationality and reasonableness, which is based on proportionality. A reasonable decision, for example, is generally capable of achieving its goal. This is not necessarily the case with a rational decision. Thus, for example, it may be rational to refuse to allow black people to donate blood (because of higher HIV infection rates). But it is unreasonable to do this because it unfairly discriminates against all black people and because there are other, non-discriminatory ways to achieve a safe blood supply.

## Accountability

On its own, the principle of *accountability* “may not always give rise to a legal duty” to act. But it is a useful tool in determining in which circumstances the state has a legal duty to act. In other words, the principle assists in determining whether and in what circumstances “government and those exercising public power should be held accountable to the broader community for the exercise of their powers” (*Rail Commuters Action Group v Transnet Ltd t/a Metrolail* 2005 (2) SA SA 359 (CC) (the *Metrorail* case at paragraphs 78 and 73 respectively.)

## Key constitutional rights

The Constitution also regulates the state’s conduct by entrenching a set of “accountability” rights – just administrative action in section 33 and access to information in section 32. These rights regulate the conduct of the state generally, as opposed to those rights that deal with specific issues, such as equality or access to health care services.

### Just administrative action

Section 195 of the Constitution says that public administration must be accountable. One of the key ways to achieve this is by using the right to just administrative action, which includes:

- a right to “administrative action that is lawful, reasonable and procedurally fair”; and
- a right to “be given written reasons” when rights “have been adversely affected by administrative action”.

In addition to setting out the broad scope of the right, section 33 of the Constitution also provides the basis for the Promotion of Administrative Justice Act, 3 of 2000 (also known as PAJA). Section 33(3) expressly required Parliament to pass a law to give effect to this right within three years of the Constitution coming into force.

See Chapter 3 for detail on PAJA and the statutory framework of the health system.

Section 1 of PAJA sets out the meaning of administrative action, which in general is “any decision taken, or any failure to take a decision”, by a person or a body exercising public power, which “adversely affects the rights of any person and which has a direct external legal effect”. Certain decisions, such as those relating to the judicial function of judges or certain constitutional powers of the President, are expressly excluded from the definition.

### USING THE RIGHT TO JUST ADMINISTRATIVE ACTION

The right to just administrative action is one important part of the broader category dealing with the regulation of the exercise of public power. Not every exercise of public power is administrative action, meaning that the right to just administrative action does not apply to every exercise of public power. But where the right is not applicable, the exercise of public power needn't go unchallenged. It is still subject to the constitutional principles of legality, rationality and accountability.

#### Example: Administrative action in health

A decision taken by the Director-General (DG) of Health in terms of section 36 of the National Health Act 61 of 2003 falls clearly into the definition of administrative action. Section 36 deals with applications for “certificates of need,” which are necessary for the provision of health services and a range of service-related activities. The definition of administrative action would include,

for example, an application by an NGO such as the TAC's Treatment Project for permission to "provide prescribed health services", such as ARV treatment. Interestingly, section 36(7) says that if the DG refuses an application, he or she must provide written reasons for the refusal within a reasonable time.

#### ASKING FOR WRITTEN REASONS

There are a number of aspects of the right to just administrative action that are relevant for developing and implementing public health policy. The right to "be given written reasons" when rights "have been adversely affected by administrative action" is a powerful tool for making sure that public officials are made to justify their actions and decisions.

Knowing that they may be asked at a later point to explain their conduct should make public health officials do their jobs with greater care and concern. They should also consider the exercise of their powers more thoroughly and make decisions more thoughtfully.

#### Access to Information

In setting out the basic values and principles governing public administration, section 195 of the Constitution also speaks about the principle of transparency, which "must be fostered by providing the public with timely, accessible and accurate information".

In support, section 32 of the Constitution speaks of the right of everyone of access to "any information held by the state" and to "any information that is held by another person and that is required for the exercise or protection of any rights". And, as with just administrative action, the Constitution also required implementation legislation, leading to the Promotion of Access to Information Act, 2 of 2000 (also known as PAIA).

See Chapter 3 for detail on PAIA and the statutory framework of the health system.

#### LINKING ACCESS TO INFORMATION WITH HEALTH

In what way does the constitutional right of access to information have an impact on the development and/or the implementation of health policy? The duty to provide access to its documents may indirectly affect the way that the state develops and implements laws and policies.

For example, the knowledge that people are watching – and can and will request documents at any time – should go some way towards getting public officials to do their jobs properly. Also, it has the potential to provide health activists with documentation that can then be used for advocacy or mobilising people.

### USING THE RIGHT OF ACCESS TO INFORMATION

If used well, the right of access to information can lead to:

- greater openness and accountability;
- public officials who are more responsive to people's needs and more likely to implement law and policy properly; and
- public officials who are more likely to take great care when doing their work to avoid any future embarrassment, or possibly even legal or disciplinary action.

### CASE STUDY: PAIA AND POLICY IMPLEMENTATION

While easy to understand, PAIA is not that simple to use. When the Government's *Operational Plan for Comprehensive HIV and AIDS Care, Management and Treatment for South Africa* (including ARV treatment) was adopted and published in November 2003, it referred to – but did not include – an implementation plan timetable which it referred to as Annexure A. It described it as “a detailed schedule for the next six months that describes the tasks that need to be accomplished in parallel in order for this plan to work”.

In February 2004, the TAC asked the Minister of Health to release Annexure A. In its view, the information was necessary to enable it to play its role in ensuring the speedy and reasonable implementation of the Operational Plan. The Minister's failure to respond to the initial request was followed by several additional formal and informal requests for her to make the implementation plan timetable publicly available.

It was only seven months later – in September 2004 and in answer to legal papers filed in the Pretoria High Court – when her department informed the TAC that Annexure A was a draft that had not been adopted, and that all references to it in the Operational Plan were made in error.

Once advised of the true status of Annexure A, the TAC did not persist in asking for its publication, as its case had always been about access to the approved implementation plan timetable. By mid-2005, no such plan had been released and it is unclear whether this plan even exists. Had the state informed the TAC earlier of the true status of Annexure A, it would not have taken the legal steps that it took, leading to incurring significant costs.

Because of this, the TAC applied for a costs order against the state, asking the High Court to hold the Minister to account by making her pay the wasted legal costs. Despite opposition, a punitive costs award in the TAC's favour was made on 14 December 2004. The Court awarded costs against the state on a scale reserved for occasions when the behaviour of one party is so bad that it justifies a punitive costs order.

### Key constitutional structures

The Constitution also regulates the exercise of public power through the setting up a range of structures designed to play a monitoring role. These are state institutions to strengthen constitutional democracy:

- Chapter 9 institutions (named after the chapter in the Constitution that deals with their establishment and powers); and
- the Public Service Commission.

All of these structures are independent. They must be impartial and must exercise their powers and perform their functions “without fear, favour or prejudice”. They gain their mandates from the Constitution, but the detail of their composition, powers and functions is provided in various national statutes that are expressly referred to in the Constitution.

With the notable exception of the Auditor-General, these bodies have – on the whole – failed to live up to their full potential. Some have alleged that they are often placed under pressure not to act, both directly (being told not to do certain things) and indirectly (through chronic under-funding). Thus, when lodging a complaint with certain Chapter 9 institutions, for example, intensive follow-up may be required before any action occurs.

### Chapter 9 institutions

There are four Chapter 9 institutions that are relevant to the general exercise of public power:

- The Public Protector.
- The South African Human Rights Commission.
- The Commission for Gender Equality.
- The Auditor-General.

#### PUBLIC PROTECTOR

Section 182 of the Constitution empowers the office of the Public Protector to deal with “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”. The Public Protector has the authority to investigate and report on this kind of conduct, and then “to take appropriate remedial action”.

#### CASE STUDY: SARAFINA II

On 20 May 1996, the Public Protector issued his report following an investigation into various funding-related matters regarding the play *Sarafina II* – commissioned by the Department of Health (DoH) as part of its HIV prevention programme. The report concluded that the “tendering procedures followed by the DoH were completely flawed and defective”, and that there had been “material non-compliance” with state Tender Board Regulations and the funding contract with the European Union, the source of the funds for the commissioned work (paragraph 6.5.1 of the *Special Report on Sarafina II*).

### CASE STUDY: THE HIV/AIDS OPERATIONAL PLAN

The Public Protector's powers of investigation may be important in cases where the use of court action is impractical, inaccessible or inappropriate. But they have also been used in an attempt to undermine progressive government policy.

Thus in 2004, the Public Protector investigated "allegations of impropriety in connection with Cabinet's approval of the Government's Operational Plan for HIV and AIDS". This was in response to a complaint lodged by an AIDS denialist. In this case, the Public Protector had to consider the allegation that the decision to adopt the plan "was unconstitutional and irrational as it did not take into account the best available evidence on the disease and ... was based on the unproven premise that HIV causes AIDS".

In dismissing the complaint, the Public Protector expressly acknowledged his "authority to investigate allegations of impropriety in regard to the formulation and implementation of government policy" (paragraph 11.1). Importantly, the Public Protector recognised government's duty "to formulate and implement a policy" to give access to ARV medicines to everyone in need of them (paragraph 11.8).

While being aware that there may be differences of scientific opinion, he made it plain that "what is expected of the state is to act responsibly and reasonably under the circumstances". In other words, public health policy should follow "the collective opinions of the international community based on research and the best available information" (paragraph 11.4).

### SOUTH AFRICAN HUMAN RIGHTS COMMISSION

Section 184 of the Constitution tasks the South African Human Rights Commission (SAHRC) with promoting respect for human rights, a culture of human rights, and protecting, developing and achieving human rights.

In particular, the Constitution mandates the SAHRC to monitor and assess the observance of human rights. This is to be achieved in various ways, such as by investigating and reporting on the state's compliance with the Constitution and by taking steps to address violations of human rights that occur.

A further example of the way in which the SAHRC attempts to discharge its mandate is by requiring various government structures to provide it with information on the steps that the state has taken to carry out its constitutional obligations on specific socio-economic rights.

The SAHRC's annual report on socio-economic rights is, unfortunately, largely based on this self-reporting, without any mechanism for assessing the accuracy of the information provided. A key factor in adopting this methodology is the limited capacity and financial resources of the SAHRC.

**CASE STUDY: GROOTBOOM AND THE SAHRC**

In the *Grootboom* case, the Constitutional Court recognised the potential role of the SAHRC in monitoring the state's compliance with its constitutional duties. The Court called on the SAHRC to monitor and, if necessary, report "on the efforts made by the state" to comply with its duties as set out in the *Grootboom* judgment (paragraph 97).

The SAHRC's report, however, focused only on the settlement relating to the specific circumstances of Mrs Grootboom and the other rights claimants, rather than on the decision's broader constitutional mandate and the Court's call for the SAHRC to monitor compliance with the order. In this regard, it took more than four years for the state to develop and formally adopt a comprehensive programme to address the gap in the housing programme identified in the *Grootboom* case. To date, the programme has yet to be implemented properly.

**COMMISSION FOR GENDER EQUALITY**

Section 187 of the Constitution sets out the mandate of the Commission for Gender Equality (CGE) to promote respect for gender equality and protect, develop and achieve gender equality. To enable it to do its job, the CGE's powers include "the power to monitor, investigate, research, educate, advise and report on issues concerning gender equality".

In many ways, the CGE is similar to the SAHRC, except that its particular focus is on gender rather than human rights in general.

For a specific focus on gender and health, see Chapter 11.

**AUDITOR-GENERAL**

Section 188 of the Constitution gives the Auditor-General (AG) the main responsibility for auditing and reporting on "the accounts, financial statements and financial management" of the state, including national and provincial departments and municipalities.

The AG also has jurisdiction to audit and report on:

- "any institution funded from the National Revenue Fund or a Provincial Revenue Fund or by a municipality"; and
- "any institution that is authorised in terms of any law to receive money for a public purpose".

The AG thus has the power to monitor the financial affairs of any body that is funded by public money, whether an official part of government or not. In the health sector, this means that the AG has an important role to play in ensuring that publicly funded health care services (and not just publicly

provided services) are delivered in an open, accountable and transparent fashion. This clearly includes the health services provided by NGOs that are funded by government.

#### Example: Audit of the DoH

The AG's report on its audit of the DoH for the financial year 2003/4 noted that the department had not complied with the Public Finance Management Act, 1 of 1999 in the way that it transferred funds to NGOs providing public health services. In particular, the report noted that the "organisations funded did not comply with Treasury Regulations (TR 8.4) and the conditions of the funding agreements with the department". (Department of Health, Annual Report 2003/4 at 62)

### Public Service Commission

Section 195 of the Constitution sets out the basic values and principles governing public administration. These include accountability, fostering transparency "by providing the public with timely, accessible and accurate information", and providing public services "impartially, fairly, equitably and without bias".

When the TAC relied on the right of access to information in the Annexure A case, Acting Justice Ranchod noted that section 195 "creates justiciable rights". This means that courts can hold public officials to account for a failure to comply with the provisions of this section. In support of this conclusion, the judge referred to numerous decisions from the Constitutional Court, the Supreme Court of Appeal and other courts.

Section 196 of the Constitution sets up the Public Service Commission (PSC) as an independent body to:

- promote "the values and principles set out in section 195, throughout the public service";
- ensure that officials perform their tasks in accordance with the Constitution; and
- investigate, monitor and evaluate "the organisation and administration, and the personnel practices of the public service".

The PSC thus has a key role to play in identifying problems in the delivery of public services, such as health care, and in suggesting solutions to our law-makers.

**CASE STUDY: PSC REPORT ON MANAGING HIV/AIDS IN THE PUBLIC SERVICE**

The PSC's *Report on the Evaluation of the Policy Framework on Managing HIV and AIDS in the Public Service*, released on 8 June 2006, expressly recognises the impact of the epidemic on the public service and its ability to deliver services. It also found that:

- Not all departments have HIV/AIDS committees and not all such committees are functioning effectively.
- There was a lack of programmes specifically targeting HIV/AIDS in the workplace.
- There is no serious commitment from senior management to deal with HIV/AIDS policies.

## 2.4 The structure of government

After considering the right of access to health care services and its implications for the development of health policy, this chapter looked at the role of the Constitution in regulating the exercise of public power. In this final section, the chapter focuses on the structure of government.

The Constitution divides government up into three branches (or areas) of authority (legislative, executive and judicial) and three spheres (national, provincial and local). While in a limited sense there is a hierarchy between the three spheres, the Constitution's use of the word spheres (instead of levels) shows an intention to create bodies with their own areas of responsibility and authority.

The Constitution sets out the composition, functions and authority of South Africa's three branches of government at all three spheres of government. For example, national government authority is allocated in this way:

- The executive – Cabinet and each Minister's government department – develops policy and implements the law;
- the legislature makes law and holds the executive to account; and
- the judiciary interprets the law in accordance with the Constitution, ensures compliance with the law, and checks that the other two branches of government carry out their constitutional duties.

The relationships between the executive and legislative branches at provincial and local government levels follow a similar model.

Examples: Authority granted by the constitution

- Legislative authority – the Constitution sets out which legislatures (Parliament, provincial legislatures and municipal councils) are entitled to pass which types of laws, and how conflicts between these different laws should be resolved.
- Executive authority – the Constitution regulates how public officials can and should exercise the various powers given to them by law.
- Judicial authority – the Constitution sets out the powers that courts have to strike down unconstitutional laws.

The development and implementation of health law and policy is a collective effort, with important processes taking place at all three branches and spheres of government. By regulating the structure of the state, the Constitution determines which branch or sphere is responsible for developing and implementing particular aspects of health law and policy.

## Principles of allocating powers

There is a dynamic relationship between the three branches and the three spheres of government in South Africa. Two key principles guide the division of authority between the legislative, executive and judicial branches of government power: the separation of powers and co-operative government.

### The separation of powers

In negotiating the interim Constitution that would take South Africa into its first democratic elections in 1994, political parties agreed that the final Constitution would be based on a set of Constitutional Principles, including the following principle dealing with the separation of powers:

*“There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.”*

While the principle of the separation of powers differs from country to country, it usually attempts to do three important things:

- In recognising the independence of the branches of government, it aims to ensure that each branch has the space and power necessary to perform its functions.
- It prevents the various branches of government from taking power from one another.

- It ensures that the various branches hold each other to account.

These three aims are achieved by the use of various checks and balances, and the proper regulation of the relationships between each branch.

### CASE STUDY: POLICY ON MOTHER-TO-CHILD TRANSMISSION OF HIV

In the *TAC* case, the government unsuccessfully tried to use the separation of powers to prevent the Constitutional Court from ordering it to change its policy on the use of ARV medicines to prevent mother-to-child transmission of HIV (PMTCT). The state's lawyers argued that even if the Court decided that the policy was unconstitutional, it would only be able to "issue a declaration of rights to that effect".

In dismissing this argument, the Constitutional Court stressed that the separation of powers "does not mean ... that courts cannot or should not make orders that have an impact on policy". Instead, it said:

"Where a breach of any right has taken place, including a socio-economic right (such as access to health care services), a court is under a duty to ensure that effective relief is granted." (Paragraphs 96 – 106)

In its *First Certification* judgment (dealing with the certification of the Constitution), the Constitutional Court made it clear that there can never be a "complete separation of powers" and that some degree of overlap between the various branches "provides a singularly important check and balance on the exercise of executive power". Most importantly, it pointed out that the model adopted in our Constitution reflects our particular history and the striking of an appropriate balance that results in "an energetic and effective, yet answerable, executive" (paragraphs 108–112).

### Co-operative government

Sections 40 and 41 of the Constitution set out the principles of co-operative government:

- Section 40(1) says that "national, provincial and local spheres of government" are "distinctive, interdependent and interrelated"; and
- section 41(2) says that an Act of Parliament must "establish or provide for structures and institutions to promote and facilitate intergovernmental relations", and "provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes".

Section 41(1) sets out a comprehensive list of principles of "co-operative government and intergovernmental relations" for all "spheres of government and all organs of state within each sphere". These include:

- respect for the “constitutional status, institutions, powers and functions of government in the other spheres”; and
- the exercise of powers and the performance of functions “in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere”.

The concept of co-operative government makes much sense in a Constitution that has chosen to allocate powers in a number of areas concurrently to government at national and provincial levels. Without a system of co-operative government, which is “implicit in any system where powers have been allocated concurrently to different levels of government”, it would rest on the courts to resolve every dispute between different spheres of government (*First Certification* case at paragraph 290).

#### CASE STUDY: ENFORCING CO-OPERATIVE GOVERNMENT

In a case closely linked to the *TAC* case, the Constitutional Court considered the principles of co-operative government. In the 2002 case of *MEC for Health, KwaZulu-Natal v Premier of KwaZulu-Natal*, the Premier of KwaZulu-Natal – a member of the Inkatha Freedom Party (IFP) – was unhappy with the approach taken by his MEC for Health – a member of the African National Congress (ANC) – in the *TAC* case. While the IFP was opposed to the DoH’s policy on PMTCT, the ANC MEC for Health had formally endorsed the policy by making an affidavit in support of the state’s case.

In the High Court, the Premier was successful in getting the MEC removed as a party to the case, having himself instated instead. But the Constitutional Court was doubtful that the case could be resolved judicially, describing the conflict between the Premier and the MEC as “a purely political dispute which could and should have been resolved at a political level” (paragraph 7). This meant that if the Premier was unhappy with the MEC, he should have fired him, as he is entitled to do under section 132(2) of the Constitution.

The Court said that the Constitution obliged both parties to make reasonable attempts to resolve the dispute in line with the principle of co-operative government. It then decided that their failure to do this was one reason why it was not in the interests of justice for the dispute to be heard on appeal (paragraphs 7-12).

The functional areas of concurrent national and provincial legislative competence, which are set out in detail in Schedule 4 of the Constitution, include areas such as education, social welfare and trade. Health is one of these functional areas, meaning that both Parliament and the provincial legislatures have the constitutional authority to pass laws on health. This creates a potential for conflict.

Instead, our Constitution has consciously chosen to avoid conflict as far as this is reasonably possible. As a matter of principle, it prefers that disputes and disagreements within government are resolved without having to resort to the courts. For example:

- section 41(3) of the Constitution requires that all reasonable steps be taken before a court will resolve intergovernmental disputes; and
- section 41(4) gives judges the power to refer disputes back to the parties concerned if they do not believe that this has in fact happened.

## Legislative branch

Parliament is vested with legislative authority for the country at national level. Nine provincial legislatures (one for each province) have legislative authority at provincial level. 284 municipal councils – including six metropolitan, 47 district and 231 local councils – have legislative authority at the local sphere of government.

### Parliament

Parliament consists of the National Assembly (NA) and the National Council of Provinces (NCOP). The NA, which is elected every five years to represent the people, currently consists of 400 members. It chooses the President from amongst its members, and considers and passes legislation. The NCOP is composed of nine ten-person delegations, one from each province. One of its key functions is to ensure that provincial interests are taken into account in the law-making process.

Both the NA and the NCOP have powers to oversee the conduct of the executive. Section 56 of the Constitution allows the NA – or any of its committees – to “summon any person to appear before it to give evidence on oath or affirmation” and “require any person ... to report to it”. The NCOP has similar powers under section 69. These powers, which apply with equal force to ordinary members of the public as well as to Cabinet members, are unfortunately seldom used to hold the executive to account.

The legislative authority of Parliament is particularly broad. It has the authority to amend the Constitution, including a power to amend the provisions of the Bill of Rights. It also has the power to pass legislation on all matters, except for a small category of functional areas listed in Schedule 5 of the Constitution. These functional areas, such as ambulance services, provincial planning and liquor licences, fall within the exclusive legislative competence of the provinces – that is, they should be dealt with only by provinces.

In some circumstances, however, the Constitution even allows Parliament to pass legislation on Schedule 5 issues. Section 44(2) of the Constitution allows Parliament to legislate on these issues if this is necessary to “maintain essential national standards ... or economic unity”, or to “establish minimum standards required for the rendering of services”.

#### CONFLICTS BETWEEN NATIONAL AND PROVINCIAL LEGISLATION

In some cases, a statute may have no effect, even though it is consistent with the Bill of Rights and was passed by Parliament in a procedurally correct way. This may happen, for example, when there is a conflict between the national statute and provincial legislation on an issue that falls within a functional area of concurrent national and provincial legislative competence.

Section 146(2) of the Constitution carefully regulates which statute will be valid in this kind of case, setting out each of the conditions that may be satisfied if “national legislation that applies uniformly with regard to the country as a whole [is to prevail] ... over provincial legislation”. These sorts of conflicts seldom happen in practice, because national legislation usually covers the broad policy framework and provinces tailor their provincial legislation to fit into the national framework.

#### CASE STUDY: CONFLICT BETWEEN PARLIAMENT AND PROVINCES

The 2000 case of *Ex parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* (the *Liquor Bill* case) is an interesting example of the way that conflict between Parliament and provincial legislatures may arise and be resolved.

The Liquor Bill of 1998 saw Parliament trying to legislate on concurrent functional areas in Schedule 4 (the liquor “trade” and “industrial promotion”), as well as on an exclusive provincial legislative competence in Schedule 5 (“liquor licences”). Using his power under section 79 of the Constitution, President Mandela asked the Constitutional Court to decide on the Bill’s constitutionality because he had “reservations” about its reach.

The Court confirmed President Mandela’s concerns, deciding that:

- Parliament’s power to make laws regarding the liquor trade does not include a power to regulate liquor licensing; and
- there was no basis for Parliament to intervene in this area of exclusive provincial legislative competence, as no argument had successfully addressed how and in what way the national interest demanded uniform national legislation regulating retail liquor licensing.

As a result, there is now some variation between provinces on the retail sale of liquor. In a province such as Gauteng, for example, alcohol can now lawfully be purchased from liquor stores on Sundays.

## Provincial legislatures

Each of the nine provinces has a provincial legislature with the power to adopt a provincial constitution and to consider, pass, amend or reject any bill relating to their functional areas, including health services. Provincial legislatures are bound by the Constitution and their own provincial constitutions, where these exist. At the time of writing, only the Western Cape had adopted a provincial constitution. KwaZulu-Natal has been struggling for some time to finalise its provincial constitution.

### PROVINCIAL POWERS TO PASS LEGISLATION

Provinces do not have any general power to legislate. Instead, they may pass laws only on “functional areas” that are expressly identified in Schedules 4 and 5 of the Constitution. In contrast, Parliament may legislate on any issue, except those reserved exclusively for the provinces.

The functional areas of concurrent national and provincial legislative competence set out in Schedule 4 include:

- health services;
- education (other than tertiary education);
- housing;
- social welfare services; and
- issues that are “reasonably necessary for, or incidental to, the effective exercise of a power concerning any matter listed in Schedule 4”.

We have seen that provinces may also pass legislation dealing with listed functional areas of exclusive provincial legislative competence, as set out in Schedule 5 of the Constitution. These include ambulance services, provincial planning and liquor licences.

In addition, provinces may pass legislation on all areas that are expressly and lawfully delegated to them by national legislation. For example, section 31(5) of the National Health Act requires provincial legislation to provide for “the functioning of district health councils”. They must also legislate on all matters where the Constitution expressly requires provincial legislation. For example, section 155 of the Constitution (dealing with the establishment of municipalities) says “provincial legislation must determine the different types of municipalities to be established in the province”.

Interestingly, provincial legislatures also have a fundamental role to play in various Parliamentary processes. This role was briefly described by the Constitutional Court in the recent case of *Matatiele Municipality v President of the Republic of South Africa (2)* (the *Matatiele Municipality* case, CCT 73/05, 18 August 2006), as follows:

*“The role of a provincial legislature goes beyond legislating for the province; it includes taking part in the national legislative process. ... The Constitution contemplates the provincial legislatures, consistent with our constitutional scheme, will be involved in the law-making process at national level, such as when they are required to confer voting mandates on their NCOP delegations or when they consider whether or not to approve proposed constitutional amendments that alter their boundaries.”* (paragraph 47)

*Matatiele Municipality*, which together with *Doctors for Life v the Speaker of the National Assembly* (the *Doctors for Life International* case, CCT 12/05, 17 August 2006) considers the balance that the Constitution strikes between representative and participatory democracy, is considered in more detail in Chapter 4 dealing with the statutory and administrative framework of the public health system.

## Municipal councils

According to the Constitution, municipalities have a range of objectives, such as providing services to communities in a sustainable way and promoting a safe and healthy environment.

But many municipalities are very weak. With this in mind, the Constitution places an obligation on national and provincial governments to assist, by supporting and strengthening the capacity of municipalities to perform their functions, such as the provision of municipal health services.

Section 155 of the Constitution deals with the three types of municipalities that collectively make up local government:

- Category A (metropolitan councils such as Tshwane and eThekweni);
- Category B (local councils such as Mangaung and Knysna); and
- Category C (district councils such as Amatole and Gert Sibande).

The Local Government: Municipal Structures Act, 117 of 1998 (the Municipal Structures Act) sets out more detail on establishing local government structures.

### LEGISLATIVE AUTHORITY OF MUNICIPALITIES

Besides taxing powers, a “municipality may make ... by-laws for the effective administration of the matters which it has the right to administer”. These, according to section 156(1) of the Constitution, are “the local government matters listed in part B of Schedule 4 and part B of Schedule 5”, as well as “any other matter assigned ... by national or provincial legislation”.

This means that municipal councils can pass by-laws (local government legislation) on a range of health-related matters listed in Schedules 4 and 5, such as water and sanitation services, refuse removal and municipal health services. Usually, municipal by-laws that conflict with national or provincial legislation are invalid. But according to section 151(4) of the Constitution, this is provided the legislation in question does not “compromise or impede a municipality’s ability or right to exercise its powers or perform its functions”.

The Constitution does not define what is meant by municipal health services. Instead, this is left to the National Health Act, 61 of 2003, which unfortunately defines municipal health services narrowly to include:

- water control monitoring;
- waste management;
- food control;
- health surveillance of premises;
- surveillance and prevention of communicable diseases, excluding immunisations;
- environmental pollution control;
- disposal of the dead; and
- chemical safety.

This kind of limited list of services may be appropriate for a local council. But the operations of a metropolitan council such as Johannesburg (that already provides a wide range of health care services) may be severely compromised if it cannot legislate on a broader range of health care service issues.

In practice, however, provincial legislation may delegate further legislative authority to local government structures. This is permitted by section 32 of the National Health Act, which deals with service level agreements between provincial and local government authorities. Without this happening, the local sphere of government would have a very limited role to play in health policy development or service delivery.

## Executive branch

### National executive

As head of state, the President is also head of the national executive. In section 84, the Constitution tasks the President with a range of responsibilities, such as:

- assenting to (agreeing to) and signing bills passed by Parliament;
- referring any bill back to the NA if the President thinks that all or part of it is unconstitutional;
- referring a bill to the Constitutional Court for a decision on its constitutionality if the President has concerns about this; and
- appointing commissions of enquiry.

The President exercises national executive authority together with other members of the Cabinet, including the Deputy President and other ministers appointed by the President.

The exercise of national executive authority is carried out by:

- developing national policy;
- preparing and introducing legislation;
- implementing legislation; and
- co-ordinating the functions of state departments and administrators.

The President allocates certain functions to Cabinet members, who are accountable to Parliament – individually and collectively – for the exercise of their powers and the performance of their functions.

### Example: Health policy

The Minister of Health and her national department usually determine specific health policy that is then put into practice through the adoption of new laws. This can be in the form of draft legislation developed by the DoH that is then tabled by the Minister in Parliament. After this, it is processed by the Portfolio Committee on Health before being put to the NA for adoption. Or it can be in the form of regulations developed by the DoH and promulgated by the Minister in terms of existing legislation.

In carrying out their functions, Cabinet members must act in accordance with the Constitution. In particular, section 92 of the Constitution requires them to “provide Parliament with full and regular reports about matters under their control”.

## Provincial executives

The executive authority of a province rests with the Premier of the province, which he or she exercises together with other members of the provincial Cabinet, known as the Executive Council. Members of the Executive Council (MECs) are in effect provincial ministers. In many respects, provincial executive authority is similar to national executive authority, except that it applies to the provincial sphere of government.

In one particular area, however, provincial executive authority is quite different – when it implements and administers national legislation. This can happen in either of two ways:

- section 125(2)(b) of the Constitution provides for provinces to implement national legislation within the functional areas listed in Schedules 4 and 5, unless the Constitution or the relevant national legislation expressly says otherwise; and
- section 125(2)(c) of the Constitution provides for provinces to administer national legislation dealing with other issues if the relevant national legislation expressly delegates this function to the province.

## LINKS BETWEEN NATIONAL AND PROVINCIAL DEPARTMENTS

The exercise of executive authority at the provincial sphere of government does not usually take place in isolation from national executive action. There is normally a direct relationship between national ministers and provincial MECs. In health, for example, the Minister and all nine MECs regularly meet to coordinate health policy development and implementation. Initially known as the Health “MinMEC”, this structure has been formalised (with its membership expanded) by section 22 of the National Health Act into the National Health Council (NHC).

The NHC’s main task is to advise the Minister on a range of health policy issues. In addition to the members of the Health MinMEC, the NHC’s membership includes a range of other people, such as limited local government representation, the DG of Health and the heads of all nine provincial health departments. Unfortunately, the NHC’s membership does not include any civil society representation.

## Municipal executives

The executive authority of a municipality rests with its municipal council. The Municipal Structures Act allows for a range of different executive structures, such as executive committees and executive mayors. The exact form of a municipal executive may thus vary from municipality to municipality.

A municipality has executive authority on a limited list of local government issues (Part B of both Schedules 4 and 5 of the Constitution), as well as on other issues expressly delegated to municipalities by national or provincial legislation.

In general, however, some constitutional provisions limit a municipality's executive powers by allowing for provincial or national government to intervene in the local sphere of government when necessary.

## Judicial branch

The judicial authority of the country rests with the courts, which are independent and subject only to the Constitution and the law. In general, courts interpret the law in accordance with the Constitution, ensure compliance with the law, and check that the other two branches of government comply with their constitutional duties.

Not all courts have full constitutional jurisdiction – full authority to hear constitutional matters. Section 39 of the Constitution requires all courts, tribunals and forums to “promote the spirit, purport and objects of the Bill of Rights” when “interpreting any legislation, and when developing the common law or customary law”. However, section 170 says that only the Constitutional Court, the Supreme Court of Appeal (SCA) and the High Courts (and courts of a similar status) may “enquire into or rule on the constitutionality of any legislation or any conduct of the President”. The Constitution defines legislation to include regulations.

In constitutional cases, courts have wide powers to grant what section 38 of the Constitution refers to as “appropriate relief”. According to section 172 of the Constitution, a court with jurisdiction must “declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency” and may “make any order that is just and equitable”. Without this power, courts would not be able to ensure that rights have real meaning. As the Constitutional Court has noted:

*“Appropriate relief will in essence be relief that is required to protect and enforce the Constitution.” (Fose v Minister of Safety and Security at paragraph 19)*

### Examples: Constitutional remedies

Over the last ten years of democratic rule in South Africa, courts have developed and implemented a range of remedies to give full and proper effect to constitutional rights, such as:

- mandating the state to do something that it previously refused to do;
- reading words into an existing statute to make it constitutional;
- removing unconstitutional words or entire sections from legislation;
- ordering the state to file documents in court explaining how it aims to give effect to a particular court order; and
- ordering the state to pay “constitutional damages”.

The Constitution provides the basis for establishing and recognising the Constitutional Court, the SCA, the High Courts and the Magistrates’ Courts, as well as any other court recognised or established by an Act of Parliament. By the end of 2005, Cabinet had approved the Superior Courts Bill and the Constitution of the Republic of South Africa Fourteenth Amendment Bill, which were expected to result in some significant changes to the court hierarchy.

However, as a result of significant opposition – from a broad range of stakeholders, including the judiciary itself – to various provisions of the bills, they have been withdrawn. At the time of writing, it was unclear how the matter is going to be resolved.

The remainder of this section of the chapter focuses on the key courts that have full jurisdiction to deal with interpreting and applying the Constitution: the Constitutional Court, the SCA and the High Courts.

### Constitutional Court

As the highest court on constitutional issues, the Constitutional Court only considers “constitutional matters, and issues connected with decisions on constitutional matters” (section 167(3)(b) of the Constitution). The jurisdiction of the Constitutional Court is broad because:

- it also makes the final decision on “whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter” (section 167(3)(c) of the Constitution);
- it has decided in a number of judgments that issues such as the interpretation of legislation mandated by the Constitution are constitutional issues; and
- unlike many other constitutions, our Bill of Rights protects a wide range of rights such as labour rights and just administrative action.

## HANDLING CONSTITUTIONAL CASES

The Constitutional Court is not the only court to have jurisdiction to deal with constitutional cases. But it does make the final decision about whether an Act of Parliament, a provincial statute or the conduct of the President is constitutional. Even if the SCA or a High Court declares that a statute is unconstitutional, the declaration must be confirmed by the Constitutional Court to become effective. This kind of case is automatically referred to the Constitutional Court for what is known as confirmation proceedings.

While it can decide to hear any case directly, most cases come to the Constitutional Court on appeal from other courts, usually a High Court or the SCA. But some cases come to it directly and automatically, as it has *exclusive jurisdiction* to deal with a range of issues, such as:

- certain disputes between organs of state;
- the constitutionality of amendments to the Constitution; and
- the certification of provincial constitutions.

In these cases, the Constitutional Court is the first and only court to make a decision on the relevant matter.

## Supreme Court of Appeal

The SCA may decide appeals in any case, as it is the highest court in the country in all cases except for constitutional cases. Section 168 of the Constitution says that the SCA may also decide “issues connected with appeals” (such as applications for leave to appeal) and “any other matter that may be referred to it in circumstances defined by an Act of Parliament”. Importantly, it does not have *original jurisdiction* – the authority to hear matters that no other court has had an opportunity to hear.

## High Courts

In non-constitutional cases, a High Court has jurisdiction to deal with any case, unless a statute specifically allocates the case to another court or forum. For example, the Competition Act, 89 of 1998 sets up the Competition Commission, Competition Tribunal and Competition Appeal Court to deal with competition law cases. These kinds of cases may re-enter the ordinary court structure at the level of the SCA (or with a constitutional issue, the Constitutional Court), but will ordinarily bypass the High Court.

High Courts also have broad constitutional jurisdiction, but this does not extend to cases falling within the exclusive jurisdiction of the Constitutional Court and those that are expressly delegated “by an Act of Parliament to another court of a status similar to a High Court”. Thus any case dealing with the interpretation of the right to fair labour practices in terms of the Labour Relations Act, 1995, for example, is currently reserved for the Labour Court.

## 2.5 Conclusion

In looking at the relationship between the Constitution and public health policy, this chapter has considered three key issues that together set the broad framework within which health law and policy is developed and implemented:

- the right of access to health care services;
- the exercise of public power; and
- the structure of government

What the analysis shows is that the right to health can be given real meaning and effect only if those who are tasked in one way or another with realising the right – including government, civil society and business – understand and work within the framework set by the Constitution. Working within this set of rules allows for disputes and disagreements between various stakeholders to be resolved.