

Chapter 32

The Constitution of the Republic of South Africa, 1996

'In its proper meaning, equality before the law means the right to participate in the making of the laws by which one is governed, a constitution which guarantees democratic rights to all sections of the population, the right to approach the court for protection or relief in the case of violation of rights guaranteed in the constitution, and the right to take part in the administration of justice as judges, magistrates, attorneys-general, law advisers and similar positions. In the absence of these safeguards the phrase "equality before the law", in so far as it is intended to apply to us, is meaningless and misleading.'

NELSON MANDELA (1918–2013)
FORMER PRESIDENT OF SOUTH AFRICA

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WHY THIS CHAPTER IS IMPORTANT

Our Constitution is the most important – or supreme – law of South Africa. No other law may conflict with it; nor may the government do anything that violates it.

The Constitution protects democracy by separating State power into three arms. The 'legislature' (Parliament, the provincial legislatures and local councils) makes the laws and monitors the executive; the 'executive' (the president, deputy president and ministers) makes policy, proposes laws and implements laws passed by the legislature; and the 'judiciary' tries cases and administers justice. The judiciary is not elected but is independent. This means no one can interfere in the work of the Constitutional Court and the other courts in the country. In practice this means each arm of the State keeps watch over the power of the others. The courts can judge the actions of the legislature and the executive, but cannot pass laws. The legislature can make laws, but cannot hand down judgments or take executive action.

Our Constitution describes how the government is formed, how it is elected and how it functions. It outlines the government's powers, as well as the limits to these powers. It also sets out how the government will be accountable to the people who elect it.

The Constitution guarantees democracy by giving every person over 18 the right to vote and ensuring one voters' roll for all adult citizens, regular elections and a multiparty system of government. It says parliamentary elections must be held once every five years. It explains how Parliament and other legislatures work, how national and provincial executives are chosen and how the courts work.

Our Constitution does more than just describe the functioning of the State. Our Constitution also reflects the hopes and aspirations of a nation torn apart by hundreds of years of colonial exploitation, many wars and decades of apartheid.¹

The Constitution was originally called the 'Constitution of the Republic of South Africa Act 108 of 1996', but a law passed in 2005 provided that it should simply be referred to as the 'Constitution of the Republic of South Africa, 1996'.² This emphasises that the Constitution is no ordinary Act of Parliament. It is the supreme law of South Africa and was passed by both Houses of Parliament sitting together as a Constitutional Assembly.

THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996

1 Structure of the Constitution

The Constitution of the Republic of South Africa, 1996, was approved by the Constitutional Court on 4 December 1996 and took effect on 4 February 1997. It has 14 chapters and comprises the following:

- Preamble.
- Chapter 1: Founding Provisions.
- Chapter 2: Bill of Rights.
- Chapter 3: Co-operative Government.
- Chapter 4: Parliament.
- Chapter 5: The President and National Executive.
- Chapter 6: Provinces.
- Chapter 7: Local Government.

1 'The Constitution,' Constitutional Court of South Africa, https://www.concourt.org.za/images/phocadownload/the_text/english-2013.pdf, accessed 2 November 2022.

2 Citation of Constitutional Laws Act 5 of 2005.

- Chapter 8: Courts and Administration of Justice.
- Chapter 9: State Institutions Supporting Constitutional Democracy.
- Chapter 10: Public Administration.
- Chapter 11: Security Services.
- Chapter 12: Traditional Leaders.
- Chapter 13: Finance.
- Chapter 14: General Provisions.

In addition, there are eight schedules:

- Schedule 1: National Flag.
- Schedule 2: Oaths and Solemn Affirmations.
- Schedule 3: Election Procedures.
- Schedule 4: Functional Areas of Concurrent National and Provincial Legislative Competence.
- Schedule 5: Functional Areas of Exclusive Provincial Legislative Competence.
- Schedule 6: Transitional Arrangements.
- Schedule 6A: Retention of membership of national assembly or provincial legislature.
- Schedule 6B: Loss or retention of membership of municipal councils.
- Schedule 7: Laws Repealed.

2 Preamble to the Constitution

We, the people of South Africa,

Recognise the injustices of our past;

Honour those who suffered for justice and freedom in our land;

Respect those who have worked to build and develop our country; and

Believe that South Africa belongs to all who live in it, united in our diversity.

We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to:

Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;

Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;

Improve the quality of life of all citizens and free the potential of each person;
and

Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

May God protect our people.

Nkosi Sikelel' iAfrika. Morena boloka setjhaba sa heso.

God seën Suid-Afrika. God bless South Africa.

Mudzimu fhatutshedza Afrika. Hosi katekisa Afrika.

3 Founding provisions of the Constitution

3.1 The Republic of South Africa³

The Republic of South Africa will be one, sovereign, democratic State founded on the following values:

- Human dignity, the achievement of equality and the advancement of human rights and freedoms.
- Non-racialism and non-sexism.
- Supremacy of the constitution and the rule of law.
- Universal adult suffrage, a national common voters' roll, regular elections and a multiparty system of democratic government, to ensure accountability, responsiveness and openness.

3.2 Supremacy of the Constitution

The Constitution is the highest law in the country and everyone will be bound by the Constitution. Any laws that go against the Constitution will be invalid.

3.3 Citizenship⁴

All South Africans are South African citizens. Every citizen is equal and has a right to the rights and privileges of being a citizen of South Africa. Everyone also has duties, obligations and responsibilities of being a citizen of South Africa.

3.4 National flag⁵

The national flag will be black, gold, green, white, red and blue, as described in Schedule 1.

3.5 National anthem⁶

The national anthem will be decided by the State president.

3.6 Languages⁷

There are 11 official languages. These are: Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu.

A Pan-South African Language Board must promote the use of all official languages, the Khoi, Nama and San languages, and sign language. It must promote and respect other languages used in South Africa such as Arabic, German, Greek, Gujarati, Hebrew, Hindi, Portuguese, Sanskrit, Tamil, Telegu, Urdu and other languages used for religious purposes.

3 Section 1.

4 Section 3.

5 Section 4.

6 Section 5.

7 Section 6.

4 The Bill of Rights

4.1 Introduction⁸

The Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

The State must respect, protect, promote and fulfil the rights in the Bill of Rights. The rights in the Bill of Rights are subject to the limitations contained in the Constitution.

4.2 Application of the Bill of Rights⁹

The Bill of Rights applies to all laws. It must be followed by all branches of government and all government bodies. This means it must be followed by the legislatures (bodies that make laws); the executive (bodies that carry out the laws); and the judiciary (the courts).

When applying a provision of the Bill of Rights, a court may be required to develop the common law to the extent that legislation does not give effect to that right, and may develop rules of the common law to limit the right, provided that the limitation is in accordance with the Constitution.

4.3 Right to equality¹⁰

Everyone is equal before the law and has the right to equal protection and benefit of the law. Being equal before the law means all laws may not unfairly discriminate against anyone.

The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, or birth.

No person can unfairly discriminate against another person, directly or indirectly, on any of the grounds listed above. Discrimination on any of these grounds is unfair unless the person or State can prove why it is fair.

4.4 Right to human dignity¹¹

Everyone has dignity and the right to have their dignity respected and protected.

4.5 Right to life¹²

Everyone has the right to life. This provision in the Constitution has led to much debate around issues such as the use of deadly force to make an arrest; the death penalty; and termination of pregnancy (abortion).

S v Makwanyane and another¹³

The two accused were convicted on four counts of murder, one count of attempted murder, and one count of robbery with aggravating circumstances. They were each sentenced to death on each

8 Section 7.

9 Section 8.

10 Section 9.

11 Section 10.

12 Section 11.

13 *S v Makwanyane and another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC).

of the counts of murder, and to long terms of imprisonment on the other counts. The appeal court held that the circumstances of the murders were such that the accused should receive the harshest sentence permissible according to law.

The Constitutional Court held that revenge cannot be given the same weight under our Constitution as the rights to life and dignity, which are the most important rights. It was not shown that the death sentence was more effective at preventing murder than the alternative sentence of life imprisonment. Also considering the possibility of error in enforcing the death penalty generally, the court held that there was not a clear and convincing case to justify the death penalty as a sentence for murder. The court held that the death penalty was unconstitutional.

4.6 Freedom and security of the person¹⁴

Everyone has the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause; not to be detained without trial; to be free from all forms of violence from either public or private sources; not to be tortured in any way; and not to be treated or punished in a cruel, inhuman or degrading way.

Everyone has the right to bodily and psychological integrity, which includes the right to make decisions concerning reproduction; to security in and control over their body; and not to be subjected to medical or scientific experiments without their informed consent.

4.7 Slavery, servitude and forced labour¹⁵

No form of slavery or forced labour is allowed.

4.8 Right to privacy¹⁶

Everyone has the right to privacy, which includes the right not to have their person or home searched, their property searched, their possessions seized, or the privacy of their communications infringed.

4.9 Freedom of religion, belief and opinion¹⁷

Everyone has the right to freedom of conscience, religion, thought, belief and opinion. People may think what they want, even if their opinion is different to the government, and have the right to practise the religion they choose.

4.10 Freedom of expression¹⁸

Everyone has the right to freedom of expression, which includes freedom of the press and other media; freedom to receive or impart information or ideas; freedom of artistic creativity; and academic freedom and freedom of scientific research.

It is possible to limit the right to freedom of expression; there are certain kinds of speech that are not protected. These are propaganda for war; inciting (encouraging) people to use violence; and hate speech. This means spreading hatred and encouraging people to act violently or harmfully towards other people because of their race, gender, ethnic origin or religion. In other words, hate speech encourages people to discriminate against other people.

¹⁴ Section 12.

¹⁵ Section 13.

¹⁶ Section 14.

¹⁷ Section 15.

¹⁸ Section 16.

4.11 Assembly, demonstration, picket and petition¹⁹

Everyone has the right peacefully and unarmed to assemble with other people, hold a demonstration, picket or present petitions.

4.12 Freedom of association²⁰

Everyone has the right to associate with whoever they want, for example, workers joining together and meeting in a trade union.

4.13 Political rights²¹

Everyone has the right and is free to make political choices, such as the right to form or join any political party, encourage other people to join, and to campaign for a political party or cause.

Every adult citizen has the right to free, fair and regular elections. They have the right to vote in secret in elections, and to stand for election.

4.14 Citizenship²²

Your citizenship is protected and cannot be taken away from you.

4.15 Freedom of movement and residence²³

Everyone has the right to move anywhere in South Africa, and to leave South Africa if they choose. Every citizen has the right to enter South Africa and stay there, live anywhere in South Africa, and to have a passport.

4.16 Freedom of trade, occupation and profession²⁴

Every citizen has the right to choose their trade, occupation or profession freely. Laws can be passed to regulate how people practise their trade, occupation or professions.

4.17 Labour relations²⁵

Everyone has the right to fair labour practices.

Workers have the right to form and join trade unions, join in the activities and programmes of the trade union, and to strike.

Employers have the right to form and join employers' organisations, and to join in the activities and programmes of the employers' organisation.

Trade unions and employers' organisations have the right to make decisions about their own administration, programmes and activities; organise; form and join a federation; and engage in collective bargaining.

4.18 Environment²⁶

Everyone has the right to an environment that is not harmful to their health or well-being, and to have the environment protected for present and future generations. The government

19 Section 17.

20 Section 18.

21 Section 19.

22 Section 20.

23 Section 21.

24 Section 22.

25 Section 23.

26 Section 24.

must pass laws that prevent pollution and damage to our natural resources; promote conservation; and make sure that natural resources are developed while also promoting the economic and social development of people.

4.19 Property²⁷

No one can have their property taken away from them unless this is done by a court in accordance with a law, and appropriate compensation is paid. Property can be expropriated by the government if it is to be used for public purposes or it is in the public interest, for example, if the government needs the land for its land reform programme.

This section also requires the government must make laws and take other steps to help people or communities to get land to live on, and to claim back land if they lost it after 1913 because of an apartheid law. Up to December 1998, in such cases people were able to claim the land back or compensation for the land.

4.20 Access to housing²⁸

Everyone has the right to have access to adequate housing. The government must take reasonable steps within its available resources to provide people with housing and access to land. No one can be evicted or have their house demolished without an order of court.

4.21 Health care, food, water and social security²⁹

Everyone has the right to have access to health care services, including reproductive health care; sufficient food and water; and to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights. No one may be refused emergency medical treatment.

4.22 Children's rights³⁰

A person under the age of 18 has the right:

- To a name and a nationality from birth.
- To family care or parental care, or to appropriate alternative care when removed from the family environment.
- To basic nutrition, shelter, basic health care services and social services.
- To be protected from maltreatment, neglect, abuse or degradation.
- To be protected from exploitative labour practices.
- Not to be required or permitted to perform work or provide services that are inappropriate for a person of that child's age, or place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development.
- Not to be detained except as a measure of last resort, in which case the child may be detained only for the shortest appropriate period of time, and has the right to be kept separately from detained persons over the age of 18 years; and treated in a manner, and kept in conditions, that take account of the child's age.

27 Section 25.

28 Section 26.

29 Section 27.

30 Section 28.

- To have a legal practitioner assigned to the child by the State, and at State expense, in civil proceedings affecting the child, if substantial injustice would otherwise result.
- Not to be used directly in armed conflict, and to be protected in times of armed conflict.

A child's best interests are of paramount importance in every matter concerning the child.

4.23 Education³¹

Everyone has the right to a basic education, including adult basic education, and to further education, which the State, through reasonable measures, must make progressively available and accessible. Everyone also has the right to be taught at a government school in the official language of their choice, but only if this is practical and if the government can afford it.

Everyone has the right to establish and maintain, at their own expense, independent educational institutions that do not discriminate on the basis of race and maintain standards that are not inferior to standards at comparable public educational institutions.

4.24 Language and culture³²

Every person has the right to use their own language and follow the culture that they choose, subject to the Bill of Rights. This means they cannot exercise their linguistic or cultural rights in a way that denies the similar rights of others.

4.25 Cultural, religious and linguistic communities³³

Communities have the right to enjoy a shared culture, practise a shared religion and use their language, subject to the Bill of Rights. This means they cannot exercise their cultural, religious or linguistic rights in a way that denies the similar rights of others.

4.26 Access to information³⁴

Everyone has the right to have access to information held by the government, or held by someone else, if they need it to protect any of their rights.

4.27 Just administrative action³⁵

Everyone has the right to administrative action that is lawful, reasonable and procedurally fair. Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

4.28 Access to courts³⁶

Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

31 Section 29.

32 Section 30.

33 Section 31.

34 Section 32.

35 Section 33.

36 Section 34.

4.29 Arrested, detained and accused persons³⁷

If a person is arrested, they have the following rights:

- To keep silent.
- To be told, in a language that they understand, that they have the right to keep silent and what will happen if they do not keep silent.
- Not to be forced to make a confession or to admit anything that could be used against them during their trial.
- To be taken to court within 48 hours of their arrest.
- At their first court appearance to be charged and released, either on warning or on bail, unless there is a good reason to keep the person in jail.

If a person is detained in jail or a police cell while they are waiting for their trial or after they have been sentenced, they have the right to:

- Be told in a language they understand why they are being detained.
- Be informed immediately that they can have a lawyer.
- Choose their own lawyer.
- Have the government pay for a State lawyer, if they cannot afford one and injustice might result if they are not given a lawyer.
- Be kept in proper conditions, including being allowed exercise and getting food.
- Accommodation, food, reading material and medical treatment at the State's expense.
- Speak to and be visited by the person's husband, wife or partner, their family, a religious counsellor, and their own doctor.
- Go to court to challenge the reasons for their detention, and to be released if there are not lawful reasons for being detained.

A person accused of committing a crime must be given a fair trial. This includes the right to:

- Be treated as an innocent person.
- Be told what the charge is against them.
- Be told that they have a right to a lawyer.
- Their own lawyer or a lawyer paid for by the government, if they cannot afford one and injustice might result if they are not given a lawyer.
- Be given enough time to prepare their defence.
- A public trial in an ordinary court.
- Be present during their trial.
- Keep silent.
- Not be forced to give evidence against themselves.
- Call witnesses and challenge any witnesses used against them.
- Be tried in a language that they understand, or to have an interpreter.
- Not be convicted for doing something which became a crime after they did it, in other words, if it was not a crime when they did it.
- Be sentenced within a reasonable time if they are convicted.
- Be sentenced to the least serious punishment, if the punishment for what they have done has changed since they did it.
- Appeal against their conviction and sentence to a higher court.
- Have their case reviewed by a higher court.
- Not be tried twice for the same crime.

If the State gets evidence against a person by going against one of their rights, this evidence will not be allowed in court.

4.30 Limitation of rights³⁸

The rights in the Bill of Rights can be limited only in terms of a law, and only if this is reasonable and justifiable in an open and democratic society that is based on human dignity, equality and freedom.

Relevant factors must be taken into account if a right is to be limited include the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose.

4.31 States of emergency³⁹

It may be necessary for a government to declare a state of emergency to deal with a major problem facing the country. During a state of emergency the Bill of Rights is usually affected. The government can only call a state of emergency when the life of the nation is threatened by war, invasion, disorder, natural disaster or other public disorder, and the state of emergency is necessary to restore peace or order.

The state of emergency and any laws passed as a result of the state of emergency can only last for 21 days, unless the National Assembly extends this. At least two-thirds (66%) of the members of the National Assembly must agree to extend this. They can extend it for three months at a time.

There are certain rights that cannot be limited at all during a state of emergency, such as the right to human dignity or the right to life. Other rights can be limited during a state of emergency, such as rights concerning the freedom and security of the person; equality; prohibition against slavery, servitude and forced labour; children; and the rights of arrested, detained and accused persons.

4.32 Enforcing rights⁴⁰

The following people can take a case to court, if they believe that a right has been threatened or infringed:

- Anyone representing themselves.
- Anyone acting on behalf of another person who cannot take the case to court.
- Anyone acting as a member of a group, or in the interests of a group or class of people.
- Anyone acting in the public interest.
- An association acting in the interests of its members.

4.33 Interpreting the Bill of Rights⁴¹

When interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom. They must consider international law, and may consider foreign law.

38 Section 36.

39 Section 37.

40 Section 38.

41 Section 39.

5 Principles of co-operative government⁴²

Government works at national, provincial and local levels, in Parliament, provincial legislatures, and municipal councils respectively. All spheres of government must:

- Keep the peace and national unity of South Africa.
- Look after the well-being of the people of South Africa.
- Be effective, transparent and accountable to the Republic as a whole.
- Be loyal to the Constitution and to South Africa.
- Respect the status, institutions, powers and functions of government in other areas.
- Not take on powers that the Constitution does not give them.
- Use their powers and perform their functions in a way that doesn't interfere with government in another area.
- Co-operate with each other by assisting, supporting, consulting with each other on things of common interest.

6 Parliament⁴³

Parliament is also called the national legislature, and is convened in Cape Town. Parliament makes laws for the country. These laws must not conflict with the Constitution and all citizens must follow them.

Parliament has two houses: the National Assembly and the National Council of Provinces.

6.1 The National Assembly⁴⁴

The National Assembly consists of between 350 and 400 Members of Parliament. The people of South Africa vote in general elections for people to represent them in the National Assembly. Only people who are 18 years or older can vote in an election. General elections are held every five years.⁴⁵ Members of the National Assembly are elected according to the system of proportional representation. This means people vote for the party and not for a person.

To be a member of the National Assembly a person must be a South African citizen who is allowed to vote, and must not have been declared by a court to be of unsound mind. The person must also not be employed by the State, and not be an unrehabilitated insolvent.

A person is also disqualified from being a member of the National Assembly for a five-year period if they were convicted of an offence, after the Constitution took effect, that carries a penalty of a minimum 12 months' imprisonment without the option of a fine. The five-year disqualification period starts after the sentence has been completed.⁴⁶

Permanent delegates to the National Council of Provinces or members of a provincial legislature or municipal council cannot be members of the National Assembly. If a member of the National Assembly joins another party then they will have to leave the National Assembly. Another person from the party that the person has left will take over the seat.

The National Assembly makes decisions by voting. If the decision is about a proposed new law (a bill), more than half of the members of the National Assembly must be present before there can be a vote. If the decision is about anything else, at least one-third of all the

⁴² Sections 40 and 41.

⁴³ Section 42.

⁴⁴ Section 46.

⁴⁵ Section 49.

⁴⁶ Section 47.

members must be present. The State president is not allowed to vote in the National Assembly.

6.2 The National Council of Provinces

The National Council of Provinces (NCOP) represents provincial and local government interests in Parliament and in the Executive. It works with the National Assembly to make and pass new laws and to change old laws. The NCOP has 90 members. Each province sends ten delegates. The ten delegates are four special delegates, including the Premier of the Province, and six permanent delegates.⁴⁷ The NCOP elects a Chairperson and two Deputies.⁴⁸

6.3 Privilege

Cabinet members, Deputy Ministers and members of the National Assembly have freedom of speech in the Assembly and in its committees, and are not liable to civil or criminal proceedings, arrest, imprisonment or damages for anything that they have said in, produced before or submitted to the Assembly or any of its committees.⁴⁹ A similar provision exists in relation to the National Council of Provinces.⁵⁰

This is known as 'parliamentary privilege' and is a cornerstone of democracy. It means that members can reveal any scandal without fear of being sued.

6.4 Making laws

A bill is a draft law that has not been passed by Parliament. An Act is a law that has been passed by Parliament.

A bill can be introduced in the National Assembly.⁵¹ A Cabinet member or Deputy Minister, a parliamentary committee, or a member of the National Assembly can introduce a bill to Parliament. The National Council of Provinces (NCOP) can introduce a bill if it is about something that falls under the powers of the provinces.

A bill that is passed in the National Assembly must be referred to the NCOP. A bill passed in the NCOP must be referred to the National Assembly.

The National Assembly looks at a bill, and sends it to a parliamentary portfolio committee for consideration. Parliamentary portfolio committees specialise in the same area as each government department. For example, there is a portfolio committee for health, prison services, defence, and so on.

The portfolio committee recommends changes and returns the bill to the National Assembly. The bill can go back and forth between the committee and the National Assembly.

At least half the members of the National Assembly must vote in favour of the bill for it to be approved by the National Assembly. The National Assembly approves the bill, and sends it to the NCOP.

The NCOP considers the bill. If the NCOP approves the bill, it refers the bill to the National Assembly to be passed.

The National Assembly can pass laws on any matter, including a matter in the functional areas listed in Schedule 4.⁵² However, it cannot pass laws on a matter in the functional areas

47 Section 60.

48 Section 64.

49 Section 58.

50 Section 71.

51 Section 73.

52 Section 68.

listed in Schedule 5, unless it becomes necessary for reasons such as maintaining national security.⁵³

If the bill is about something that only the National Assembly can make law on, then the NCOP can approve the bill, or can suggest changes but the National Assembly decides what the bill finally says. Each member of the NCOP has one vote, and a simple majority of members is needed to approve the bill. (A simple majority means that half the votes, plus at least one vote, must be in favour of the bill.)

If the matter is one that provinces can make law on, then the NCOP can approve the bill, suggest changes to it or reject it. To approve the bill, each province has one vote and at least five of the nine provinces must vote in favour of the bill. If the NCOP suggests changes or rejects the bill and the National Assembly doesn't agree, the NCOP can refer the bill to a mediation committee to resolve any differences. The mediation committee consists of nine members of the NCOP and nine members of the National Assembly. If the mediation committee resolves the differences, it refers the bill to the National Assembly to be passed. If the National Assembly and NCOP still cannot agree, then the National Assembly has to have a special vote to make the bill law. It will only become an Act if it gets a two-thirds (66%) majority in the National Assembly.

Once the National Assembly passes the bill, it is sent to the State president. They sign it and it gets published in the *Government Gazette*. When this has happened, the bill becomes law and is called an Act of Parliament.

If a bill is, or might be, unconstitutional, then members of the National Assembly can apply to the Constitutional Court for an order to declare that all or part of an Act of Parliament is unconstitutional. At least one-third of the members of the National Assembly must support this application. The application must be made within 30 days of the date on which the State president signed the Act.

If the State president thinks a bill goes against the Constitution, the State president can refuse to sign it and send it back to Parliament for them to look at it again. If Parliament makes the changes suggested by the State president, the State president must sign the bill.

If Parliament does not make these changes, the State president can either sign the bill or send it to the Constitutional Court to decide whether or not the law goes against the Constitution. If the Constitutional Court is satisfied with the bill, the State president must sign it. If the Constitutional Court is not satisfied with the bill, it will be sent back to Parliament. Parliament can either change the bill or let it fall away.

6.5 Bills amending the Constitution

There are very strict provisions relating to bills to amend the Constitution:⁵⁴

- Section 1 (Founding Provisions of the Constitution) may be amended by a bill passed by the National Assembly, with a supporting vote of at least 75% of its members; and the National Council of Provinces, with a supporting vote of at least six provinces.
- Chapter 2 (The Bill of Rights) may be amended by a bill passed by the National Assembly with a supporting vote of at least two-thirds of its members; and the National Council of Provinces with a supporting vote of at least six provinces.
- Any other provision of the Constitution may be amended by a bill passed by the National Assembly with a supporting vote of at least two-thirds of its members; and also by the National Council of Provinces (NCOP) with a supporting vote of at least six

⁵³ Section 45.

⁵⁴ Section 74.

provinces, if the amendment relates to a matter that affects the NCOP; alters provincial boundaries, powers, functions or institutions; or amends a provision that deals specifically with a provincial matter.

7 The State president and the national executive

The president is the Head of State, head of the national executive and commander-in-chief of the Defence Force. The State president is elected by the National Assembly from among its members. The State president has the powers entrusted by the Constitution and legislation, including those necessary to perform the functions of Head of State and head of the 'national executive'.

The national executive is the body that puts the laws written by Parliament into action. They cannot make new laws. They may also be called the cabinet.⁵⁵ The cabinet consists of the State president, the deputy president, and all the ministers. Each minister has a government department of which they are in charge.

The State president is responsible for:⁵⁶

- Agreeing to and signing bills.
- Referring a bill back to the National Assembly or the Constitutional Court for reconsideration of the bill's constitutionality.
- Summoning the National Assembly, the National Council of Provinces or Parliament to an extraordinary sitting to conduct special business.
- Appointing commissions of inquiry.
- Calling a national referendum in terms of an Act of Parliament.
- Receiving and recognising foreign diplomatic and consular representatives; appointing ambassadors, plenipotentiaries, and diplomatic and consular representatives.
- Pardoning or reprieving offenders and remitting any fines, penalties or forfeitures; and conferring honours.

The National Assembly, by a resolution adopted with a supporting vote of at least two-thirds of its members, may remove the State president from office only on the grounds of a serious violation of the Constitution or the law; serious misconduct; or the inability to perform the functions of office.⁵⁷

The State president selects and appoints the deputy president and the ministers in the cabinet. The State president can also appoint deputy ministers to assist members of the cabinet. The State president can dismiss any of these people they have appointed. The deputy president and the ministers are all accountable to the State president and to Parliament.

If the National Assembly, by a vote supported by a majority of its members, passes a motion of no confidence in the cabinet excluding the State president, the State president must reconstitute the cabinet.

If the National Assembly, by a vote supported by a majority of its members, passes a motion of no confidence in the State president, the State president and the other members of the cabinet and any deputy ministers must resign.⁵⁸

55 Section 91.

56 Section 84.

57 Section 89.

58 Section 102.

8 Provinces

There are nine provinces: Eastern Cape; Free State; Gauteng; KwaZulu-Natal; Mpumalanga; Northern Cape; Limpopo; North West and Western Cape.⁵⁹

Each province has its own provincial government. This is made up of a provincial legislature and a provincial executive.

The provincial legislatures write laws called ordinances for their provinces. Only people living in the province and people visiting it will have to follow these laws. Members of provincial legislatures are elected during the national general elections which take place every five years. There will be between 30 and 80 members in each provincial legislature.

The provincial executives are made up of the Premier and the Executive Council of that province. The Executive Council consists of the Premier and not more than ten others appointed by the Premier.

Provincial governments have certain powers to make decisions for their provinces. Provinces can make their own constitutions and their own laws, but these must follow the national Constitution. Provincial legislatures can pass laws on any matter in the functional areas listed in Schedules 4 and 5 of the Constitution.

National and provincial government share powers to make laws about some issues, like health, welfare and education. National government is responsible for setting national standards on these issues, so laws written by provinces must follow national standard-setting legislation.

A decision by a court that legislation prevails over other legislation does not invalidate that other legislation, but that other legislation becomes inoperative for as long as the conflict remains.⁶⁰

National legislation will generally prevail over provincial legislation, particularly when the national legislation deals with a matter that requires uniformity across the nation to be dealt with effectively.

National legislation will also prevail over provincial legislation in matters necessary for the maintenance of national and economic security and unity; protection of the common market in respect of the mobility of goods, services, capital and labour; promotion of economic activities across provincial boundaries; promotion of equal opportunity or equal access to government services; and protection of the environment.⁶¹

9 Local government

Local governments make decisions and laws for their own municipal areas. The objects of local government are to provide democratic and accountable government for local communities; ensure the provision of services to communities in a sustainable manner; promote social and economic development; promote a safe and healthy environment; and to encourage the involvement of communities and community organisations in the matters of local government.⁶²

Municipal councils carry out the executive and legislative functions of local government. Local governments make by-laws, but these must not go against the Constitution or any Act of Parliament or any provincial ordinance.

⁵⁹ Section 103.

⁶⁰ Section 149.

⁶¹ Section 146.

⁶² Section 152.

Municipal councils are elected every five years in local elections. People who can vote must live in the area covered by the local government or own property in the area, and they must be registered as a voter in the area.

Local governments have the right to administer the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5, and any other matter referred to them by national or provincial laws.

10 Courts and administration of justice

The judicial authority of the Republic is vested in the courts. 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.⁶³

The courts are the Constitutional Court; the Supreme Court of Appeal; the High Courts; magistrates' courts; and other courts set up by Acts of Parliament, for example, the Labour Court, and the small claims court.⁶⁴

10.1 The Constitutional Court⁶⁵

The Constitutional Court is made up of the Chief Justice of South Africa, the Deputy Chief Justice of South Africa and nine other judges. The judges can only be appointed for a maximum term of up to nine years.

The Constitutional Court is the highest court in all constitutional matters. It may decide only constitutional matters, and issues connected with decisions on constitutional matters and makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter.

Some of these cases involve disputes over constitutional matters between government bodies and between different levels of government, for example, between a national and a provincial body; whether laws passed (or about to be passed) by Parliament or provincial governments go against the Constitution; or if any conduct of the State president goes against the Constitution.

The Supreme Court of Appeal and the High Courts can make an order about how unconstitutional a law is. But they can only provide temporary relief until the case goes to the Constitutional Court. Only the Constitutional Court can confirm that it is unconstitutional and therefore invalid.

Anyone can take a case directly to the Constitutional Court. But it is often difficult for a person who is not a lawyer to do this because of the legal questions involved. Anyone who wants to bring a case to the Constitutional Court must usually start in a High Court. In certain cases the State will provide Legal Aid. A High Court will hear the case and it has the power to make a decision. The person can usually appeal against a decision of the High Court. The appeal will be heard in the Constitutional Court.

The Constitution requires at least eight judges to hear any case that goes to the Constitutional Court. Decisions of the Court are reached by a majority vote of the judges hearing a case.

63 Section 165.

64 Section 166.

65 Section 167.

The Constitutional Court works with written arguments presented by both parties to a dispute. Each party writes down its argument and submits this to the Constitutional Court. The judges listen to the arguments of each party but they do not hear evidence or question witnesses. They make their decisions based on the written arguments.

The Constitutional Court does not decide directly whether an accused person is guilty or whether damages should be awarded. The ordinary courts will decide this. The Constitutional Court has to decide on the meaning of the Constitution in relation to a dispute. The Court has to interpret the relevant section in the Constitution and see how it applies to the case. Sessions of the Constitutional Court are open to the public and press.

10.2 The Supreme Court of Appeal⁶⁶

The Supreme Court of Appeal has a Chief Justice, a Deputy Chief Justice and other judges. This court is the highest court of appeal in all cases, except cases about the Constitution. It decides on appeals from lower courts and decisions of this court must be followed by all lower courts.

10.3 High Courts⁶⁷

Each province has a High Court. If a person is unhappy about a decision of a High Court they can appeal to the Constitutional Court if it is a constitutional matter, or to the Supreme Court of Appeal in any other matter.

10.4 Magistrates' courts⁶⁸

Each area in the country called a magisterial district has its own magistrates' court. These courts deal with less serious criminal and civil courts. If a person is unhappy with the decision of a magistrate they may be able to appeal to a High Court of that province.

10.5 How judges are chosen⁶⁹

The State president consults the Judicial Services Commission and leaders of parties in the National Assembly. The State president then appoints the Chief Justice of South Africa and Deputy Chief Justice of South Africa.

The Judicial Services Commission is made up of the Chief Justice of South Africa; a Judge President of a High Court; the Minister of Justice; two advocates; two attorneys; a professor of law; four members of the National Council of Provinces; and four people chosen by the State president.

A judge may be removed from office only if the Judicial Service Commission finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct, and the National Assembly calls for that judge to be removed by a resolution adopted with a supporting vote of at least two-thirds of its members.⁷⁰

66 Section 168.

67 Section 169.

68 Section 170.

69 Section 174.

70 Section 177.

10.6 Prosecuting authority⁷¹

There is a single national prosecuting authority consisting of a National Director of Public Prosecutions, who is the head of the prosecuting authority, and is appointed by the State president, and Directors of Public Prosecutions and prosecutors as determined by an Act of Parliament.

The prosecuting authority has the power to institute criminal proceedings on behalf of the State, and to carry out any necessary functions incidental to instituting criminal proceedings.

11 State institutions that support constitutional democracy

The Constitution provides for government institutions to protect people from abuse by the government. They are referred to as the protection mechanisms. It is their job to make sure that the government does its work properly. These institutions are independent and report to Parliament at least once a year. They are the Public Protector;⁷² South African Human Rights Commission;⁷³ Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities;⁷⁴ Commission for Gender Equality;⁷⁵ Auditor General;⁷⁶ Electoral Commission;⁷⁷ and the Independent Authority to Regulate Broadcasting.⁷⁸

12 Public administration

Public administration refers to people who work for the government, also called the public service. This includes the police, army and people who get a salary from the government, including all those in government departments such as the Department of Education. Public administration must be governed by the democratic values and principles enshrined in the Constitution.⁷⁹

The Public Service Commission is an independent body. It comprises a total of 14 commissioners appointed by the State president: five commissioners must be approved by the National Assembly, and one commissioner for each province must be nominated by the Premier of the province.

Its job is to monitor, evaluate and oversee the organisation and administration of the public service, and to report to Parliament. It investigates, monitors and evaluates the organisation and administration and the personnel practices of the public service to propose measures to ensure effective and efficient performance within the public service.⁸⁰

The public service is structured in terms of national legislation, and must loyally execute the lawful policies of the government of the day.⁸¹

71 Section 179.

72 Section 182.

73 Section 184.

74 Section 185.

75 Section 187.

76 Section 188.

77 Section 190.

78 Section 192.

79 Section 195.

80 Section 196.

81 Section 197.

The terms and conditions of employment in the public service must be regulated by national legislation. Employees are entitled to a fair pension as regulated by national legislation. No employee of the public service may be favoured or prejudiced only because that person supports a particular political party or cause.

Provincial governments are responsible for the recruitment, appointment, promotion, transfer and dismissal of members of the public service in their administrations within a framework of uniform norms and standards applying to the public service.

13 Security services

The security services consist of a single defence force, a single police service and any intelligence services established in terms of the Constitution. No other army apart from the South African army will be allowed. National security is controlled by Parliament and the national executive.

The security services must follow the law and the Constitution and any international treaties signed by South Africa. They are there to protect the people and the country. They are not allowed to act for or against a political party.⁸²

14 Traditional leaders

The Constitution recognises traditional leaders and indigenous or customary law. It says the courts can apply customary law if it is appropriate in a case. But, customary laws cannot go against the Constitution. For example, a customary law that goes against the Bill of Rights will not be acceptable in a court.⁸³

The Constitution allows for national law and provincial law to establish councils of traditional leaders. These councils allow traditional leaders to play an advisory role to national and provincial governments when dealing with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law.⁸⁴

15 Finance

The Constitution sets up a National Revenue Fund. All money raised by the national government must go into this Fund. For example taxes, fines and donations. Parliament and provincial governments get their money from this Fund.⁸⁵

The Financial and Fiscal Commission is an independent body subject only to the Constitution and the law. It must not be biased in its work. It can advise and make recommendations to any level of government about how to spend their money. It can also give advice about how much money should go to provincial and local governments. The Finance and Fiscal Commission advises the government on how much money should be allocated to the provincial and local governments. The budgets are debated in Parliament. Parliament can approve or reject how the money will be allocated. The money that has been budgeted for the different departments, such as housing, education, environment, is given to these departments.

⁸² Section 199.

⁸³ Section 211.

⁸⁴ Section 212.

⁸⁵ Section 213.

The Constitution recognises the establishment of the South African Reserve Bank, whose principal role is to protect the value of the currency in the interest of balanced and sustainable economic growth.⁸⁶

16 General provisions

International agreements only become law in South Africa once they are made law by an Act of Parliament and they are published in the *Government Gazette*.⁸⁷

17 Schedules

There are eight Schedules that form part of the Constitution. Only five will be discussed in this text.

17.1 Schedule 1

This schedule sets out the design of the national flag.

17.2 Schedule 2

This schedule sets out the wording of oaths and solemn affirmations.

17.3 Schedule 3

This schedule sets out the election procedures for meetings of the National Assembly to elect the President, or the Speaker or Deputy Speaker of the Assembly; the National Council of Provinces to elect its Chairperson or a Deputy Chairperson; and a provincial legislature to elect the Premier of the province or the Speaker or Deputy Speaker of the legislature.

It also sets out the formula to determine party participation in provincial delegations to the National Council of Provinces.

17.4 Schedule 4

This lists concurrent functional areas of the national and provincial legislatures. This means that the National Assembly and provincial legislatures can pass laws on any matter, including a matter in the functional areas listed in Schedule 4.

⁸⁶ Section 223.

⁸⁷ Section 231.

Part A

<ul style="list-style-type: none"> • Administration of indigenous forests. • Agriculture. • Airports (not international or national). • Animal control and diseases. • Casinos, racing, gambling and wagering, excluding lotteries and sports pools. • Consumer protection. • Cultural matters. • Disaster management. • Education at all levels, excluding tertiary education. • Environment. • Health services. • Housing. • Indigenous law and customary law. • Industrial promotion. • Language policy and the regulation of official languages. 	<ul style="list-style-type: none"> • Media services. • Nature conservation, excluding national parks. • Police. • Pollution control. • Population development. • Public transport. • Public works only in respect of the needs of provincial government. • Regional planning and development. • Road traffic regulation. • Soil conservation. • Tourism. • Trade. • Traditional leadership. • Urban and rural development. • Vehicle licensing. • Welfare services.
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Part B

The following are local government functions. The national government and the provincial governments have the legislative and executive authority to see that municipalities perform these functions.

<ul style="list-style-type: none"> • Air pollution. • Building regulations. • Child care facilities. • Electricity. • Ferries, jetties, piers and harbours. • Fire-fighting services. • Local tourism. • Municipal airports. 	<ul style="list-style-type: none"> • Municipal planning. • Municipal public transport. • Municipal public works. • Stormwater management systems in built-up areas. • Trading regulations. • Water and sanitation services (domestic water use and sewage disposal systems).
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17.5 Schedule 5

Part A

Functional areas that belong only to the provinces:

<ul style="list-style-type: none"> • Abattoirs. • Ambulance services. • Archives that belong to the provinces. • Libraries (but not national libraries). • Liquor licences. • Museums (but not national museums). 	<ul style="list-style-type: none"> • Provincial planning. • Provincial cultural matters. • Provincial recreation and amenities. • Provincial sport. • Provincial road and traffic. • Vets.
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Part B

The following are local government functions. The provincial governments have the legislative and executive authority to see that municipalities perform these functions.

<ul style="list-style-type: none"> • Beaches and amusement facilities. • Billboards and display of advertisements in public places. • Cemeteries, funeral parlours and crematoria. • Cleansing. • Control of public nuisances. • Control of businesses that sell liquor to the public. • Facilities to accommodate and bury animals. • Fences. • Licensing of dogs. • Licensing and control of businesses that sell food to the public. • Local amenities. 	<ul style="list-style-type: none"> • Local sport facilities. • Markets. • Municipal abattoirs. • Municipal parks and recreation. • Municipal roads. • Noise pollution. • Pounds. • Public places. • Refuse removal and refuse dumps. • Street trading. • Street lighting. • Traffic and parking.
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THIS CHAPTER IN ESSENCE

- 1 The Bill of Rights applies to all laws. It must be followed by all branches of government and all government bodies. This means it must be followed by the legislatures (bodies that make laws); the executive (bodies that carry out the laws); and the judiciary (the courts).
- 2 Parliament has two houses: the National Assembly and the National Council of Provinces.
- 3 A bill is a draft law that has not been passed by Parliament. An Act is a law that has been passed by Parliament.
- 4 Each province has its own provincial government. This is made up of a provincial legislature and a provincial executive.
- 5 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.
- 6 The Constitutional Court is the highest court in all constitutional matters. It may decide only constitutional matters, and issues connected with decisions on constitutional matters and makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter.
- 7 The Supreme Court of Appeal has a Chief Justice, a Deputy Chief Justice and other judges. This court is the highest court of appeal in all cases, except cases about the Constitution. It decides on appeals from lower courts and decisions of this court must be followed by all lower courts.