

## **NOTE**

In refining the draft, the Working Group was careful to avoid changing the intended meaning of the original text prepared through the political process. Occasionally however, the meaning was ambiguous or unclear to us. In those cases, we attempted after carefully considering the content, the related provisions, and the supporting documents.

A revision must communicate what the original authors intended, but meaning is often subtle, and we may have misunderstood nuances of some provisions of the text. Where that is the case, the resulting errors were unintended.

# Contents

<b>CHAPTER 1</b>	
<b>Constitutional Democracy / Founding Principles .....</b>	<b>3</b>
<b>CHAPTER 2</b>	
<b>"National Identity" .....</b>	<b>4</b>
<b>CHAPTER 3</b>	
<b>Bill of Rights .....</b>	<b>5</b>
<b>CHAPTER 4</b>	
<b>Parliament .....</b>	<b>18</b>
<b>CHAPTER 5</b>	
<b>The National Executive.....</b>	<b>24</b>
<b>CHAPTER 6</b>	
<b>Courts and Administration of Justice .....</b>	<b>30</b>
<b>CHAPTER 7</b>	
<b>Institutions Supporting Constitutional Democracy .....</b>	<b>37</b>
<b>CHAPTER 8</b>	
<b>Provinces</b>	
<b>.....</b>	<b>41</b>
<b>CHAPTER 9</b>	
<b>Local Government.....</b>	<b>50</b>
<b>CHAPTER 10</b>	
<b>Indigenous Leaders .....</b>	<b>50</b>
<b>CHAPTER 11</b>	
<b>Security Services.....</b>	<b>51</b>
<b>CHAPTER 12</b>	
<b>Public Administration .....</b>	<b>55</b>
<b>CHAPTER 13</b>	
<b>Finance .....</b>	<b>57</b>
<b>CHAPTER 14</b>	
<b>Amendment of the Constitution .....</b>	<b>60</b>

PREAMBLE

**CHAPTER 1**

**Constitutional Democracy / Founding Principles**

**Republic of South Africa / Constitutional Democracy<sup>1</sup>**

1. The Republic of South Africa is one, sovereign state founded on respect for human rights, [a commitment to achieving equality], a common South African citizenship, universal franchise, regular elections and other principles of constitutional democracy as enshrined in this Constitution.

**Supremacy of the Constitution**

2. The Constitution is the supreme law of the Republic. It binds the Republic, its institutions, its citizens and all persons within its boundaries; law or conduct inconsistent with it is invalid.

---

<sup>1</sup> The wording of this section must be considered in relation to the content of the Preamble, which has yet to be drafted.

**CHAPTER 2**  
**"National Identity"<sup>2</sup>**

---

<sup>2</sup> This chapter could contain provisions on franchise, citizenship, language and symbols. If the provisions are technical, it might be preferable to put the Bill of Rights as Chapter 2, instead. See Report page 12.

## **CHAPTER 3 Bill of Rights**

### **State Duty to Respect and Protect Rights**

3. Human dignity is the foundation of a just society; the state therefore must respect and protect the rights declared in this Bill.

### **Equality**

4.
  - (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
  - (2) Equality includes the full and equal enjoyment of all rights and freedoms. To achieve equality, legislative and other measures designed to protect and advance groups or categories of persons disadvantaged by unfair discrimination may be used.
  - (3) Neither the state nor any person may [unfairly] discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth.
  - (4) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

### **Human Dignity**

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

### **Life (3 Options)**

#### **Option 1**

6. Everyone has the right to life.

#### **Option 2**

Everyone has the right to life, and the right not to be deprived of life except by execution of a court sentence following conviction of a crime for which the death penalty is prescribed by law.

#### **Option 3**

- (1) Everyone has the right to life, which must be respected by others and protected by law from the moment of conception to natural death.
- (2) No one may be deprived of life except by execution of a court sentence following conviction of a crime for which the death penalty is prescribed by law.

### **Freedom and Integrity of the Person**

7. (1) Everyone has the right to physical and psychological integrity and to freedom of the person.
- (2) No one may be -
  - (a) deprived of liberty arbitrarily or without just cause; or
  - (b) detained without trial.
- (3) No one may be -
  - (a) tortured in any way;
  - (b) treated or punished in a cruel, inhuman or degrading way; or
  - (c) subjected to medical or scientific experiments without their [that person's] consent.

### **Slavery, Servitude and Forced Labour**

8. No one may be subjected to slavery, servitude or forced labour.

### **Privacy**

9. (1) Everyone has the right to privacy, including the right not to have -
  - (a) their person, home, or property searched;
  - (b) their possessions seized; or
  - (c) the privacy of their communications violated.
- (2) Every juristic person has the right not to have -
  - (a) their property searched;
  - (b) their possessions seized; or
  - (c) the privacy of their communications violated.

### **Freedom of Religion, Belief and Opinion**

10. (1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion, including freedom to change religion or belief, and freedom to practise religion alone or in community, in private or in public.
- (2) Religious observances may be conducted at state or state-aided institutions provided -
  - (a) that those observances follow any rules established by an appropriate authority;
  - (b) that they are conducted on an equitable basis; and
  - (c) that attendance at them is free and voluntary.
- (3) Nothing in this Bill of Rights precludes legislation recognising -
  - (a) a system of personal and family law adhered to by persons professing a particular religion; and
  - (b) the validity of marriages concluded under a system of religious law subject to specified procedures.

### **Freedom of Expression<sup>3</sup>**

---

<sup>3</sup> 11 - The words "of speech" were removed, since speech is one form of expression, and "freedom of speech" is included within the meaning of "freedom of expression".

11. (1) Everyone has the right to freedom of expression, including -
  - (a) freedom of the press and other media; and
  - (b) freedom to receive and impart information and ideas.
- (2) The protection in subsection (1) does not extend to either -
  - (a) propaganda for war; or
  - (b) advocacy of hatred that constitutes incitement to discrimination, hostility or violence, and that is based on race, ethnicity, gender, or religion.
- (3) The state must regulate any media that it finances or controls to ensure that it is impartial and presents a diversity of opinion.

### **Assembly, Demonstration and Petition**

12. Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, or to present petitions.

### **Freedom of Association**

13. Everyone has the right to freedom of association.

### **Political Rights**

14. (1) Every citizen is free to make political choices which includes the rights -
  - (a) to form a political party;
  - (b) to participate in the activities of, or to recruit members for, a political party; and
  - (c) to campaign for a political party or cause.
- (2) Every citizen has the right to vote in secret in free, fair, and regular elections.
- (3) Every citizen has the right to stand for election to public office and, if elected, to hold office.

### **Citizenship**

15. No citizen may be deprived of citizenship.

### **Freedom of Movement and Residence**

16. (1) Everyone has the right to freedom of movement and residence anywhere in the Republic.
- (2) Everyone has the right to leave the Republic.
- (3) Every citizen has the right to enter and to remain in the Republic.
- (4) Every citizen has the right to a passport.

### **Economic Activity**

Option 1

17. No provision regarding a right to economic activity.

Option 2

17. (1) Everyone has the right to pursue a livelihood and engage in economic activity anywhere in the Republic.
- (2) Subsection (1) does not preclude measures that are designed to promote the protection or the improvement of the quality of life, economic growth, human development, social justice, basic conditions of employment, fair labour practices, or equal opportunity for all, provided such measures are justifiable in an open and democratic society based on freedom and equality.

**Labour Relations**

18. (1) Everyone has the right to fair labour practices.
- (2) Workers have the right -
- (a) to form and join trade unions;
  - (b) to participate in the activities and programmes of a trade union; and
  - (c) to strike.
- (3) Employers have the right -
- (a) to form and join employers' organisations; and
  - (b) to participate in the activities and programmes of an employers' organisation.
- [(c) to lock-out].<sup>4</sup>
- (4) Every trade union and every employers' organisation has the right -
- (a) to determine its own administration, programmes and activities
  - (b) to organise;
  - (c) to bargain collectively;
  - (d) to form and join a federation.

**Environment**

19. Everyone has the right -
- (a) to an environment that is not harmful to their health or well-being;
  - (b) to have their environment protected through reasonable measures, including legislation, designed to -<sup>5</sup>
    - (i) prevent pollution and ecological degradation;
    - (ii) promote conservation; and
    - (iii) secure sustainable development and use of natural resources.

**Property**

20. (1) Property and the right of inheritance are guaranteed. Its content and limits may be determined by law. Property imposes duties. Its use should also serve the common good.

---

<sup>4</sup> The right to lock-out in subsection (3)(c) has been bracketed as its inclusion is contentious.

<sup>5</sup> Status: Accepted by CC



- (2) No one may be deprived of property except in accordance with a law of general application.
- (3) Property may be expropriated in terms of a law of general application -
  - (a) for a public purpose or in the public interest; and
  - (b) subject to payment of compensation and a payment schedule which has been either -
    - (i) agreed; or
    - (ii) decided by a court of law to constitute an equitable balance between the public interest and the interests of those affected.
- (4) When any court decides either the amount or the payment schedule of compensation in terms of subsection (3)(b)(ii), the court must consider all relevant factors, including, with respect to the amount of compensation -
  - (a) the current use of the property;
  - (b) the history of its acquisition; and
  - (c) its market value.
- (5) Every person and community dispossessed of land after [decided date] as a result of any law or practice that would have been inconsistent with section 4 had that section been in operation at the time of dispossession, has a right to restitution of that land, or alternatively, to equitable redress in the manner described by law.
- (6) . . .

### **Housing and land**

21. (1) Everyone without adequate resources has a right to reasonable and appropriate measures by the state -
  - (a) to secure adequate housing; and
  - (b) to obtain equitable access to land.
- (2) Everyone has the rights not to be evicted from home, or have their home demolished -
  - (a) arbitrarily ; and
  - (b) without an order from a court made after considering the circumstances under which such home is occupied, the duration of the occupation and the availability of suitable alternative accommodation.

### **Health**

22. (1) Everyone has the right to health care, including reproductive health care, which the state must take reasonable and progressive measures to improve and make accessible to all; and
- (2) Any measures taken by the state in terms of subsection (1) must include at least necessary medical treatment for anyone without adequate resources.

### **Social Assistance, Food and Water**

23. (1) Everyone who is unable to support themselves and their dependants has the right to receive reasonable and appropriate social assistance from the

state.

- (2) Everyone has the right to clean water and sufficient food which the state must take reasonable and appropriate measures to make accessible.

## Children

24. Every child has the right to -
  - (a) a name and a nationality from birth;
  - (b) family care, or appropriate alternative care when removed from the family environment;
  - (c) basic nutrition and health and social services;
  - (d) be protected from maltreatment, neglect, or abuse;
  - (e) be protected from exploitative labour practices, and not to be required or permitted to perform work or provide services that are inappropriate for a person of that child's age, or that place at risk the child's well-being, education, physical or mental health, or spiritual, moral, or social development; and
  - (f) not to be detained except as a measure of last resort, in which case, in addition to the rights the child enjoys under sections 7 and 31, the child may be detained only for the shortest possible period of time and has the right to be -
    - (i) kept separately from other detained persons over the age of 18 years; and
    - (ii) treated in a manner, and kept in conditions, that take account of the child's age.
- (2) The child's best interest is of paramount importance in every matter concerning the child.
- (3) In this section, "child" means a person under the age of 18 years.

## Education

25. (1) Everyone has the right to -
  - (a) a basic education, including adult basic education, in a state or state-aided institution;
  - (b) further education, which the state must take reasonable and progressive measures to make generally available and accessible; and
  - (c) choose instruction in any language where instruction in that language can be reasonably provided at state or state-aided institutions.
- (2) Everyone has the right to establish and maintain, at their own expense, private educational institutions that-
  - (a) do not discriminate on the basis of race;
  - (b) are registered with the state; and
  - (c) maintain standards that are not inferior to standards at comparable state-aided educational institutions.

Alternative wording suggested for subsection (2)(c)

- (c) to educational institutions based on a common culture, language, or religion, provided that there shall be no discrimination on the ground of race and, provided further that the state shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it has been established on the basis of a common language, culture, or religion.

### **Academic Freedom**

- 26. [(1) Every institution of higher learning and everyone within these institutions has the right to academic freedom.
- (2) Everyone has the right to freedom of artistic creativity and scientific research [activity].]

### **Language and Culture**

- 27. Everyone has the right to choose a language and a culture, and to use that language and participate in the life of that culture; but, no one exercising this right may violate the rights of anyone else.

### **Access to Information**

- 28. Everyone has a right to access -
  - (a) any information held by the state; and
  - (b) any information that is held by another person and that is required for the exercise or protection of any rights.

### **Administrative Justice (3 Options)**

#### **Option 1**

- 29. (1) Everyone has the right to administrative action that is lawful, reasonable [justifiable], and procedurally fair.
- (2) Everyone has the right to be given written reasons for administrative action, unless the reasons have been published.

#### **Option 2**

The same as Option 1, except delete the words "lawful" and "procedurally" from subsection 1.

#### **Option 3**

- (1) Anyone whose rights or interests are affected or threatened by administrative action has the right -
  - (a) to have that administrative action be fair, reasonable, and justifiable; and
  - (b) to be given written reasons for that administrative action, unless those

- reasons have been published.
- (2) Anyone whose rights or legitimate expectations are affected or threatened by administrative action has the right to have that administrative action be reasonably fair.

### **Access to justice**

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

### **Arrested, detained and accused persons**

31. (1) Everyone who is arrested for allegedly committing an offence has the right -
- (a) to remain silent;
  - (b) to be informed, promptly and in a language that the arrested person understands -
    - (i) of the right to remain silent; and
    - (ii) of the consequences of not remaining silent;
  - (c) not to be compelled to make any confession or admission that could be used in evidence against that person;
  - (d) as soon as reasonably possible, but at least within 48 hours of being arrested, either to be released or to be brought before a court of law and, while there, to be either charged or informed of a reason for the detention to continue; but, if the period of 48 hours after a person has been arrested expires outside ordinary court hours, that person may be detained until the next court day; and
  - (e) to be released with or without bail, unless the interests of justice require that person to be detained.[if the interests of justice permit that person to be released.]
- (2) Everyone who is detained, including every sentenced prisoner, has the right-
- (a) to be informed, promptly and in a language that the detained or imprisoned person understands, of the reason for being detained;
  - (b) to choose and to consult with a legal practitioner, and to be informed of this right promptly and in a language that the detained person understands;
  - (c) to have a legal practitioner provided by the state if substantial injustice would otherwise result, and to be informed of this right promptly and in a language that the detained person understands;
  - (d) to challenge the lawfulness of the detention in person before a court of law and, if the detention is unlawful, to be released;
  - (e) to conditions of detention that are consistent with human dignity, including at least the provision of adequate accommodation, nutrition, reading material, and medical treatment at state expense; and
  - (f) to communicate with, and be visited by, that person's
    - (i) spouse or partner;
    - (ii) next of kin;

- (iii) chosen religious counsellor; and
  - (iv) chosen medical practitioner.
- (3) Every accused has a right to a fair trial, which includes the right -
- (a) to be informed of the charge with sufficient details to answer the charge;
  - (b) to have adequate time and facilities to prepare a defence;
  - (c) to a public trial that begins, and concludes, without unreasonable delay in an ordinary court of law;
  - (d) to be present when being tried;
  - (e) to choose and be represented by a legal practitioner, to have a legal practitioner provided at state expense if substantial injustice would otherwise result, [where the interests of justice require it,] and to be informed of both of these rights;
  - (f) to be presumed innocent, and to remain silent, and not to testify during the proceedings;
  - (g) to adduce and challenge evidence;
  - (h) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;
  - (i) not to be convicted for any act or omission that was not an offence under either national or international law at the time it was committed or omitted;
  - (j) not to be tried for any offence in respect of an act or omission for which that person has previously been either acquitted or convicted;
  - (k) to be sentenced within a reasonable time after being convicted; and
  - (l) to the benefit of the least severe of the prescribed punishments, if the prescribed punishment for the offence has been changed during the period between the time that the offence was committed and the time of sentencing;
  - (m) of appeal to, or review by, a higher court.
- (4) No one may be compelled to give self-incriminating evidence.<sup>6</sup>
- [(5) Any evidence obtained in a manner that violates any right in this Bill must be excluded if the admission of that evidence would bring the administration of justice into disrepute.]

### Limitation of Rights

32. (1) The rights in this Bill, except the rights in section 34, may be limited by or pursuant to law of general application only to the extent that the limitation of a right is -
- (a) [reasonable and justifiable\ necessary] in an open and democratic society based on freedom and equality; and
  - (b) compatible with the nature of the right that it limits.
- (2) The provisions of this Bill do not prevent the state from adopting any legislative or other measures designed to prevent or prohibit unfair

---

<sup>6</sup> The scope of this section may need to be considered by the Technical Committee.

discrimination.

- (3) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Constitution.

### State of Emergency

33. (1) An Act of Parliament may provide that a state of emergency may be declared whenever -
- (a) the life of the nation is threatened by war, invasion, general insurrection, disorder, national disaster, or other public emergency; and
  - (b) declaring a state of emergency is necessary to restore peace or order.
- (2) Any declaration of a state of emergency, and any legislation enacted or other action taken in consequence of that declaration, may be effective only -
- (a) prospectively from the date of the declaration; and
  - (b) for no more than 21 days from the date of the declaration, unless the National Assembly resolves to extend the declaration. The National Assembly, by a majority of at least two-thirds of its members, may resolve to extend a declaration of state of emergency for a period of up to three months, or for consecutive periods of up to three months each. [for no more than 14 days . . . up to 60 days, or for consecutive periods of up to 60 days each.]
- (3) Any legislation enacted in consequence of a declared state of emergency may derogate from this Bill only to the extent that -
- (a) is strictly required by the emergency;
  - (b) it is consistent with the Republic's obligations under international law;
  - (c) it conforms to subsection (4); and
  - (d) it is published in the Gazette immediately after being enacted.
- (4) No Act that authorises a declaration of a state of emergency, and no legislation enacted or other action taken in consequence of a declaration, may permit or authorise -
- (a) the creation of retrospective crimes or the imposition of retrospective penalties;
  - (b) indemnifying the state, or anyone acting under state authority, for unlawful acts committed during the state of emergency; or
  - (c) any derogation from this section or any of the sections listed below.

Section 4	Equality
Section 5	Human Dignity
Section 6	Life
Section 7(3)	Freedom from torture and degrading treatment
Section 8	Freedom from servitude (excluding forced labour)
Section 10	Freedom of Religion, Belief and Opinion
Section 18(1)	Right to fair labour practices
Section 18(2)&(3)	Right to form and join trade unions or employers'

organisations

- Section 24(1)(d) Right of children to not be abused or neglected
- Section 24(1)(e) Right of children to freedom from exploitative labour practices
- Section 24(1)(f) Rights of children who are detained
- Section 30 Right of access to the courts
- Section 31(2)(d) Right to challenge detention and be released
- Section 31(1)(a)&(b) Right to remain silent, and to be informed of that right
- Section 31(1)(c) Right not to be compelled to confess or make statements
- Section 31(3)(4)&(5) Right to a fair trial
- Section 32 Rights contained in limitation section.
- Section 35 Application of the Bill

- (5) Despite subsection (4)(a), nothing in this section prevents the state trying and punishing anyone for an act or omission that, at the time it was committed, was criminal according to the general principles of international law.
- (6) Any superior court may enquire into the validity of -
  - (a) a declaration of a state of emergency;
  - (b) any extension of a declaration of a state of emergency; or
  - (c) any legislation enacted, or other action taken, under a declaration of a state of emergency.
- (7) Whenever anyone is detained in consequence of a declaration of a state of emergency, the following conditions must be observed -
  - (a) an adult family member or friend of the detainee must be contacted as soon as reasonably possible, and told that the person has been detained;
  - (b) a notice must be published in the Gazette within five days of the person being detained, stating the detainee's name and referring to the emergency measures under which that person has been detained;
  - (c) the detainee must be allowed to choose, and be visited at any reasonable time by, a medical practitioner;
  - (d) the detainee must be allowed to choose, and be visited at any reasonable time by, a legal representative;
  - (e) a court must review the detention as soon as reasonably possible, but no later than 10 days after the date the person was detained, and the court must release the detainee unless the detention is necessary to restore peace and order;
  - (f) if the court does not release a detainee, that detainee may apply to the court for a further review after 10 days, and the court must again review the detention, and must release the detainee unless the detention is still necessary to restore peace and order;
  - (g) the detainee must be allowed to appear in person before any court considering the detention, and to be represented by a legal practitioner at those hearings, and to make representations against continued detention; and
  - (h) the state must present written reasons to the court to justify the detention or continued detention of the detainee, and must give a

copy of those reasons to the detainee at least two days before the court reviews the detention.

- (8) If a court releases a detainee, that person may not be detained again unless the state first shows a court good cause for re-detaining that person.

### **Enforcement of rights**

34. (1) Anyone listed in this section has the right to apply to a competent court, alleging that a right declared in this Bill has been infringed or threatened, and the court may grant appropriate relief including a declaration of rights. The persons who may apply for relief are:
- (a) anyone acting in their own interests;
  - (b) anyone acting on behalf of another person who cannot act in their own name;
  - (c) anyone acting as a member of, or in the interest of, a group or a class of persons;
  - (d) anyone acting in the public interest; and
  - (e) an association acting in the interests of its members.
- (2) If anyone, acting as a member of, or in the interests of, a group or class of persons, applies for relief and the court makes an order that may prejudice the members of that group or class, that order is not binding on the members of that group or class unless they have received notice of the action and have had an opportunity to exclude themselves from the group or class.

### **Application**

35. (1) This Bill applies to all law and binds the legislature, the executive, the judiciary, and all other organs, institutions, and agencies of the state at every level and, where applicable, binds all natural and juristic persons.<sup>7</sup>
- (2) This Bill does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law, or legislation, to the extent that they are consistent with this Bill.

### **Option 1**

- (3) Juristic persons are entitled to the rights in the Bill of Rights, to the extent that the nature of the rights, and of the juristic persons, permit.

### **Option 2**

- (3) Juristic persons are entitled to the following rights . . .

---

<sup>7</sup> The reference to "organs, institutions and agencies of the state" must be reconsidered when a standardized method of referring to the state has been decided.



## **Interpretation of the Bill of Rights**

36. (1) When interpreting this Bill of Rights, every court -
  - (a) must promote the values that underlie an open and democratic society based on freedom and equality;
  - (b) must consider all applicable international law; and
  - (c) may consider comparable foreign case law.
- (2) When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with this Bill of Rights over any alternative interpretation of the legislation that is inconsistent with this Bill.
- (3) When interpreting any legislation, and when developing the common law or customary law, every court must promote the spirit, purport, and objects of the Bill of Rights.

## CHAPTER 4 Parliament

### Legislative authority of Republic

37. The legislative authority of the Republic vests in Parliament, which consists of the National Assembly ... and has the power to make laws ...

### The National Assembly

#### Composition and election of National Assembly<sup>8</sup>

38. The National Assembly consists of ... women and men elected as members in terms of an electoral system that is prescribed by national legislation, is based on a common voters roll and results, in general, in proportional representation.

#### Qualifications of members of National Assembly<sup>9</sup>

39. (1) Every citizen is eligible to be a member of the National Assembly unless disqualified in terms of subsection (2).
- (2) The following may not be a member of the National Assembly:
- (a) Anyone disqualified from voting in elections of the National Assembly.
  - (b) Anyone holding office of profit under the Republic, except the Deputy President, Ministers and Deputy Ministers and any other office-bearers whose functions have been declared by national legislation to be compatible with the functions of a member of Parliament.
  - (c) Members of [the Senate], a provincial legislature or a local government.
  - (d) Unrehabilitated insolvents.
  - (e) Anyone declared to be of unsound mind by a court of the Republic.
  - (f)<sup>10</sup> Anyone who was serving a sentence of more than 12 months-imprisonment without the option of a fine when the Constitution takes effect.
  - (g) Anyone who, after the Constitution takes effect, has been sentenced to more than 12 months-imprisonment without the option of a fine, either in the Republic, or outside the Republic if the conduct constituting the offence would have been an offence in the Republic;

---

<sup>8</sup> **37&38 - The text of these sections was combined in the new section 38 and revised to be declaratory, to remove ambiguity, and to remove the possessive form of "voters".**

<sup>9</sup> **41 - Revised to present eligibility in a positive rather than negative tone. The exclusions were reordered to place office holders ahead of criminals, etc.**

<sup>10</sup> **39 - (2)(f) and (g): There are some small inconsistencies between these two provisions. See Report page 14.**

- but, no one may be regarded as having been sentenced until an appeal against the conviction or sentence has been determined, or until the time for an appeal has expired.
- (3) The disqualification of a person in terms of either subsection (2)(f) or (g) ends five years after their sentence has been completed.
- [(4) Anyone who sits or votes in the National Assembly, knowing that they are not a member, will be fined in terms of the rules and orders of the Assembly.]<sup>11</sup>

### **Vacancies**<sup>12</sup>

40. (1) A vacancy exists in the National Assembly when -
- (a) a member ceases to be eligible;
  - (b) a member resigns or dies; or
  - (c) a member is absent from Parliament without permission in circumstances for which the rules and orders of the National Assembly prescribe loss of membership.
- (2) Vacancies in the National Assembly must be filled in terms of national legislation.<sup>13</sup>

### **Oaths or affirmation by members**<sup>14</sup>

41. Before members of the National Assembly may begin to perform their functions in the Assembly, they must swear or affirm faithfulness to the Republic and obedience to the Constitution, by solemn declaration in accordance with Schedule . . .

### **Sittings and recess periods**<sup>15</sup>

---

<sup>11</sup> This section seems unnecessary; it also makes a fine obligatory. See Report page 14.

<sup>12</sup> Clause 42(c) in the Consolidated Draft is superfluous because it is covered by subclause (1)(a).

The CA has not decided whether crossing the floor leads to loss of membership. If it does a provision to that effect should be added here.

*42 & 43 (Of interim constitution) - Combined in new section 40.*

<sup>13</sup> This clause should be checked when final details on the electoral system are settled. The system for filling vacancies must comply with the same requirements as the electoral system in general.

<sup>14</sup> This is a standard provision, used each time an oath or affirmation is required (although the wording differs for the judiciary). The full procedure as well as the terms of oath will be included in a schedule. See Report page 15.

*44 - Revised to remove the archaic and vague expression "take his seat in the Assembly".*

<sup>15</sup> This proposes that the President of the Constitutional Court should choose the date of the first sitting because it has been decided that he or she will preside over the election of the President at that sitting.

42. (1) The first sitting of the National Assembly after an election must take place at a time and on a date determined by the President of the Constitutional Court, but not more than 10 days after the election result has been declared. The National Assembly may determine the time and duration of its other sittings and its recess periods.
- (2) The President may summon the National Assembly to an extraordinary sitting at any time to conduct urgent business.
- (3) The seat of the National Assembly is ... Sittings at other places are permitted only on the grounds of public interest, security or convenience, and if provided for in the rules and orders of the National Assembly.<sup>16</sup>

### **Duration of National Assembly<sup>17</sup>**

43. (1) The National Assembly is elected for a term of five years from the date of its election.
- (2) The National Assembly may be dissolved before the end of its term if it passes a vote of no confidence in the Cabinet.
- (3) The National Assembly remains competent to function from the time it is dissolved or its term expires until the day before polling for the next National Assembly.
- (4) When the National Assembly is dissolved, or its term expires, the President by proclamation must call and set dates for an election, which must be within 90 days of the date the National Assembly was dissolved, or of the expiry of its term.<sup>18</sup>

### **Speaker and Deputy Speaker**

44. (1) At its first sitting after a general election, and when necessary to fill a vacancy, the National Assembly must elect from among its members a man or woman to be Speaker and a woman or man to be Deputy Speaker.<sup>19</sup>

---

*45(1) - Revised to place first sitting ahead of second and later sittings.*

<sup>16</sup> It is not agreed where the seat of Parliament will be.

Special sittings - see Report page 15.

<sup>17</sup> *Edited to remove surplus words.*

Provisions should be inserted to deal with the NA should elections become impossible (during a state of national defence for example).

<sup>18</sup> The last part of this section was added because without it, the President could delay an election for months or even years. The period given here was taken from the draft on provincial legislatures.

<sup>19</sup> The question remains open whether the role of Deputy Speaker should be reserved to a non-majority party.

- (2) The President of the Constitutional Court must preside over the election of the Speaker, or designate another judge to do so. The Speaker presides over the election of a Deputy Speaker.<sup>20</sup>
- (3) The procedure set out in Schedule ... applies to the election of the Speaker and the Deputy Speaker.
- (4) The Speaker and the Deputy Speaker have the powers and functions assigned to them by the Constitution and other legislation, including the rules and orders of the National Assembly.<sup>21</sup>
- (5) The National Assembly may remove the Speaker or Deputy Speaker from office by resolution.
- [(6) The Speaker or Deputy Speaker ceases to hold office upon resigning from office or ceasing to be a member of the National Assembly.]<sup>22</sup>

## Decisions<sup>23</sup>

45. (1) A majority of the members of the National Assembly must be present before a vote may be taken on a Bill and one-third of the members must be present before a vote may be taken on any other matter, except where the Constitution provides otherwise.
- (2) All questions before the National Assembly must be decided by a majority of the votes cast, except where the Constitution provides otherwise.
- (3) The presiding member of the National Assembly has no deliberative vote, but must cast a deciding vote whenever there is an equal number of votes on both sides of a question.

## President's rights in National Assembly

46. The President may attend, and may speak in the National Assembly, but may not vote.

---

<sup>20</sup> The decision that the President of the Constitutional Court presides over the election of the President seems to mean that he or she should also preside here because the elections are likely to take place at the same time.

<sup>21</sup> A provision briefly describing the role of the Speaker would make the operation of the NA much clearer to readers.

<sup>22</sup> This provision is unnecessary. It cannot be disputed that a Speaker ceases to hold office on resignation, and the requirement in subclause (1) that a Speaker must be member of the NA means that a Speaker could not hold office after leaving the Assembly.

*Revised by separating the power of to remove the Speaker from the Speaker's ability to resign.*

<sup>23</sup> This provision allows a vote of no confidence to be taken when only one-third of the members are present. The vote could therefore be carried by a very small number. Special provision for votes of no confidence either here or in the section dealing with them in the Chapter on the Executive might be considered.

*Reordered to deal with quorum for voting before dealing with required majority on a vote. The different subjects have been separated into subsections.*

### **Internal autonomy<sup>24</sup>**

47. The National Assembly may make its internal arrangements, rules and orders.

### **Remuneration of members**

48. The salaries, allowances and benefits of members of the National Assembly must be as provided for by national legislation.

### **Parliamentary privilege<sup>25</sup>**

49. (1) Members of the National Assembly have freedom of speech and debate in the National Assembly and in its committees, subject to its rules and orders. [This freedom may not be limited by or questioned in the courts.]<sup>26</sup>
- (2) Members of the National Assembly are not liable to civil or criminal proceedings, arrest, imprisonment or damages for -
- (a) anything they have said in, produced before, or submitted to the National Assembly or any of its committees; or
  - (b) anything revealed as a result of anything that they have said, produced or submitted.
- (3) Other privileges and immunities of members of the National Assembly may be prescribed by national legislation.

### **Ordinary Bills**

50. ....

### **Money Bills**

51. ...

### **Bills affecting provincial matters**

52. ...

### **Assent to Bills**

---

<sup>24</sup> 48 - Divided into two sections as it deals with two distinct subjects.

<sup>25</sup> Although headed "Parliamentary privilege", this clause deals with the National Assembly. It will have to be amended appropriately when the Chapter is completed.

<sup>26</sup> The reference to freedom of speech in subclause (1) is problematic as the draft Bill of Rights refers to freedom of speech and expression; The sentence in brackets should be deleted. See report page 15.

53. (1) The President, without delay, must assent to and sign every Bill passed by Parliament.
- (2) If the President is concerned that a Bill is not consistent with the Constitution or that Parliament passed the Bill other than in accordance with the Constitution, the following procedure applies.<sup>27</sup>
- (a) The President must refer the Bill back to Parliament for reconsideration with a written statement of the reasons for the reservation, and Parliament may either allow the Bill to lapse or consider the President's reservations.
  - (b) If Parliament considers the President's reservations, addresses them, and passes the Bill with the necessary changes, the President must sign the Bill.<sup>28</sup>
  - (c) If Parliament considers the President's reservations but disagrees with them, the Speaker must refer the Bill back to the President and the President may either sign the Bill or refer it to the Constitutional Court for a ruling on its constitutionality.
  - (d) If the Constitutional Court decides that the Bill is constitutional, the President must sign the Bill.
  - (e) If the Constitutional Court decides that the Bill is not constitutional, Parliament may either reconsider the Bill, or allow it to lapse.
- (3) A Bill signed by the President becomes an Act of Parliament upon its promulgation.

### Safe keeping of and public access to Acts of Parliament

54. The signed copy of every Act of Parliament must be entrusted for safe keeping to the Appellate Division/Constitutional Court immediately after promulgation, and is conclusive evidence of the provisions of that Act.

<sup>27</sup>

This clause has been filled out to:

- (i) indicate that Parliament may choose to allow a Bill to lapse;
- (ii) provide that the President rather than the Speaker should refer the Bill to the CC;
- (iii) allow the President to change his or her mind and sign the Bill.

*53(2) - Revised by setting out the process in case of a Presidential reservation in clearer detailed form. Options implied but not addressed by the previous text, have now been dealt with explicitly.*

<sup>28</sup>

chooses one of two options. See Report page 15.

## CHAPTER 5 The National Executive

### Executive authority of the Republic

55. (1) The executive authority of the Republic vests in the national executive consisting of the President and other members of the Cabinet, who must perform their functions in accordance with this Constitution.
- (2) The national executive may perform any acts required to give effect to the Constitution.<sup>29</sup>

### The President<sup>30</sup>

56. (1) The President is the symbol of the unity of the nation and promotes that which will advance the Republic and opposes that which may harm the Republic.<sup>31</sup>
- (2) The President is the Head of State, Head of the National Executive and Commander-in-Chief of the defence force, and must uphold, defend and respect the Constitution as the supreme law of the Republic, and is responsible for the observance of the Constitution by the national executive.
- (3) The international sovereignty of the Republic vests in the President.<sup>32</sup>

### Powers and functions of the President<sup>33</sup>

57. (1) The President has the powers and functions entrusted to that office by this Constitution and any legislation.
- (2) The President must act in consultation with the other members of Cabinet when performing functions entrusted to the President, except when

---

<sup>29</sup> This is a "general empowerment clause" intended to provide a constitutional basis for executive actions not expressly mentioned.

<sup>30</sup> This section seeks to accurately reflect the majestas of the office as requested by the CC subcommittee.

*56 - Expanded by introducing core words from the Presidential oath of office in order to add a tone of majesty to the description of the president's office.*

<sup>31</sup> This is taken partly from the presidential oath and places a positive obligation on the President.

<sup>32</sup> This identifies the seat of sovereignty of the Republic vis-a-vis other states.

<sup>33</sup> The reference to "legislation" excludes the common law and the possible incorporation of the "royal" prerogatives.

*60 - The specific list has been reordered to reflect a more logical flow of functions in order of importance.*



- performing the functions in the following list-<sup>34</sup>
- (a) appointing and dismissing the Deputy President(s)/Prime Minister, Ministers and Deputy Ministers;<sup>35</sup>
  - (b) convening Cabinet meetings,
  - (c) assenting to and signing Bills passed by Parliament
  - (b) referring a Bill passed by Parliament back to Parliament for reconsideration;
  - (e) referring a Bill passed by Parliament to the Constitutional Court for a ruling on its constitutionality;
  - (f) summoning the National Assembly to an extraordinary sitting to conduct urgent business;
  - (g) dissolving the National Assembly after a motion of no confidence in the Cabinet has been passed by the National Assembly;<sup>36</sup>
  - (h) accrediting foreign diplomatic representatives;<sup>37</sup>
  - (i) conferring honours; and
  - (j) any other functions which the Constitution states or implies may be performed by the President acting alone.
- (3) Decisions of the President in consultation with the Cabinet must be in writing, signed by the President, and countersigned by a Minister.<sup>38</sup>

### **Election of President**

58. (1) At its first sitting after a national election, and whenever necessary to fill a vacancy, the National Assembly must elect a man or a woman from among its members to be President.
- (2) The President of the Constitutional Court must preside over the election of the President, or designate another judge to do so. The procedure set out in Schedule ... applies to the election of the President.

### **Assumption of office by President<sup>39</sup>**

---

<sup>34</sup> To emphasize the importance of the office of the President, the most important powers of the President are listed first.

"in consultation with" may need to be defined.

<sup>35</sup> The question of appointments may still be contentious.

<sup>36</sup> The matter of snap elections remains to be considered.

<sup>37</sup> Appointment of diplomats requires agreement.

<sup>38</sup> 61 - *Rewritten to remove the repetitious use of "his" and "her".*

<sup>39</sup> The mandatory assumption of office on the day of election may be problematic. The President-elect may not be present to be sworn in the same day, and too little time is allowed for a public ceremonial swearing in.

59. Upon being elected President, a person ceases to be a member of the National Assembly, and assumes the office of President that day by swearing or affirming faithfulness to the Republic and obedience to the Constitution, by solemn declaration in accordance with Schedule ....

### **Term of office of President<sup>40</sup>**

60. (1) The President's term of office begins on assuming office and ends upon a vacancy occurring or when the person next elected President assumes office.
- (2) No person may hold office as President for more than two terms of office; but, when a person is elected to fill a vacancy in the office of President, the period between that election and the next election of a President is not regarded as a term of office.

### **Vacancies**

61. (1) A vacancy occurs in the office of President when -
- (a) the President dies, or resigns from office by notice in writing to the Speaker;
  - (b) the National Assembly passes a vote of no confidence in the President alone; or
  - (c) the National Assembly, by resolution, removes the President from office.
- (2) An election to fill a vacancy in the office of President must be held at a time and on a date determined by the President of the Constitutional Court, but not later than 30 days after the vacancy occurs.

### **Acting President**

62. (1) When the President is absent from the Republic or otherwise unable to fulfil the duties of the office of President, or during a vacancy in the office of President, an office-bearer in the order below acts as the President -<sup>41</sup>
- (a) the Deputy President;
  - (b) a Minister designated by the President;
  - (c) a Minister designated by the other members of the Cabinet;
  - (d) the Speaker;
  - (e) a member of the National Assembly elected by its members.

---

<sup>40</sup> **57 - Excess words removed, and the substance of subsection (4) moved to new section 61 which deals with vacancies.**

**59 - This section has been separated into new sections 60 and 61.**

**62 - This section was combined with an identical section dealing with salaries, etc. for other members of the executive.**

<sup>41</sup> **64 - The word "if" replaced by "when" since there is no doubt that the President will be absent on occasion.**

- (2) An acting President has all the responsibilities, powers and functions of the President.

### Deputy President(s)/Prime Minister

63. ...<sup>42</sup>

### Removal of President or Deputy President

64. (1) The National Assembly, by a resolution of at least two-thirds of its members, may remove the President [or Deputy President] from office only on the grounds of -<sup>43</sup>
- (a) a serious violation of the Constitution or the laws of the Republic,
  - (b) serious misconduct; or
  - (c) inability to perform the functions of office.
- (2) A person who has been removed from the office of President [or Deputy President] in terms of subsection (1) may not receive any benefits from that office, and may not be elected to any public office; but, a person removed from office as result of inability may receive any benefits due from that office.<sup>44</sup>

### Cabinet

65. (1) The Cabinet consists of the President, the Deputy President, and the Ministers.
- (2) The President must preside at Cabinet meetings. If the President is absent, the Deputy President must preside, and if both the President and Deputy President are absent, another Minister designated by the President must preside.<sup>45</sup>

### Appointment and dismissal of Ministers and Deputy Ministers

---

<sup>42</sup> The number of deputy Presidents, and the issue of a Prime Minister, needs to be addressed.

<sup>43</sup> It seems to be an anomaly that the National Assembly has the power to remove the Deputy President but not Ministers.

<sup>44</sup> Should there be some discretion in the NA regarding the removal of an incumbent's rights to benefits from the office?

A separate procedure may be preferred for removing office holders for reasons of physical or mental inability.

<sup>45</sup> The formulations appear to be rigid and do not allow for casual absence for short periods during a meeting, or for the chair to be left temporarily.

*66(2) - Revised to reunite the general rule, "The President..must preside at Cabinet meetings", which previously was interrupted by 2½ lines of text.*

66. ....<sup>46</sup>

### **Oath or solemn affirmation**

67. Before Ministers or Deputy Ministers may begin to perform the functions of their office, they must swear or affirm their faithfulness to the Republic and obedience to the Constitution, by solemn declaration in accordance with Schedule ...

### **Accountability of Ministers and Cabinet**

68. (1) The Deputy President and Ministers are individually accountable both to the President and the National Assembly, and all members of the Cabinet are collectively accountable to the National Assembly for the performance of the national government and its policies.
- (2) [In the performance of their functions,] Ministers are bound by the policies of the Cabinet.

### **Conduct of the Cabinet and Deputy Ministers<sup>47</sup>**

69. (1) Members of the Cabinet and Deputy Ministers must act in accordance with a code of ethics prescribed by national legislation.
- (2) Members of the Cabinet and Deputy Ministers may not -
- (a) undertake any other paid work;
  - (b) engage in activities inconsistent with their office or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests; or
  - (c) use their position or any information entrusted to them to enrich themselves or any other person.<sup>48</sup>

### **Remuneration**

70. Parliament determines the salaries, allowances and benefits of the members of the Cabinet.

### **Temporary assignment of a Minister's powers and functions to another Minister**

71. The President may assign to a Cabinet member any powers and functions of another member who is absent from office or is unable to exercise those powers or perform those functions.

---

<sup>46</sup> This item requires agreement. It is intended that Deputy Ministers are to be provided for in the Constitution, although they are not strictly speaking part of the National Executive.

<sup>47</sup> 70 - Edited to reunite the verb phrase "shall act", previously interrupted by a clause concerning time.

<sup>48</sup> Inserting "improperly" before "use" may lead to confusion. When could it ever be proper for Ministers to use their position or information (often confidential) to enrich themselves?

**Transfer of powers and functions to another Minister<sup>49</sup>**

72. The President by proclamation may transfer to a member of the Cabinet
- (a) the administration of a law entrusted to another member; or
  - (b) any power or function entrusted by a law to another member.

**Votes of no-confidence**

73. (1) If the National Assembly passes a vote of no confidence in the Cabinet, the President must either resign or dissolve the National Assembly and call an election.
- (2) If the National Assembly passes a vote of no confidence in the President alone, the President must resign.
- (3) If the National Assembly passes a vote of no confidence in the Cabinet, excluding the President, the President must either resign or reconstitute the Cabinet.

---

<sup>49</sup> Proclamation is recommended in the interest of legal certainty and public awareness of which ministry carries which responsibilities.

## CHAPTER 6 Courts and Administration of Justice

### Judicial authority

74. (1) The judicial authority of the Republic vests in the courts [of law]. They are independent, and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.<sup>50</sup>
- (2) A decision of any court binds all persons and organs of state to which the decision applies.<sup>51</sup>
- (3) No person and no organ of state may interfere with the courts.<sup>52</sup>
- (4) Organs of state, through legislative and other measures, must assist and protect the courts in order to ensure the independence, impartiality, dignity and effectiveness of the courts.

### Judicial system<sup>53</sup>

75. (1) The courts of law of the Republic are:
- (a) The Constitutional Court consisting of a President, a Deputy President and nine other judges.
- (b) The Supreme Court of Appeal consisting of the Chief Justice, a Deputy Chief Justice and the number of judges of appeal determined in terms of an Act of Parliament.
- (c) Any courts of appeal established in terms of an Act of Parliament, which hear appeals from the High Court or other courts of similar status.<sup>54</sup>

---

<sup>50</sup> This formulation is altered to emphasise that the courts are independent.

It may be necessary to qualify the word "court" to indicate that traditional courts are not covered by this provision.

*121 - Redundant words were removed. Subsections were revised to make statements declaratory and in the present tense. Subsection (8) was moved to the new section...*

<sup>51</sup> As the envisaged intermediate courts of appeal will be new, they will have no inherent jurisdiction unless it is granted to them by law.

The words "within jurisdiction" have been removed. See Report page 17.

The word "decision" has been used because it is broader than "order" and includes orders.

<sup>52</sup> The word "improperly" has been omitted because it is superfluous (interference incorporates the idea of impropriety) and because other, similar provisions use the term "interfere" without qualification.

<sup>53</sup> *113 - The opening statement was made declaratory rather than promissory. Paragraph (c) was revised to speak continuously in the present, rather than in the future tense.*

<sup>54</sup> We are concerned about the term "courts of similar status" rather than superior" and "lower" courts. The terms "superior" and "lower" carry well established meanings. For example, the Water Court and the Tax Appeal Court are superior courts. It is not as clear that these two courts are "of similar status" to the Supreme Court. These courts are "special

- (d) The provincial and local divisions of the High Court and other courts of similar status.
  - (e) Magistrates' Courts and other courts of similar status.
  - (f) Any other courts established by legislation.<sup>55</sup>
- (2) The jurisdiction in constitutional matters of the Constitutional Court, the Supreme Court of Appeal, a division of the High Court, and courts hearing appeals from the High Court, is determined only by the Constitution. The jurisdiction in constitutional matters of other courts is as determined by an Act of Parliament.

### **Jurisdiction of Constitutional Court**

76. (1) The Constitutional Court is the highest court in constitutional matters, has jurisdiction in all constitutional matters including the final decision whether a matter is within its jurisdiction, and has jurisdiction to make its own rules.<sup>56</sup>
- (2) Only the Constitutional Court has jurisdiction -
- (a) over disputes in constitutional matters between the national and provincial governments or between provincial governments; or<sup>57</sup>
  - (b) to consider the constitutionality of any parliamentary or provincial Bill.
- (3) Any person may bring a matter directly to the Constitutional Court, with leave of that court granted in the interest of justice, or in terms of national legislation.
- (4) In any matter before it, the Constitutional Court -
- (a) must declare invalid law or conduct that is inconsistent with the Constitution;
  - (b) may make any order that is just and equitable, including an order as to costs, and an order that a declaration of invalidity is to have retrospective operation, and the extent of that order.
  - (c) may suspend a declaration of invalidity, on any conditions and for any specified period, to allow the competent authority to correct the defect.
- (5) A decision of the Constitutional Court binds all other courts, persons, and organs of state.
- (6) The Constitutional Court has no jurisdiction other than that granted in the

---

courts". The use of the terms "superior" and "lower" would avoid any controversy in this regard.

<sup>55</sup> If, for instance, traditional courts are classified as "courts", it may be necessary to insert a provision stipulating the level of government at which different levels of court may be established.

<sup>56</sup> 114(1) - The subsections were reordered for better logical transition. Subsection (4) was revised to make the statement less vague. Subsection (5) was revised to achieve greater precision, and to remove unintended ambiguity.

<sup>57</sup> The draft does not provide for exclusive constitutional jurisdiction in respect to disputes between organs of national government. See Report page 17.

Constitution.

### **Jurisdiction of Supreme Court of Appeal<sup>58</sup>**

77. (1) The Supreme Court of Appeal is the highest court of appeal in all matters other than constitutional matters and has -
- (a) jurisdiction in all constitutional matters except those matters over which only the Constitutional Court has jurisdiction; and
  - (b) the inherent jurisdiction that vested in the Appellate Division of the Supreme Court before the Constitution took effect.
- (2) (a) The Supreme Court of Appeal, exercising its jurisdiction in constitutional matters, may make any order set out in section 76(4).
- (b) Any finding by the Supreme Court of Appeal that an Act of Parliament, [a Provincial Act] or any conduct of the President is unconstitutional has no force or effect unless confirmed by the Constitutional Court; but, the court may grant a temporary interdict or other temporary relief.
- (3) The Supreme Court of Appeal has no jurisdiction other than that granted in the Constitution.<sup>59</sup>

### **Constitutional jurisdiction of other courts**

78. (1) Courts of appeal other than the Supreme Court of Appeal, and the provincial and local divisions of the High Court, have jurisdiction in all constitutional matters except those matters over which only the Constitutional Court has jurisdiction.
- (2) All other courts have jurisdiction in constitutional matters, as determined by an Act of Parliament; but, no Act of Parliament may grant a court -
- (a) jurisdiction over those matters over which only the Constitutional Court has jurisdiction; or
  - (b) jurisdiction to enquire into or rule on the validity of an Act of Parliament, an Act of a provincial legislature, or other law determined by an Act of Parliament.<sup>60</sup>
- (3) (a) A court, exercising its jurisdiction in constitutional matters, may make any order set out in section 76(4).
- (b) Any finding by a court that an Act of Parliament, [a Provincial Act] or any conduct of the President, is unconstitutional has no force or effect unless confirmed by the Constitutional Court; but, a court may grant a

---

<sup>58</sup> 115 - *The content of this section was divided into two sections,...and...dealing with constitutional jurisdiction of other courts, and other jurisdiction of other courts, respectively.*

<sup>59</sup> This is intended to reflect section 121(7) of the Consolidated Draft.

<sup>60</sup> The extent of the constitutional jurisdiction of the lower courts must be determined by an Act of Parliament. For instance, Parliament must determine whether Magistrate's Courts may invalidate subordinate legislation or municipal bylaws.



temporary interdict or other temporary relief.<sup>61</sup>

### Other jurisdiction of courts

79. (1) Courts, other than the Supreme Court of Appeal, have the jurisdiction in matters other than constitutional matters that is conferred on them in terms of an Act of Parliament.
- (2) The provincial and local divisions of the High Court have the inherent jurisdiction that vested in the provincial and local divisions of the Supreme Court before the Constitution took effect.

### Appointment of judicial officers<sup>62</sup>

80. (1) Any woman or man who is a citizen, [who qualifies], and is a fit and proper person is eligible to be appointed as a judicial officer.<sup>63</sup>
- (2) [A provision concerning qualifications could be included here.]<sup>64</sup>
- (3) The President, in consultation with the Cabinet and after consulting the Judicial Service Commission, must appoint the Chief Justice and the President of the Constitutional Court, and the Deputy Chief Justice and the Deputy President of the Constitutional Court.<sup>65</sup>
- (4) The President, (on the advice of the Judicial Service Commission), must appoint all other judges, except judges of the Constitutional Court.<sup>66</sup>
- (5) When there is a vacancy in the Constitutional Court, other than in the office of the President or the Deputy President of the Constitutional Court, due to death, resignation, removal from office or the expiry of a judge's term of

---

<sup>61</sup> It is uncertain whether the consequences of this provision are intended, see Report page 17.

<sup>62</sup> *116 - This section was reordered to create a better logical transition through its several subtopics.*

<sup>63</sup> This formulation introduces the reminder that both men and women are eligible for appointment.

*116(1) - Edited to make the statement positive, and by replacing "qualified" with "eligible". This added precision, since the subsection was intended to establish the basis of eligibility for judicial office. Qualifications were not addressed.*

<sup>64</sup> CP VII requires the judiciary to be appropriately qualified. It is not certain that 80(1) is sufficient.

*116(2) - Edited for consistency and to conform to the formulation introduced in earlier chapters dealing with similar topics.*

<sup>65</sup> *116(3) - Revised to make the statement active, and to clarify the substantive and procedural duty imposed on the President.*

<sup>66</sup> *116(4) - The paragraph in this section were substantially edited to add precision, clarity and remove excess words, eg. "when a vacancy in the ranks of Constitutional Court judges arises" was reduced to "When there is a vacancy in the Constitutional Court".*

office, the following procedure applies:

- (a) The President, in consultation with the Cabinet and after consulting the President of the Constitutional Court, must appoint a judge to fill the vacancy, from a list of nominees prepared by the Judicial Service Commission.
  - (b) The Judicial Service Commission must prepare the list with no more than three names in excess of the number of vacant positions, and submit the list to the President with written reasons for its recommendations.
  - (c) The President may make appointments from the list after considering the reasons given, and must advise the Judicial Service Commission, with written reasons, if any of the nominees are unacceptable and any vacancy remains to be filled.
  - (d) The Judicial Service Commission must [supplement the list with further nominees] and the President must appoint people from the supplemented list to fill the remaining vacancy.<sup>67</sup>
- (6) At all times at least four members of the Constitutional Court must be persons who, at the time they were appointed to the Constitutional Court, were judges of the Supreme Court of Appeal, a division of the High Court or any court hearing appeals from the High Court.
- (7) The Member of Cabinet responsible for the administration of justice must appoint acting judges on the advice of the senior judge of the court in which the acting judge will serve.<sup>68</sup>
- (8) Other judicial officers must be appointed in terms of an Act of Parliament.<sup>69</sup>
- (9) Before judicial officers may begin to perform their functions, they must swear or affirm to uphold and protect the constitution of the Republic, by solemn affirmation in accordance with Schedule....
- (10) Members of the Constitutional Court hold office for non-renewable terms of up to nine years. An acting member of the Constitutional Court may serve for no more than six months.<sup>70</sup>

### Removal of judges from office<sup>71</sup>

<sup>67</sup> It is not clear whether appointments should be made from a new list or the original list supplemented by new names.

<sup>68</sup> Should the Minister be obliged to make appointments? "Senior judge" refers to the head of a division.

<sup>69</sup> Are heads of traditional courts judicial officers?

<sup>70</sup> It is not clear whether "6 months" refers to one period or a number of shorter periods totalling 6 months, and whether it is renewable. What happens if the period expires while a judge is hearing a matter?

<sup>71</sup> 117(3) - This section was not related to the other topics in the section, and has been moved to new section.....It was revised for consistency, using "salaries" instead of the odd word "emoluments".

81. (1) A judge may be removed from office only if -
- (a) the Judicial Service Commission finds that the judge suffers from an incapacity, is grossly incompetent, or is guilty of gross misconduct; and
  - (b) the National Assembly and ..., at a joint sitting, adopts a resolution calling for that judge to be removed, which is supported by at least two-thirds of the members of both houses combined.
- (2) The President, on the advice of the Judicial Service Commission, may suspend from office a judge who is the subject of a procedure in terms of Subsection (1), and must dismiss from office a judge upon the adoption of a resolution calling for that judge to be removed from office.<sup>72</sup>

### Remuneration of judges

82. The salaries, allowances and benefits of judges are as prescribed by national legislation and may not be reduced.

### Other matters concerning courts

83. Any matter concerning [the functioning of] any court, that is not dealt with in the Constitution, may be regulated only by national legislation.<sup>73</sup>

### Judicial Service Commission

84. (1) There is a Judicial Service Commission, consisting of -<sup>74</sup>
- (a) the Chief Justice, who presides at meetings of the Commission;
  - (b) the President of the Constitutional Court;
  - (c) one Judge President designated by the Judges President;<sup>75</sup>
  - (d) the Member of Cabinet responsible for the administration of justice, or that member's nominee;
  - (e) two practising advocates designated by the advocates' profession;<sup>76</sup>

---

<sup>72</sup> The "Judicial Service Commission" is inserted in the place of "Chief Justice" to ensure that the CJ does not have the power of suspension over Constitutional Court judges. In addition, this captures the intention that the CJ would exercise this function as chair of the JSC.

This phrasing requires the President to remove a judge once the procedure in 81(1) has occurred.

<sup>73</sup> "the functioning of" may be deleted to widen the scope of the provision.

<sup>74</sup> It is necessary to consider the tenure of JSC members who do not hold their positions ex officio.

<sup>75</sup> The provision constitutionalises the offices of the Judge President. See Report page 18.

<sup>76</sup> An alternative formulation for Sec 11(1)(e) and (f) may be required.

- (f) two practising attorneys designated by the attorneys' profession;
  - (g) one professor of law designated by all the deans of the law faculties at South African universities;
  - (h) four senators designated together by the Senate by resolution adopted by at least two-thirds of its members;<sup>77</sup>
  - (i) four persons, two of whom are practising attorneys or advocates, designated by the President in consultation with the Cabinet; and
  - (j) when considering matters specifically relating to a provincial or local division of the High Court, the Judge President of that division and the Premier of the province concerned.
- (2) In addition to its other functions, the Judicial Service Commission may advise the national and provincial governments on any matters relating to the judiciary and the administration of justice, but when it does so, it must sit without the four senators referred to in subsection (1)(h).
- (3) The Commission may determine its own procedure.
- [(4) Decisions of the Commission must be supported by an ordinary majority of all its members.]<sup>78</sup>
- (5) The Commission may appoint committees from among its members and assign any of its powers and functions to any committee.

---

<sup>77</sup> The meaning of "together"/"en bloc" is unclear. What happens if one Senator resigns?

<sup>78</sup> Is this a quorum provision? Must members be present at meetings at which decisions are made, or can JSC make decisions without a meeting?

## CHAPTER 7 Institutions Supporting Constitutional Democracy

### Establishment and governing principles<sup>79</sup>

85. (1) The following institutions are established to strengthen constitutional democracy in the Republic -
- (a) the Public Protector;
  - (b) the Human Rights Commission;
  - (c) the Commission for Gender Equality;
  - (d) the Auditor General; and
  - (e) the Electoral Commission.
- (2) These institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.
- (3) Organs of state, through legislative and other measures, must assist and protect these institutions in order to ensure the independence, impartiality, dignity and effectiveness of the institutions.
- (4) No person and no organ of state may interfere with any of these institutions.
- (5) The institutions established in subsection (1) are accountable to Parliament, and must report on their activities to Parliament at least once a year.

### Public Protector

#### Functions of Public Protector

86. (1) The Public Protector has the following powers, as regulated by national legislation -
- (a) to investigate any conduct in state affairs or the public administration at any level of government that is alleged or suspected to be improper or to result in any impropriety or prejudice;
  - (b) to report on that conduct; and
  - (c) to take appropriate remedial action.
- (2) The Public Protector has the additional powers and functions prescribed by national legislation.
- [(3) The Public Protector may not investigate the performance of judicial functions by the courts of the Republic.]<sup>80</sup>
- (4) The Public Protector must be accessible to all persons and communities.
- (5) Any report issued by the Public Protector must be open to the public, unless exceptional circumstances [security of the Republic, interests of justice] require that a report be kept confidential.<sup>81</sup>

<sup>79</sup> Establishment of institutions and principles governing them have been moved to the beginning of the Chapter. See Report page 20.

<sup>80</sup> No decision on this as yet. See Report page 20.

<sup>81</sup> The words in brackets indicate possible alternatives to be considered for "exceptional circumstances".

### **Qualifications and tenure of office**

87. (1) The Public Protector must be a man or woman who is a South African citizen, is a fit and proper person to hold that office, and complies with any other requirements prescribed by national legislation.
- (2) The Public Protector is appointed for a period of seven years.

### **Provincial public protectors**

88. ...

### **Human Rights Commission**

#### **Functions of Human Rights Commission**

89. (1) The Human Rights Commission must promote -
- (a) respect for human rights;
  - (b) the development, protection and attainment of human rights; and
  - (c) the development of a culture of human rights in the Republic.
- (2) The Human Rights Commission has the power, as regulated by national legislation, necessary to fulfil its purposes, including the power to monitor, to investigate and report on the observance of human rights, to take steps to secure appropriate redress where human rights have been breached, to perform research, and to educate.
- (3) The Human Rights Commission has the additional powers and functions prescribed by national legislation.<sup>82</sup>

### **Commission for Gender Equality**

#### **Function of Commission for Gender Equality<sup>83</sup>**

90. (1) The Commission for Gender Equality must promote respect for gender equality and the development, protection and attainment of gender equality.
- (2) The Commission for Gender Equality has the power, as regulated by national legislation, necessary to fulfil its purposes, including the power to monitor, to research, to educate, to advise and to report on issues relating to gender equality.
- (3) The Commission for Gender Equality has the additional powers and functions prescribed by national legislation.

### **Auditor General**

---

<sup>82</sup> For purposes of consistency, this section has been adjusted to read the same as 86(2) above.

<sup>83</sup> This section was redrafted to be consistent with the Human Rights Commission sections.

## Functions of Auditor General

91. (1) The Auditor General must audit and report on -
- (a) the accounts and financial statements of all national and provincial state departments and administrations;
  - (b) the accounts and financial statements of all local governments; and
  - (c) any other accounts and financial statements that are required by national [and provincial] legislation to be audited by the Auditor General.<sup>84</sup>
- (2) The Auditor General may also audit and report on the accounts and financial statements of any institution funded from public money, as may be regulated by legislation.
- (3) The Auditor General must submit audit reports to every authority that has a direct interest in the relevant audit and to any authority prescribed by national [and provincial] legislation. All reports must be made public.

## Qualifications and tenure of office of Auditor General

92. (1) The Auditor General must be appointed in accordance with section 95 and may be dismissed in accordance with section 96.
- (2) The Auditor General must be a woman or man who is a South African citizen, is a fit and proper person to hold that office, and must not hold office in any political party or organisation. Specialised knowledge of, or experience in, auditing, state finances, and public administration must be given due regard in appointing the Auditor General.
- (3) The Auditor General must be appointed for a non-renewable term of not less than 5 years and not more than 10 years.

## Electoral Commission

### Functions of Electoral Commission

93. The Electoral Commission is responsible for managing free and fair elections at national, provincial and local legislators.<sup>85</sup>

### Composition of the Commission

94. The Electoral Commission must be composed of at least three persons appointed for a fixed term of office, as prescribed by national legislation.

---

<sup>84</sup> 91(1)(c)&(3) - There is uncertainty as to whether provinces should have the power to require the Auditor General to perform audits.

<sup>85</sup> The word "legislators" is recommended. as the reference to "local legislatures" would be anomolous.

## **General Provisions**

### **Appointments**

95. (1) Any appointment required to be made in accordance with this section, must be made by the President acting on the recommendation of Parliament.
- (2) Parliament must recommend a person -
- (a) nominated by a committee of Parliament ...; and
  - (b) approved by Parliament by a resolution adopted by at least ...% of the members present and voting.

### **Removal from office**

96. (1) Any person whose removal from office is required to conform to this section, may be removed from office only -
- (a) on the grounds of misbehaviour, incapacity and incompetence;
  - (b) upon a finding to that effect by a committee of Parliament... and participating in the committee; and
  - (c) the adoption by Parliament of a resolution, calling for that person's removal from office, and supported by at least ... of the members present and voting.
- (2) The President may suspend a person from office when Parliament is considering removing that person from office, and must dismiss a person from office immediately upon adoption of a resolution calling for that person's removal from office.



## CHAPTER 8 Provinces

### PROVINCIAL LEGISLATURES

#### Provincial legislative authority<sup>86</sup>

97. The legislative authority of a province vests in its provincial legislature ...

#### Composition of provincial legislatures<sup>87</sup>

98. (1) Each provincial legislature consists of a number of women and men who are elected as members in terms of an electoral system that is prescribed by national legislation, is based on a common voters roll, and results, in general, in proportional representation.
- (2) The number of members in each provincial legislature must be determined in terms of national legislation and must be no fewer than ... and no more than ...

#### Qualification for membership of provincial legislatures<sup>88</sup>

99. (1) Every citizen is eligible to be a member of a provincial legislature unless disqualified in terms of subsection (2).
- (2) The following may not be members of a provincial legislature:
- (a) Anyone disqualified from voting in elections of the National Assembly.
  - (b) Anyone holding office of profit under the Republic, except the Premier and other members of the executive council of a province, and any other office-bearers whose functions have been declared by national legislation to be compatible with the functions of a member of a provincial legislature.
  - (c) Members of [the Senate], the National Assembly [or a local government.]<sup>89</sup>
  - (d) Unrehabilitated insolvents.
  - (e) Anyone declared to be of unsound mind by a court of the Republic.
  - (f) Anyone who was serving a sentence of more than 12 months imprisonment without the option of a fine at the commencement of the

---

<sup>86</sup> Structured this way, this chapter withholds until much later the fact that provinces may have their own constitutions establishing different procedures from those given here. It might be appropriate to include a reference to the possible existence of provincial constitutions in the opening provisions.

<sup>87</sup> The method of determining the number of members needs to be agreed.

<sup>88</sup> This provision is taken from the provision for the NA. There may be a need to add a residency requirement.

<sup>89</sup> It is not clear whether membership of a local council is intended to be a disqualification.

Constitution.<sup>90</sup>

- (g) Anyone who, after the commencement of the Constitution, has been sentenced to more than 12 months imprisonment without the option of a fine, either in the Republic, or outside the Republic if the conduct constituting the offence would have been an offence in the Republic; but, no one may be regarded as having been sentenced until an appeal against the conviction or sentence has been determined, or until the time for an appeal has expired.
- (3) The disqualification of a person in terms of either subsection (2) (f) or (g) applies during their sentence and for five years after the sentence has been completed.
- [(4) Anyone who sits or votes in a provincial legislature while knowing that they are not a member will be fined in terms of the rules and orders of that legislature.]<sup>91</sup>

### **Vacancies<sup>92</sup>**

- 100. (1) A vacancy exists in a provincial legislature when -
  - (a) a member ceases to be eligible;<sup>93</sup>
  - (b) a member resigns or dies;
  - [(c) a member is absent from the provincial legislature without permission in circumstances for which the rules and orders of the provincial legislature prescribe loss of membership.]
- (2) Vacancies in the provincial legislatures must be filled in terms of national legislation.

### **Oath or affirmation by members**

- 101. Before members of a provincial legislature may begin to perform their functions in the legislature, they must swear or affirm by solemn declaration their faithfulness to the Republic and obedience to the Constitution, by solemn declaration in accordance with Schedule ...<sup>94</sup>

### **Sittings and recess periods**

---

<sup>90</sup> 99(2)(f)&(g) - There are some small inconsistencies between these two provisions. See Report page 21.

<sup>91</sup> This section seems unnecessary; it also makes a fine obligatory. See Report page 22.

<sup>92</sup> The CA has not decided whether crossing the floor leads to loss of membership. If it does a provision to that effect should be added here.

<sup>93</sup> This replaces 80(1)(c) on the original draft.

<sup>94</sup> This is a standard provision, used each time an oath or affirmation is required (although the wording differs for the judiciary). The full procedure as well as the terms of oath will be included in a schedule.

102. (1) The first sitting of a provincial legislature after an election must take place at a time and on a date determined by the Chief Justice, but not more than 10 days after the election result has been declared. Each provincial legislature may determine the time and duration of its other sittings and its recess periods.
- (2) The Premier of a province may summon the provincial legislature to an extraordinary sitting at any time to conduct urgent business.
- (3) Each provincial legislature may determine where it ordinarily will sit [and may make exceptions at any time.]<sup>95</sup>

### **Duration and dissolution of provincial legislatures<sup>96</sup>**

103. (1) Each provincial legislature is elected for a term of five years from the date of its election.
- (2) A provincial legislature may be dissolved before the end of its term if that legislature passes a vote of no-confidence in the Executive Council of that province.
- (3) A provincial legislature remains competent to function, from the time it is dissolved or its term expires until the day before polling for the next provincial legislature.
- (4) When a provincial legislature is dissolved, or its term expires, the Premier of the province, by proclamation, must call and set dates for an election, which must be within 90 days of the date that the legislature was dissolved, or of the expiry of its term.<sup>97</sup>

### **Speaker and Deputy Speaker of provincial legislature**

104. (1) At the first sitting after its election, and when necessary to fill a vacancy, a provincial legislature must elect a man or a woman from among its members to be Speaker and a woman or a man from among its members to be Deputy Speaker .
- (2) A judge designated by the President of the Constitutional Court / Chief Justice must preside over the election of the Speaker, and the Speaker must preside over the election of the Deputy Speaker.
- (3) The procedure set out in Schedule ... applies to the election of the Speaker and the Deputy Speaker.
- (4) The Speaker and the Deputy Speaker have the powers and functions

---

<sup>95</sup> As it is entirely within provincial discretion to choose where the legislature should sit the words in brackets are unnecessary.

<sup>96</sup> Provisions should be inserted to deal with provincial legislatures should elections become impossible (during a state of national defence for example).

<sup>97</sup> It may be more appropriate for the President to call, and set the date for, provincial elections.

- assigned to them by the Constitution, provincial legislation, and the rules and orders of their provincial legislature.<sup>98</sup>
- (5) A provincial legislature may remove its Speaker or its Deputy Speaker from office by resolution.
- [(6) The Speaker or the Deputy Speaker ceases to hold office upon resigning from office, or ceasing to be a member of the provincial legislature.]<sup>99</sup>

## Decisions

105. (1) A majority of the members of a provincial legislature must be present before a vote may be taken on a Bill and one-third of the members must be present before a vote may be taken on any other matter, except where the Constitution provides otherwise.<sup>100</sup>
- (2) All questions before a provincial legislature must be decided by a majority of the votes cast, except where the Constitution provides otherwise.
- (3) The presiding member of a provincial legislature has no deliberative vote, but must cast a deciding vote if there is an equal number of votes on both sides of a question.

## Internal autonomy

106. A provincial legislature may make its internal arrangements, rules and orders.

## Remuneration of members

107. The salaries, allowances and benefits of members of provincial legislatures must be as provided for by national legislation.

## Privileges and immunities of members of provincial legislatures

108. (1) Members of a provincial legislature have freedom of speech and debate in the provincial legislature and in its committees, subject to its rules and orders.[This freedom may not be limited by or questioned in the courts.]<sup>101</sup>

---

<sup>98</sup> Is this provision necessary? A provision briefly describing the role of the Speaker would make this part and the operation of provincial legislatures much clearer to readers. See Report page 22.

<sup>99</sup> This provision is unnecessary. It cannot be disputed that a Speaker ceases to hold office on resignation, and the requirement in subclause (1) that a Speaker must be a member of the legislature means that a Speaker could not hold office after leaving it.

<sup>100</sup> This provision has been reordered so that it deals with quorums first and then voting. As this provision is worded at present, it allows a vote of no confidence to be taken when only one-third of the members are present. The vote could therefore be carried by a very small number. Special provision for votes of no confidence either here or in the section dealing with them in the part on provincial executives might be considered.

<sup>101</sup> The reference to freedom of speech in subclause (1) is problematic as the draft Bill of Rights refers to freedom of speech and expression; the sentence in brackets should be

- (2) Members of provincial legislatures are not liable to civil or criminal proceedings, arrest, imprisonment or damages for -
  - (a) anything they have said in, produced before, or submitted to their provincial legislature or any of its committees; or
  - (b) anything revealed as a result of anything that they have said, produced or submitted.
- (3) Other privileges and immunities of members of the provincial legislatures may be prescribed by [national or provincial] legislation.

### **Assent to Bills**

109. (1) The Premier of a province, without delay, must assent to and sign every Bill passed by the provincial legislature.<sup>102</sup>
- (2) A Bill signed by the Premier of a province becomes an Act of that province upon its promulgation.<sup>103</sup>

### **Safe keeping of Provincial Acts**

110. The signed copy of every Act of a provincial legislature must be entrusted for safekeeping to the Appellate Division/Constitutional Court immediately after promulgation, and is conclusive evidence of the provisions of that Act.

### **Provincial Constitutions**

#### **Adoption**

111. (1) A provincial legislature may adopt a constitution by resolution of at least two-thirds of its members.
- (2) A provincial constitution must be consistent with the Constitution, but it may establish different legislative and executive structures and procedures for the province.
- (3) A provincial constitution has no force or effect unless the Constitutional Court has certified that all of its provisions are consistent with the Constitution.
- (4) A certification by the Constitutional Court in terms of subsection (3) is final, and no court of law has jurisdiction to enquire into the validity of that constitution.

---

deleted. See Report page 22.

<sup>102</sup> This provision differs from its counterpart in the Chapter on Parliament, because it does not give a Premier the right to refer Bills. This is an issue that must still be considered.

<sup>103</sup> Laws passed by provincial legislatures are consistently referred to as Acts. This enables clear distinctions to be made in reference to law and laws. In particular, the term Act is narrower than "legislation" which includes proclamations.

## PROVINCIAL EXECUTIVES<sup>104</sup>

### Executive authority of Provinces<sup>105</sup>

112. The executive authority of a province vests in the provincial executive consisting of a Premier and other members of the Executive Council, who must exercise perform their functions in accordance with the Constitution.

### Powers and functions of Premiers<sup>106</sup>

113. (1) The Premier of a province has the powers and functions entrusted to that office by the Constitution and any legislation.
- (2) The Premier must act in consultation with the other members of Executive Council of that province when performing functions entrusted to the Premier, except when performing the functions in the following list-
- (a) appointing and dismissing the members of the Executive Council;
  - (b) convening Executive Council meetings,
  - (c) assenting to and sign Bills passed by the provincial legislature;
  - (d) summoning the provincial legislature to an extraordinary sitting for the conduct of urgent business;
  - (e) dissolving the provincial legislature after a motion of no confidence in the Executive Council has been passed by the provincial legislature; and
  - (f) any other powers or functions which the Constitution states or implies may be exercised or performed by the Premier acting alone.
- (5) Decisions of the Premier in consultation with the Executive Council must be in writing, signed by the Premier, and countersigned by another member of the Executive Council.

### Election of Premiers

114. (1) At its first sitting after its election, and whenever necessary to fill a vacancy, a provincial legislature must elect a woman or a man from among its members to be Premier.
- (2) A judge designated by the President of the Constitutional Court/ Chief Justice must preside over the election of the Premier. The procedure set

---

<sup>104</sup> **89 - Edited by reducing the complex phrase "exercise and perform its powers and functions" to "perform its functions". Powers are a subset of functions, and fully captured by that word. Other excess words were removed.**

<sup>105</sup> **The CC has not yet conducted political debate on this report. This draft has been adjusted to correspond with the National Executive draft. Most issues raised in the report on the National Executive also arise in this draft.**

<sup>106</sup> **93 - The specific list has been reordered to reflect a more logical flow of functions in order of importance.**

out in Schedule ... applies to the election of the Premier.

### **Assumption of office by Premiers**

115. The Premier-elect assumes the office of Premier on the day elected, by swearing or affirming faithfulness to the Republic and obedience to the Constitution, by solemn declaration in accordance with Schedule ....

### **Term of office of Premier**

116. (1) The Premier's term of office begins when the Premier assumes office and ends upon a vacancy occurring or when the person next elected assumes office.
- (2) No person may hold office as Premier for more than two terms of office; but, when a person is elected to fill a vacancy in the office of Premier, the period between that election and the next election of a Premier will not be regarded as a term of office.<sup>107</sup>

### **Vacancies**

117. (1) A vacancy occurs in the office of Premier when -
- (a) the Premier dies, or resigns from office by notice in writing to the Speaker of the provincial legislature; or
  - (b) the provincial legislature passes a vote of no confidence in the Premier alone.
- (2) An election to fill a vacancy in the office of Premier must be held at a time and on a date determined by the President of the Constitutional Court/Chief Justice, but not later than 30 days after the vacancy occurs.

### **Acting Premier**

118. (1) When the Premier is absent or otherwise unable to fulfil the duties of the office of Premier, or during a vacancy in the office of Premier, an office-bearer in the order below acts as the Premier -
- (a) a member of the Executive Council designated by the Premier;
  - (c) a member of the Executive Council designated by the other members of the Executive Council;
  - (d) the Speaker of the provincial legislature;
  - (e) a member of the provincial legislature elected by its members.
- (2) An acting Premier has all the responsibilities, powers and functions of the Premier.

### **Executive Council**

119. (1) The Executive Council of a province consists of the Premier and no fewer

---

<sup>107</sup> This provision is taken from the National Executive. It may not be appropriate here.

- than five and no more than ten members appointed by the Premier.
- (2) The Premier must preside at Executive Council meetings. If the Premier is absent, another member of the Executive Council, designated by the Premier, must preside.

### **Oath or solemn affirmation**

120. Before members of the Executive Council of a province may begin to perform the functions of their office, they must swear or affirm their faithfulness to the Republic and obedience to the Constitution, by solemn declaration in accordance with Schedule ...

### **Accountability of Members of Executive Council**

121. (1) The members of the Executive Council of a province are individually accountable both to the Premier and the provincial legislature, and all members of the Executive Council are collectively accountable to the provincial legislature for the performance of the functions of the provincial government and its policies.
- (2) [In the performance of their functions,] members of the Executive Council are bound by the policies of the Executive Council.

### **Conduct of members of Executive Councils**

122. (1) Members of the Executive Council of a province must act in accordance with a code of ethics prescribed by national legislation.
- (2) Members of the Executive Council of a province may not -
- (a) undertake any other paid work;
  - (b) engage in activities inconsistent with their office or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests; or
  - (c) use their position or any information entrusted to them to enrich themselves or any other person.

### **Remuneration of members of Executive Councils**

123. Parliament determines the salaries, allowances and benefits of the members of the Executive Council.

### **Temporary assignment of powers and functions**

124. The Premier may assign to a member of the Executive Council any powers and functions of another member who is absent from office or is unable to exercise those powers or perform those functions.

### **Transfer of powers and functions**

125. The Premier by proclamation may transfer to a member of the Executive Council -



- (a) the administration of legislation entrusted to another member; or
- (b) any power or function entrusted by legislation to another member.

**Votes of no-confidence**

126. (1) If the provincial legislature passes a vote of no confidence in the Executive Council, the Premier must either resign or dissolve the provincial legislature and call an election.
- (2) If the provincial legislature passes a vote of no confidence in the Premier alone, the Premier must resign.
- (3) If the provincial legislature passes a vote of no confidence in the Executive Council, excluding the Premier, the Premier must either resign or reconstitute the Executive Council.

**National and Provincial**

**Legislative Competencies**

**CHAPTER 9  
Local Government**

**Sections**

**CHAPTER 10  
Indigenous Leaders**

**Sections**

## CHAPTER 11 Security Services

### Statement of principle<sup>108</sup>

The provisions of this Chapter must be interpreted and understood in the spirit of the following principles of national security:

- (a) National security must reflect the resolve of all South Africans, as individuals and as a nation, to live as equals, to live in peace and harmony, to be free from fear and want, and to seek a better life.
- (b) National security must be pursued in strict compliance with the Constitution, the law and all applicable international conventions and norms.<sup>109</sup>
- (c) National security must be subject to the authority of Parliament and the Executive.

### Establishment and governing principles

127. (1) The security services of the Republic consist of a single defence force, a police service and any intelligence services established in terms of the Constitution.
- (2) The defence force is the only lawful military force in the Republic. Other than the security services established in terms of the Constitution, armed organisations or services may be established only in terms of national legislation.<sup>110</sup>
- (3) The security services must be structured and regulated by national legislation.
- (4) The security services must act, and must train and require their members to act, in accordance with the Constitution and the law, including customary international law and treaties binding on the Republic.
- (5) No member of any security force may obey a manifestly illegal order.
- (6) The security services must exercise their powers and perform their functions in the national interest; neither the security services nor any of their members may perform any duty or function in a manner that furthers or prejudices the interests of any political party.
- [(7) The security services must be broadly representative of the South African people.]<sup>111</sup>

---

<sup>108</sup> The statement of principle has been reordered to improve readability. For comment on separate interpretative clauses for individual chapters of the Constitution. See Report page 23.

<sup>109</sup> See Report page 24 for comment on reference to international law.

<sup>110</sup> This provision appears as 120(3) in the Consolidated draft. As it refers to armed services, it is more appropriately included in this general section.

<sup>111</sup> This provision suggest that security systems must be "broadly representative" immediately. This needs reconsideration. Compare section 138(1)(i). It may be unnecessary to include this provision here if security services are covered by Public Administration.

- [(8) Mechanisms and procedures for regulating labour relations to accommodate the specific needs of the security services may be established.]<sup>112</sup>

## DEFENCE

### Defence force

128. (1) The defence force must be structured and managed as a disciplined military force.
- (2) The primary object of the defence force is to defend and protect the Republic, its territorial integrity and its people, [guided by] the principles of international law regulating the use of force.<sup>113</sup>

### Political responsibility

129. (1) A member of the Cabinet must be responsible for defence.
- (2) A (joint) multi-party committee of Parliament must oversee all defence matters.

### Command of defence force<sup>114</sup>

130. (1) The President must appoint a man or a woman as Chief of the defence force, to command the defence force. [The President may dismiss the Chief of the defence force.]<sup>115</sup>
- (2) The Chief of the defence force must exercise command in accordance with the directions of the Cabinet member responsible for defence and, during a state of national defence, of the President.

---

<sup>112</sup> This provision seems unnecessary because the Constitution does not bar the establishment by law of special mechanisms for regulating industrial relations in the Security Services, and because it is not clear whether the mechanisms referred to here are intended to trump the Bill of Rights. If they are, this section may not achieve the intention.

<sup>113</sup> The question is whether "guided by" does not contradict (b) under "Statement of Principle". See Report page 24.

Section 124 of Consolidated Draft has been omitted as it is a duplication of section 127(6) and 128(2) as well as of the mini-preamble to this chapter.

<sup>114</sup> Section 56 establishes the President as Commander of the defence force. Section 130(2) speaks of the Chief of defence force acting on Ministerial or Presidential direction. These provisions need to be clarified. Section 130(2) is modelled on Section 225 of Interim Constitution.

<sup>115</sup> The provision that the President may dismiss the Chief of the Defence Force was included to make the provision consistent with the provision on the National Commissioner of the police service.

## **Defence civilian secretariat<sup>116</sup>**

131. A civilian secretariat for defence must be established to function under the direction [and control] of the Cabinet member responsible for defence, and to administer any matters in connection with defence that are entrusted to it by that Cabinet member, or by national legislation.

## **POLICE**

### **Police service**

132. (1) The national police service must be structured to function at national and provincial levels, as set out in national legislation.
- (2) National legislation must establish the powers and functions of the police service and must enable the police service to discharge its responsibilities effectively.
- (3) The objects of the police service are to prevent and investigate crime, to maintain public order, and to protect and secure the Republic, its inhabitants and their property.

### **Political responsibility and accountability**

133. (1) A member of the Cabinet must be responsible for policing.
- (2) A [joint] multi-party committee of Parliament must oversee all police matters.

### **Control of police service**

134. (1) The President must appoint a woman or a man as National Commissioner of the police service, to control and manage the police service. The President may dismiss the National Commissioner of the police service.
- (2) The National Commissioner must exercise control and management in accordance with the directions of the Cabinet member responsible for policing.
- (3) The National Commissioner must appoint a man or a woman as provincial commissioner for each province, in accordance with national legislation. The National Commissioner may dismiss a provincial commissioner.
- (4) The National Commissioner may direct the provincial commissioners, who are each responsible for policing in their province, as prescribed by national legislation.
- (5) Each provincial government is responsible for monitoring and overseeing the conduct and efficiency of the police service and cultivating good relations between the police and the rest of the community in their province, [and may establish mechanisms to carry out these responsibilities.]

### **Police civilian secretariat**

---

<sup>116</sup>

This formulation does not explain how a secretariat should be established.

135. A civilian secretariat for the police service must be established to function under the direction [and control] of the Cabinet member responsible for policing, and to exercise any powers and functions in connection with policing that are entrusted to it by that Cabinet member, or by national legislation.

## **INTELLIGENCE**

### **Establishment and control of intelligence services**

136. (1) The President may establish an intelligence service or services.  
(2) The President must appoint a man or a woman as head of each intelligence service established in terms of subsection (1) and must either assume political responsibility for the control and direction of any of those services, or designate a member of the Cabinet to assume that responsibility.

### **Powers, functions and monitoring**

137. National legislation must establish and regulate the objects, powers and functions of the intelligence services established in terms of section 136(1) and must provide for -
- (a) a parliamentary committee to oversee the budgets of those services;
  - (b) civilian monitoring of the activities of those services by an inspector [or inspectors] appointed by the President with the approval of the National Assembly by a resolution adopted by at least two-thirds of its members; and
  - (c) co-ordination of all intelligence services in the Republic.

## CHAPTER 12 Public Administration

### Basic values and principles governing public administration

138. (1) Public administration at all levels of government, including the administration of institutions that are dependent on government funds or other sources of public money, must be governed by the democratic values and principles enshrined in the Constitution, and the following principles apply:<sup>117</sup>
- (a) A high standard of professional ethics must be promoted and maintained.
  - (b) Efficient, economic and effective use of resources must be promoted.
  - (c) Public administration must be development oriented.
  - (d) Services must be provided impartially, fairly, equitably and without bias.
  - (e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.
  - (f) Public administration must be accountable.
  - (g) Transparency must be fostered by providing the public timely, accessible and accurate information.
  - (h) Good human-resource management and development practices, to maximise human potential, must be cultivated.
  - (i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.
- (2) The appointment in the public administration of a number of persons on policy considerations as regulated by legislation is not precluded.
- [(3) Legislation regulating the public administration may differentiate between different sectors, administrations or institutions in the public administration.]<sup>118</sup>

### Public Administration Commission

139. (1) There is a single Public Administration Commission for the Republic, which is independent and must be impartial and regulated by national legislation. Each of the provinces may nominate a representative to be appointed to the Commission.<sup>119</sup>

<sup>117</sup> The principles in (a) to (h) have been reordered to begin with the more general principles dealing with the delivery of services to the public and end with the two more specific principles dealing with staff management, resulting in the following order:  
Ethics, Efficiency, Development, Quality of service, Responsiveness, Transparency and Staff.

<sup>118</sup> This provision seems unnecessary. See note to 127(8).

<sup>119</sup> See CP XXIX. The question whether the Public Administration Commission complies with the requirement in CP XXIV that a Public Service Commission be established needs to be

- (2) The object of the Public Administration Commission is to promote the basic values and principles of public administration.
- (3) Provincial representatives in the Public Administration Commission may exercise the powers and perform the functions of the Commission within the provinces, as prescribed by national legislation.
- (4) The Public Administration Commission is accountable to Parliament.

**Public Service**<sup>120</sup>

140. (1) There is a public service for the Republic, which must function, and be structured, in terms of national legislation, and which must loyally execute the lawful policies of the government of the day.
- (2) The terms and conditions of employment in the public service must be regulated by law. Employees are entitled to a fair pension as regulated by legislation.

---

considered.

<sup>120</sup> The requirements of CP XXX need to be considered.



## CHAPTER 13 Finance

### General financial matters

#### National Revenue Fund

141. (1) There is a National Revenue Fund, into which all revenue, as determined by national legislation, raised or received by the national government must be paid.<sup>121</sup>
- (2) Parliament may make appropriations from the National Revenue Fund only in accordance with national legislation.
- (3) No money may be withdrawn from the National Revenue Fund except under appropriation made by national legislation; but, revenue to which a province is entitled [in terms of this Constitution] is a direct charge against the National Revenue Fund to be credited to the Provincial Revenue Fund concerned.<sup>122</sup>

#### Annual budget

142 ...

#### Procurement administration

143. (1) The procurement of goods and services by organs of state at any level must be regulated by [national and provincial] legislation, which must provide for independent and impartial tender boards to be appointed to deal with procurement.<sup>123</sup>
- (2) The tendering system must be fair, public and competitive.
- (3) No person and no organ of state may interfere with a tender board.
- (4) All decisions of a tender board must be recorded and open to public inspection, and a tender board must provide reasons for a decision if requested to do so by an interested party.

#### Guarantees by national government

144. The national government may guarantee a provincial or local government loan, only if -

---

<sup>121</sup> The word "government" appears to be clear in this context. An alternative formulation avoiding the use of the word "government" could not be found.

<sup>122</sup> A provision dealing with the Provinces' share of revenue will be included elsewhere in the Constitution. There are several outstanding issues related to this to be resolved.

<sup>123</sup> It is not clear whether procurement should be regulated by national legislation only or national or provincial legislation. It is also not clear whether the intension is to exclude local government from regulating the procurement of goods by the laws.

- (a) the guarantee complies with the norms and conditions for such a guarantee as set out in national legislation; and
- (b) the Financial and Fiscal Commission has made a recommendation concerning compliance of the guarantee with such norms and conditions.<sup>124</sup>

### **Accountability of enterprises receiving public funds**

145. Any enterprise may be required to report to or give evidence before Parliament, in a manner determined by national legislation, if public money is invested in it, its sources of revenue are regulated by legislation, or it is able to raise revenue in terms of any legislation.

### **Financial and Fiscal Commission**

#### **Establishment**

146. There is a Financial and Fiscal Commission for the Republic, which is independent and subject only to this Constitution and the law, and which must be impartial.

#### **Functions<sup>125</sup>**

147. (1) The Commission may give advice and make recommendations to Parliament, provincial legislatures and any other authorities determined by national legislation regarding the financial and fiscal requirements of the national, provincial and local governments, including -
- (a) financial and fiscal policies;
  - (b) criteria for the allocation of financial and fiscal resources;
  - (c) equitable allocations to national, provincial and local governments from revenue collected at national level;
  - (d) the form of any taxes, levies, imposts, and surcharges that a provincial government intends to levy;
  - (e) the raising of loans by a provincial or local government and the norms and conditions that apply to those loans; and
  - (f) any other matter assigned to the Commission by the Constitution or national legislation.
- (2) In performing its functions, the Commission must consider all relevant information including the national interest, economic disparities between the provinces, and their population and development needs, administrative responsibilities and other legitimate interests.

### **Appointments, qualifications, tenure and dismissal of members**

---

<sup>124</sup> This appears to be an unnecessary provision. Differentiation is prohibited by the Constitution.

<sup>125</sup> There is only broad agreement on the functions of the Commission, several issues involving the substance and scope of these functions still require agreement.

148. ...<sup>126</sup>

### **Reports**

149. The Commission must report regularly to both Parliament and provincial legislatures as prescribed by national legislation.

### **Central Bank**

#### **Establishment**

150. There is a South African Reserve Bank, which is the central bank of the Republic, and is regulated by national legislation.

#### **Primary objective**

151. (1) The primary object of the South African Reserve Bank is to protect the value of the currency [of the Republic] in the interest of balanced and sustainable economic growth in the Republic.<sup>127</sup>
- (2) The South African Reserve Bank, in the pursuit of its primary object, must perform its functions independently and without fear, favour or prejudice, subject [only] to national legislation; but, there must be regular consultation between the South African Reserve Bank and the Minister responsible for national financial matters.<sup>128</sup>

#### **Powers and functions**

152. The powers and functions of the South African Reserve Bank are those customarily exercised and performed by central banks, and must be determined by national legislation.

---

<sup>126</sup> The method of appointment remains a contentious issue.

<sup>127</sup> The words "of the Republic" are inserted to give meaning to currency.

<sup>128</sup> The inclusion of the word "only" suggest that the Reserve Bank is not subject to the Constitution and the law in general. This impression is strengthened by the fact that independent institutions such as the Public Protector are subject to the "Constitution and the law".

**CHAPTER 14**  
**Amendment of the Constitution**

153. [Parliament may amend the Constitution by a Bill passed by at least two-thirds of the members of the National Assembly.]