

## CHAPTER 1 FOUNDING PROVISIONS

### Republic of South Africa

1. (1) The Republic of South Africa is one sovereign democratic state founded on a commitment to promote and protect human dignity; to achieve equality; and to advance fundamental human rights and freedoms.<sup>1</sup>
- (2) ...<sup>2</sup>

### Supremacy of the Constitution<sup>3</sup>

2. (1) This Constitution is the supreme law of the Republic. It binds the Republic, its institutions, its citizens and all persons within its borders; law or conduct inconsistent with it is invalid.
- (2) All constitutional obligations must be performed diligently and without delay.

### Citizenship

3. (1) There is a common South African citizenship.
- (2) All citizens are equally -
  - (a) entitled to the rights, privileges and benefits of citizenship; and
  - (b) subject to the duties and responsibilities of citizenship.
- (3) National legislation must provide for the acquisition, loss and restoration of citizenship.

4...

### National symbols

5. The national flag is black, gold, green, white, red and blue as sketched and described in Schedule 2.

### Languages

6. *Option 1*
  - (1) The official languages of the Republic are Afrikaans, English, isiNdebele, Sesotho sa Leboa, Sesotho, siSwati, Xitsonga, Setswana, Tshivenda, isiXhosa and isiZulu.
  - (2) The Pan South African Language Board must promote the conditions for the development and use of the official languages.

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<sup>1</sup> Reordered for consistency with the Bill of Rights.

<sup>2</sup> The TRT does not consider it necessary to define national territory.

<sup>3</sup> To be revisited in light of other founding provisions and preamble.

- (3) The Pan South African Language Board is also responsible for promoting respect for and the development of languages including German, Greek, Gujarati, Hindi, Portuguese, Tamil, Telegu, Urdu, Khoi, San and sign language and other languages commonly used by communities in South Africa, as well as Arabic, Hebrew, Sanskrit and other languages used for religious purposes.
- (4) National and provincial government may use particular official languages for the purposes of government taking into account usage, practicality and expense.

*Option 2*

The same as section 3 of the interim Constitution.

*Option 3*

- (1) Afrikaans, English, isiNdebele, Sesotho sa Leboa, Sesotho, siSwati, Xitsonga, Setswana, Tshivenda, isiXhosa and isiZulu are recognised as the national languages of the Republic.
- (2) The use of these languages as official languages must be regulated by national and provincial legislation.

## CHAPTER 2 BILL OF RIGHTS

### State's duties

7. The state must respect, protect, promote, and fulfil the rights in this Bill of Rights.

### Equality

8. (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 promote the achievement of equality, legislative and other measures that are designed for the protection and advancement of persons or categories of persons disadvantaged by unfair discrimination may be taken.
- (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 [and affiliation or any other grounds].<sup>4</sup>
- (4) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.<sup>5</sup>

### Human dignity

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

### Life

10.

*Option 1*

Everyone has the right to life.

*Option 2*

Everyone has the right to life and the death penalty is hereby abolished.

*Option 3*

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

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<sup>4</sup> Words in brackets are still in contention. Panel and Technical Committee to provide alternative formulations and to move section 35(4) into this section.

<sup>5</sup> Agreed. May need to be revisited if "unfair" and "unfairly" fall out.

**Freedom and security of the person**

11. (1) Everyone has the right to freedom of the person, including the right not to be -
- (a) deprived of liberty arbitrarily or without just cause; or
  - (b) detained without trial.
- (2) Everyone has the right to security of the person, including the right -
- (a) to be free from all forms of violence;
  - (b) to [bodily / physical] and psychological integrity; and
  - (c) to make decisions concerning [reproduction / their body] free from coercion, discrimination and violence.
- (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 that person's consent.

**Slavery, servitude and forced labour**

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

**Privacy**

13. Everyone has the right to privacy, including the right not to have<sup>6</sup> -
- (a) their person or home searched;
  - (b) their property searched;
  - (c) their possessions seized; and
  - (d) the privacy of their communications infringed.

**Freedom of religion, belief and opinion**

14. (1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.
- (2) Religious observances may be conducted at state or state-aided institutions provided that -
- (a) those observances follow rules made by an appropriate public authority;
  - (b) they are conducted on an equitable basis; and
  - (c) attendance at them is free and voluntary.
- (3) (a) This section does not prevent legislation recognising -
- (i) marriages concluded under any tradition or a system of religious, personal or family law; and
  - (ii) systems of personal and family law under any tradition or adhered to by persons professing a particular religion.
- (b) The legislation referred to in paragraph (a) must be consistent with

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<sup>6</sup> Panel/TC4 to write memo on inclusion of 'reasonable' in (a), (b) and (c).

the provisions of the Constitution.

### **Freedom of expression**

15. (1) Everyone has the right to freedom of expression, including -
- (a) freedom of the press and other media;
  - (b) freedom to receive and impart information and ideas;
  - (c) freedom of artistic creativity; and
  - (d) academic freedom and freedom of scientific research.<sup>7</sup>
- (2) The right in subsection (1) does not extend to -
- (a) propaganda for war;
  - (b) the incitement of imminent violence; or
  - [(c) advocacy of hatred based on race, ethnicity, gender or religion that constitutes incitement to cause harm.]<sup>8</sup>
- (3) *Option 1*  
The state must regulate any media that it finances or controls to ensure that it is impartial and presents a diversity of opinion.

#### *Option 2*

The state must regulate any newspapers and electronic media that it finances or controls to ensure that they are impartial and represent broadly the views of society.<sup>9</sup>

### **Assembly, demonstration and petition**

16. Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, [to picket,] or to present petitions.

### **Freedom of association**

17. Everyone has the right to freedom of association.

### **Political rights**

18. (1) Every citizen is free to make political choices, which includes the right -
- (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 free, fair and regular elections for any legislative body established in terms of the Constitution.

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<sup>7</sup> NP wants to be sure provision applies to juristic persons.

<sup>8</sup> Section 15(2)(c) still under discussion.

<sup>9</sup> Possible formulations for this provision and similar provision in Chapter 7 are being prepared by the TRT.

- (3) Every adult citizen has the right:
  - (a) to vote, in elections for any legislative body established in terms of the Constitution, and to do so in secret; and
  - (b) to stand for public office and, if elected, to hold office.

### **Citizenship**

19. No citizen may be deprived of citizenship.

### **Freedom of movement and residence**

- 20. (1) Everyone has the right to freedom of movement and residence anywhere in the Republic.<sup>10</sup>
- (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.

### **Freedom of occupation**

21. Every citizen has the right to choose freely their [trade,] occupation or profession, their place of work and their place of training.<sup>11</sup> [The practice of an occupation may be regulated by law.]

### **Labour relations<sup>12</sup>**

- 22. (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;
  - (b) to participate in the activities and programmes of an employers' organisation; and
  - [(c) to lock-out.]
- (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; and

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<sup>10</sup> ANC is reconsidering the use of the word 'everyone'.

<sup>11</sup> DP considering reference to 'citizen'.

<sup>12</sup> Section 22 still under discussion.

- (d) to form and join a federation.

### Environment<sup>13</sup>

23. 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 legislative and other measures designed to -
    - (i) prevent pollution and ecological degradation;
    - (ii) promote conservation; and
    - (iii) secure sustainable development and use of natural resources.

### Property

24. (1) The state must guarantee property **[and it must foster conditions which enable people to gain access to property on an equitable basis]**.
- (2) **[The nature, content and limits of property may be determined by law.]** No one may be deprived of property except in accordance with a law of general application **[but no one may be arbitrarily deprived of property]**.
- (3) Property may be expropriated only in terms of a law of general application -
- (a) for public purposes or in the public interest which includes land reform to address the results of past racial discrimination; and
  - (b) subject to the payment of **[just and equitable]** compensation within a time period and in a manner as agreed or decided by a court.
- (4) When a court decides the amount of compensation, timing or manner by which payment must be made, the court must determine a fair balance between all relevant interests having regard to all the relevant factors, including -

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<sup>13</sup> NP proposes the following clause:

*"Everyone has the right -*

- (1) *to an environment that is not harmful to their health, well-being and quality of life, and*
- (2) *to have their environment protected through reasonable legislative and other measures for the benefit of present and future generations -*
  - (a) *preventing pollution and ecological degradation;*
  - (b) *promoting conservation;*
  - (c) *securing the ecologically sustainable use of natural resources;*
  - (d) *safeguarding the environment while promoting justifiable economic development; and*
  - (e) *securing the ecological integrity of the environment."*

- (a) the current **[and intended]** use;
- (b) the history of its acquisition;
- (c) its market value;
- (d) **[the ability of the state to pay]**;
- (e) the purpose of expropriation;
- (f) the level and extent of state investment and subsidy;
- (g) **[the value of the investment in the property]**; and
- (h) **[the need for effective land reform]**.

[(5) This section does not invalidate reasonable legislative and other measures that are designed to bring about land reform to redress the results of past racial discrimination.]

### Access to land

24A [Everyone has the right to have equitable access to land. The state must take reasonable legislative and other measures, within the state's available resources, to facilitate this access.]<sup>14</sup>

### Housing

25. (1) Everyone has the right to have access to adequate housing.
- (2) The state must take reasonable legislative and other measures, within the state's available resources, to achieve the progressive realisation of this right.
- (3) No one may be evicted from their home or have their home demolished [arbitrarily] without an order of court made after considering the relevant circumstances.<sup>15</sup>

### Health, food, water, and social security

26. (1) Everyone has the right to have access to -
- (a) health care services, including reproductive health care;
  - (b) sufficient food and water; and
  - (c) social security including, if they are unable to support themselves and their dependants, appropriate social assistance.
- (2) The state must take reasonable legislative and other measures, within the state's available resources, to achieve the progressive realisation of each of these rights.
- (3) No one may be refused emergency medical treatment.

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<sup>14</sup> Agreed to deal with land in separate clause. Full clause still to be developed. ANC and NP submitted drafts for discussion.

<sup>15</sup> Panel/TC4 to prepare memo on the inclusion of the word "arbitrary". NP proposes that the clause should refer to a "lawfully occupied" home.



**Children**

27. (1) Every child has the right -
- (a) to a name and a nationality from birth;
  - (b) to family care, parental care, or appropriate alternative care when removed from the family environment;
  - (c) to basic nutrition, shelter, basic health care services, and social services;
  - (d) to be protected from maltreatment, neglect, abuse, or degradation;
  - (e) to 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 11 and 34, the child may be detained only for the shortest 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**28. *Option 1*

- (1) Everyone has the right -
- (a) to a basic education, including adult basic education, in a state or state-aided institution;<sup>16</sup>
  - (b) to further education, which the state must take reasonable and progressive legislative and other measures to make generally available and accessible; and
  - (c) to 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

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<sup>16</sup>

The wording in the preamble. See TC4 memo.

state-aided educational institutions.

*Option 2*

Subsections (1) and (2) above and the following:-

- (3) Everyone has the right to educational institutions based on a common culture, language, or religion, provided that there must be no discrimination on the ground of race and provided further that the state may 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.

29. ...<sup>17</sup>

**Language and culture**

30. Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may violate the rights of anyone else.<sup>18</sup>

**Access to information**<sup>19</sup>

31. *Option 1*

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

[(2) This right must be regulated by national legislation.]<sup>20</sup>

*Option 2*

- (1) The state must take legislative measures to provide reasonable access to any information that is -  
 (a) required for the exercise and protection of any rights; and  
 [(b) held by the state or a natural or juristic person.]<sup>21</sup>

**Just administrative action**<sup>22</sup>

<sup>17</sup> Agreed that Section 29 on academic freedom would be incorporated under Section 15.

<sup>18</sup> TRT has considered the formulation and believes it is appropriate. NP is considering this provision.

<sup>19</sup> Panel/TC4 to provide new wording.

<sup>20</sup> Section 31 to be reconsidered when horizontality and juristic persons discussed.

<sup>21</sup> The words in brackets seem unnecessary.

<sup>22</sup> ANC proposes the following formulation:

"(1) *The State must provide by way of relevant legislation access to just administrative action.*

(2) *The legislation referred to in subsection (1) must -*

32. *Option 1*

- (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*

- (1) No one may be adversely affected by administrative action that is unlawful or unreasonable.
- (2) Everyone whose rights are adversely affected by administrative action has the right to fair procedure unless the administrative action is of general application.
- (3) Everyone whose rights or interests have been adversely affected by an administrative action has the right to written reasons.

**Access to courts**

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

**Arrested, detained and accused persons**

- 34. (1) Everyone who is arrested for allegedly committing an offence has the right -
  - (a) to remain silent;
  - (b) to be informed promptly -
    - (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) to be brought before a court of law as soon as reasonably possible, but not later than 48 hours after the arrest, or where the period of 48 hours expires outside ordinary court hours, on the

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- (a) *Provide for the review of administrative action by a court of law or an independent and impartial tribunal;*
  - (b) *impose a duty on the state and the organs of state to take lawful, reasonable and procedurally fair administrative action;*
  - (c) *be justifiable in an open and democratic society based on freedom and equality; and*
  - (d) *promote an efficient administration."*

Panel/TC4 to provide new wording.

- next court day; and while there, to be released from detention unless that person is charged and the court orders the further detention; and
- (e) to be released from detention subject to reasonable conditions if the interest of justice permit.<sup>23</sup>
- (2) Everyone who is detained, including every sentenced prisoner, has the right-
- (a) to be informed promptly of the reason for being detained;
- (b) to choose and to consult with a legal practitioner, and to be informed of this right promptly;
- (c) to have a legal practitioner assigned by the state if substantial injustice would otherwise result, and to be informed of this right promptly;
- (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 and to be informed of this right;
- (f) to have a legal practitioner assigned to the accused person at state expense if substantial injustice would otherwise result,<sup>24</sup> and to be informed of this right;
- (g) to be presumed innocent, and to remain silent, and not to testify during the proceedings;
- (h) to adduce and challenge evidence;
- (i) not to be compelled to give self-incriminating evidence;
- (j) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that

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<sup>23</sup> DP and PAC do not support this wording

<sup>24</sup> DP reserves position on wording.

- language;
  - (k) 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;
  - (l) 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;
  - (m) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and
  - (n) of appeal to, or review by, a higher court.
- (4) Any evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would bring the administration of justice into disrepute.<sup>25</sup>
- (5) Where this section requires information to be given to a person, that information must be given in a language that the person understands.<sup>26</sup>

### Limitation of rights

35. (1) The rights in the Bill of Rights may be limited by or pursuant to a law of general application only to the extent that the limitation is [demonstrably] justifiable in an open and democratic society based on human dignity, equality and freedom and limits the right as little as is reasonably possible.<sup>27</sup>
- (2) Any limitation in terms of subsection (1) must take into account the nature of the right and -
- (a) the importance of the purpose of the limitation;
  - (b) the nature and extent of the limitation; and
  - (c) whether the limitation can achieve its purpose.
- [(3) The provisions of the Bill of Rights do not prevent the state from adopting any legislative or other measures designed to prevent or prohibit [unfair] discrimination.]<sup>28</sup>
- (4) Except as provided in subsections (1) and (2) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

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<sup>25</sup> See Panel/TC4 memo of 11 March 1996 with proposed wording.

<sup>26</sup> Inserted to avoid repetition several times.

<sup>27</sup> Panel/TC4 to prepare memo on this provision.

<sup>28</sup> Agreed to move this section to section 8. Panel/TC4 will propose formulation.

**States of emergency**<sup>29</sup>

36. (1) A state of emergency may be declared only in terms of an Act of Parliament and only when -
- (a) the life of the nation is threatened by war, invasion, [general] insurrection, disorder, [national] disaster, or other public emergency; and
  - (b) the declaration 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 a 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 the Bill of Rights only to the extent that -
- (a) (i) 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 national Government 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 except for an act or omission that, at the time it was committed, was criminal in terms of international law;
  - (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 8  
 Section 9  
 Section 10  
 Section 11(3)  
 Section 12

Equality  
 Human dignity  
 Life  
 Freedom from torture and degrading treatment  
 Freedom from slavery and servitude

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<sup>29</sup>

TRT to draft reformulation.

	(excluding forced labour)
Section 14	Freedom of religion, belief and opinion
Section 22(1)	Fair labour practices
Section 22(2)	and (3) Right to form and join trade unions or employers' organisations
Section 27(1)	(d) Right of children to not be maltreated, neglected or abused
Section 27(1)	(e) Right of children to freedom from exploitative labour practices
Section 27(1)	(f) Rights of children who are detained
Section 33	Access to courts
Section 34(1)	(a) and (b) Right to remain silent, and to be informed of that right
Section 34(1)	(c) Right not to be compelled to confess or make statements
Section 34(2)	(d) Right to challenge detention and be released
Section 34(3)	and (4) Fair trial
Section 35	Rights contained in limitation section
Section 38	Application of the Bill

(5) ...

[(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 national Government 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

- (g) the detainee must be allowed to appear in person before any court considering the detention, 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 on the same grounds unless the state first shows a court good cause for re-detaining that person.

### **Enforcement of rights**

37. Anyone listed in this section has the right to apply to a competent court, alleging that a right declared in the Bill of Rights 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.

### **Application**

38. (1) The Bill of Rights applies to all law and binds the legislature, the executive, the judiciary, and all other organs of state.
- (2) The Bill of Rights binds all natural and juristic persons if applicable.
- (3) The Bill of Rights 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 the Bill.
- (4) Juristic persons are entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and of the juristic persons.<sup>30</sup>

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

39. (1) When interpreting the Bill of Rights, every court -
- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
  - (b) must consider international law; and

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<sup>30</sup>

**NP to consider wording.**



- (c) may consider foreign law.
- (2) ...<sup>31</sup>
- (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.

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<sup>31</sup>

Moved to Judiciary chapter (S99(b)).

## CHAPTER 3 PARLIAMENT<sup>32</sup>

### Legislative authority of Republic

40.<sup>33</sup>

### THE NATIONAL ASSEMBLY

#### Composition and election of National Assembly

41. The National Assembly consists of between 300 and 400 members as determined by national legislation, who are women and men elected 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.<sup>34</sup>

#### Membership

42. (1) Every citizen who is qualified to vote for the National Assembly is eligible to be a member of the Assembly, except -

- (a) anyone who is appointed by or is in the service of the state and receives remuneration, other than -
  - (i) the President, Deputy President, Ministers and Deputy Ministers; and
  - (ii) **any other office-bearers whose functions are compatible with the functions of a member of Parliament and have been declared compatible with those functions by national legislation;**
- (b) members of [the second House,] a provincial legislature or a local government;
- (c) unrehabilitated insolvents;
- (d) anyone declared to be of unsound mind by a court of the Republic; or
- (e) anyone who, after this section takes effect, has been convicted of an offence and 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. A disqualification under this paragraph ends five years after the sentence has been completed.

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<sup>32</sup> Whether the National Council of Provinces should form part of Parliament is not yet resolved.

<sup>33</sup> See clause 1 in Chapter 9 which will be moved to this section once it is finalised.

<sup>34</sup> The NP proposes a list of principles in a schedule with which the electoral system must comply.

- (2) A person loses membership of the National Assembly if that person -
  - (a) ceases to be eligible; or
  - (b) is absent from the Assembly without permission in circumstances for which the rules and orders of the Assembly prescribe loss of membership.
- (3) Vacancies must be filled in terms of national legislation.

43. ...

#### **Oaths or affirmation by members**

44. Before members of the National Assembly 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 3.

#### **Sittings and recess periods**

45. (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) ...

#### **Elections and duration of National Assembly**

46. (1) The National Assembly is elected for a term of five years.
- (2) If the National Assembly is dissolved in terms of section 46A or when its term expires, the President, by proclamation, must call and set dates for an election, which must be held within 90 days of the date the Assembly was dissolved, or its term expired.
- (3) If the results of an election of the National Assembly are not declared within the period referred to in section 113(1) or if an election is set aside by a court, the President, by proclamation, must call and set dates for another election, which must be held within 90 days of the expiry of that period or of the date on which the election was set aside.
- (4) The National Assembly remains competent to function from the time it is dissolved or its term expires until the day before the first day of polling for the next Assembly; but, if the election results are not declared within the period referred to in section 113(1) or an election is set aside by a court, the Assembly as constituted previously again becomes competent to

function until the day before the first day of polling in the next election.<sup>35</sup>

### **Dissolution of National Assembly before expiry of its term**

- 46A. (1) The President may dissolve the National Assembly with the approval of the Assembly by a vote of the majority of the members.<sup>36</sup>**
- (2) An Acting President must dissolve the National Assembly if -**
- (a) the President has resigned after a vote of no confidence in terms of section 93; and**
  - (b) the Assembly fails to elect a new President within 21 days of the vote of no confidence.**

### **Speaker and Deputy Speaker**

- 47. (1)** At the first sitting after its election, or when necessary to fill a vacancy, the National Assembly must elect a Speaker and a Deputy Speaker from among its members.
- (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.
- (3)** The procedure set out in Schedule 4 applies to the election of the Speaker and the Deputy Speaker.
- (4)** The National Assembly may remove the Speaker or Deputy Speaker from office by resolution. A majority of the members of the Assembly must be present when the resolution is adopted.

### **Decisions**

- 48. (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.

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<sup>35</sup> The NA's competency to function after an election has been set aside should be a qualified one, e.g. "competent to function for the conduct of urgent business".

<sup>36</sup> NP proposes that the NA's approval must be by two thirds majority vote.

**President's rights in National Assembly**

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

**Internal autonomy**

50. (1) The National Assembly may determine and control its internal arrangements and may make rules and orders concerning its business and proceedings, including rules and orders regulating the establishment, composition, powers and functions, procedures and duration of its committees.

(2) The rules and orders must provide for the participation of minority parties in the legislative process in a manner consistent with democracy.

(3) A committee of the National Assembly may summon anyone to appear before it to give evidence on oath or affirmation or to produce documents.

**Parliamentary privilege**

51. (1) Members of the National Assembly have freedom of speech and debate in the Assembly and in its committees, subject to its rules and orders.

(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 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.

**Bills**

52....

**Constitutional amendments**

53. The Constitution may be amended by a Bill passed by Parliament if it is adopted by at least two thirds of the members of [both Houses of] Parliament.<sup>37</sup>

**Assent to Bills**

54. (1) The President must either assent to and sign a Bill passed by Parliament or, if the President has reservations about the constitutionality of the Bill, refer it back to Parliament for reconsideration.

(2) If the President refers a Bill back to Parliament, the following procedure

applies:

- (a) Parliament must reconsider the Bill in the light of the President's reservations.
- (b) If Parliament does not reject the Bill and passes it fully accommodating the President's reservations, the President must assent to and sign the Bill.
- (c) If Parliament confirms the Bill or passes it without fully accommodating the President's reservations, the President must either assent to and sign the Bill or refer it to the Constitutional Court for a decision on its constitutionality.
- (d) If the Constitutional Court decides that the Bill is constitutional the President must assent to and sign it. If the court decides the Bill is unconstitutional, the Bill lapses.

### **Application by members to Constitutional Court**

- 54A.(1) At least one third of the members of the National Assembly may apply to the Constitutional Court for an order declaring that a Bill passed by Parliament or part of the Bill, or if the Bill has been promulgated, the Act, or part of the Act, is unconstitutional.
- (2) An application -
    - (a) may not be made before the President has assented to and signed the Bill; and
    - (b) must be made no more than 30 days after the Bill has been signed by the President.
  - (3) When an application is made, the Constitutional Court may order that the Bill may not be promulgated or that the Act or part of it has no force until the Court has decided the application if -
    - (a) the interests of justice require this; and
    - (b) the application has reasonable prospects of success.
  - (4) If the application is unsuccessful the Constitutional Court must order the applicants to pay the costs unless the application had reasonable prospects of success.

### **Promulgation**

55. A Bill assented to and signed by the President must be promulgated and becomes an Act of Parliament upon its promulgation.

### **Safekeeping of Acts of Parliament**

56. The signed copy of an Act of Parliament is conclusive evidence of the provisions of that Act and must be entrusted for safekeeping to the Constitutional Court immediately after promulgation.

## CHAPTER 4 THE NATIONAL COUNCIL OF PROVINCES<sup>38</sup>

### Composition

1. (1) There shall be a National Council of Provinces through which the provinces participate in the national legislative process.
- (2) The National Council shall comprise of nine provincial delegations made up as follows:
  - (a) five (Option: seven) members elected directly by each provincial legislature in proportion to the support enjoyed by the political parties represented in such provincial legislature. (Option: the members so elected shall cease to be members if the provincial legislature loses confidence in its representatives.)
  - (b) five (Option: three) representatives appointed by each provincial legislature (Option: Executive) in proportion to the support enjoyed by the political parties to attend specific council meetings from time to time.

### Participation in National Legislative Process

2. (a) The National Council shall have the power to consider legislation dealing with matters which fall within the exclusive competence of national government.
  - (b) The National Council may consent or to object to such legislation and may propose amendments thereto.
  - (c) Where the National Council has proposed amendments or has objected to such a Bill, the National Assembly must reconsider such a Bill and amendments if any and may pass the Bill with or without such amendments by a simple majority.
  - (d) The National Council and the National Assembly may establish any joint committee in accordance with their respective rules to consider such a Bill and any amendments proposed thereto, provided that no more than 30 days shall be allowed for such joint consideration after the Bill has been referred to the National Council.
2. (2) All Bills which affect the exercise or performance of the powers and functions of the provinces as provided in schedule 5, excluding appropriation bills and amendments to the Constitution shall be dealt with by the National Council as follows:
    - (a) if the Council supports the Bill, it must be submitted to the President for assent;
    - (b) if the Council proposes amendments or opposes the Bill, the Bill together with any proposed amendments must be referred to the Mediation Committee;

- (c) if the Mediation Committee agrees on the version of the Bill as passed by the National Assembly, the Bill must be submitted to the President for assent;
- (d) if the Mediation Committee agrees on a different version of the Bill to that approved by the National Assembly it shall be submitted to the Assembly for approval, and if approved, the Bill shall be submitted to the President for assent.

(Option. If the Mediation Committee agrees on a different version of the Bill, to that approved by the National Assembly, such amended Bill must be referred to both the Council and the Assembly for approval before it is submitted to the President for assent.); and

- (e) if the Mediation Committee fails to agree on the Bill or amendments thereto, the Bill shall lapse unless the Assembly approves such Bill by a majority of at least of its members present.

(Option. If the Mediation Committee fails to agree on the Bill, or amendments thereto, the Bill shall lapse.)

### **Financial Bills**

3.

- 3.1 All appropriation Bills shall be dealt with in terms of procedures set out in section 2(1).
- 3.2 Other Bills having financial implications for provincial government with regard to the functional areas listed in schedule 5, shall be dealt with in terms of the procedures set out in section 2(2).

### **Constitutional Amendments**

4.

- 4.1 The approval of the total number of members of the National Council shall be required for any constitutional amendment which amends any provisions of the Constitution dealing with provinces.
- 4.2 In the event that a constitutional amendment amends the powers and functions of a specific province or provinces, the approval of the legislature of such province or provinces shall be required.

### **Mediation Committee**

5.

- 5.1 The Mediation Committee shall consist of
  - (a) one delegate from each province designated by members of the province in the National Council and
  - (b) nine members of the National Assembly elected by the Assembly in



proportion to the representation of the parties represented in the Assembly.

- 5.2 Support by the majority of the members of the National Assembly and by the majority of the delegates of the National Council on any issue placed before the Mediation Committee shall constitute an agreement by the Committee.

### **Voting in the Council**

- 6.
- 6.1 Each Province shall be entitled to one vote to be cast by its representatives in accordance with the mandate given by the provincial legislature.
- 6.2 With regard to all decisions other than those which affect the exercise of performance of the powers and functions of the provinces as provided in Schedule 5, each member of the Council shall exercise a vote and the Council shall take its decisions by a majority of such votes cast.

### **Powers to summon Ministers**

- 7.
- 7.1 The Council shall have the power to summon national Ministers and officials of the Executive to the Council and its committees.
- 7.2 Members of the Cabinet shall have the right to address the National Council or its committees in respect of any deliberations regarding legislation affecting their portfolio.

### **Appointments**

- 8.
- 8.1 The National Council may confirm the appointments set out in Schedule X. (Option. The National Council shall confirm the appointment of Constitutional Court judges.)

### **Chairpersons**

- 9.
- 9.1 The Chairperson of the National Council shall be a member of the National Council elected by the Council.
- 9.2 Upon election, a Chairperson shall have no vote and his or her delegation may fill the vacancy caused by such an election.
- 9.3 The term of office of such a Chairperson shall be for one year and he or she shall be succeeded by a person chosen from another province. Provision shall be made for Deputy Chairpersons.

#### *Option*

- 10.1 There shall be a President of the Council who shall be appointed by the President.

- 10.2 The President of the Council shall have no vote and shall be responsible for the Secretariat.
- 10.3 There shall be two vice-presidents who shall be elected annually at a meeting of the council of Premiers from amongst their numbers.
- 10.4 At least one of the vice Presidents shall be elected from one of the minority parties if such a minority party is a majority party in a province.

### **General**

#### **11.**

- 11.1 The members of the National Council of Provinces shall be entitled to participate in the deliberations of the Provincial Legislatures from which they have been elected and in the committees of such legislatures but shall have no vote therein.
- 11.2 Properly mandated representatives (delegates) of local government may attend and participate in the National Council and their committees but may not vote.
- 11.3 The Council shall have the right to express itself by passing resolutions on any matter of concern including the performance of the national or provincial executives and their members.

## CHAPTER 5 THE NATIONAL EXECUTIVE<sup>39</sup>

### Executive authority of the Republic

76.<sup>40</sup>

### The President

77. The President -

- (a) promotes the unity of the nation and that which will advance the Republic;
- (b) is the Head of State, Head of the national executive and Commander-in-Chief of the defence force;
- (c) must uphold, defend and respect the Constitution as the supreme law of the Republic; and
- (d) is responsible for the observance of the Constitution by the national executive.

### Powers and functions of President

78. (1) The President has the powers and functions entrusted to that office by the Constitution and any legislation.

(2) The President must exercise the powers and perform the functions entrusted to that office in consultation with the other members of the Cabinet, except where -

- (a) the Cabinet has determined that the President may act in consultation with a member or a committee of members; or
- (b) the Constitution states or implies that the President may act alone.

(3) The President may act alone when -

- (a) appointing and dismissing Cabinet members and Deputy Ministers and assigning powers and functions to them;<sup>41</sup>
- (b) convening Cabinet meetings;
- (c) assenting to and signing Bills;
- (d) referring a Bill back to Parliament for reconsideration of the Bill's constitutionality;
- (e) referring a Bill to the Constitutional Court for a decision on the Bill's constitutionality;
- (f) summoning the National Assembly to an extraordinary sitting to conduct urgent business;
- (g) dissolving the National Assembly and calling an election after a vote of no confidence in the Cabinet has been passed by the

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<sup>39</sup> The Panel is still investigating aspects of this Chapter.

<sup>40</sup> See clause 9 in Chapter 9 which will be moved to this section when finalised.

<sup>41</sup> Outcome of this matter depends on decision on composition of cabinet.

- Assembly;
- (h) appointing commissions of enquiry;
  - (i) accrediting foreign diplomatic representatives;
  - (j) appointing ambassadors; and
  - (k) conferring honours.
- (4) Decisions of the President taken in consultation with the other members or a member or committee of the Cabinet, must be in writing, signed by the President, and countersigned by another Cabinet member.

### **Election of President**

79. (1) At its first sitting after its election, and whenever necessary to fill a vacancy, the National Assembly must elect a woman or a man from among its members to be the 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 4 applies to the election of the President.
- (3) 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 more than 30 days after the vacancy occurs.

### **Assumption of office by President**

80. When elected President, a person ceases to be a member of the National Assembly, and, within five days, must assume the office of President by swearing or affirming faithfulness to the Republic and obedience to the Constitution, by solemn declaration in accordance with Schedule 3.<sup>42</sup>

### **Term of office of President**

81. (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**

82...

### **Acting President**<sup>43</sup>

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<sup>42</sup> Has been removed from 82(2). If the requirement of a written resignation is regarded as necessary, it could be added in 79. It might not be necessary in view of the publicity a resignation will inevitably receive.

<sup>43</sup> Outcome would depend on decision on composition of cabinet.

83. (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 -
- (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.
- (2) An acting President has the responsibilities, powers and functions of the President.

#### Removal of President

84. (1) The National Assembly, by a resolution of at least two thirds of its members, may remove the President from office only on the grounds of
- (a) a serious violation of the Constitution or the law;
  - (b) serious misconduct; or
  - (c) inability to perform the functions of office.
- (2) Anyone who has been removed from the office of President in terms of subsection (1) (a) or (b) may not receive any benefits of that office, and may not serve in any public office.

#### Cabinet

85. (1) The Cabinet consists of the President, a Prime Minister and Ministers.
- (2) The President appoints the Deputy President and Ministers from among the members of the National Assembly, and may dismiss them.
- (3) The Prime Minister and Ministers are responsible for the functions of the executive assigned to them by the President.

The Deputy President is the leader of government business in Parliament and must assist the President in the execution of the functions of government.

#### Deputy Ministers

86. The President may appoint Deputy Ministers from among the members of the National Assembly to assist the members of the Cabinet, and may dismiss them.

#### Continuation of Cabinet after elections

87. When an election of the National Assembly is held, the Cabinet, its members and the Deputy Ministers remain competent to function until the person elected President by the next Assembly assumes office.

#### Oath of office

88. Before Ministers and Deputy Ministers begin to perform their functions, they must swear or affirm their faithfulness to the Republic and obedience to the Constitution, by solemn declaration in accordance with Schedule 3.

**Accountability of Ministers and Cabinet**

89. (1) The Deputy President and Ministers are individually accountable both to the President and Parliament, and all members of the Cabinet are collectively accountable to Parliament 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 Cabinet members and Deputy Ministers**

90. (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) act in any way that is 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 improperly benefit any other person.

**Temporary assignment of powers and functions**

91. 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.

**Transfer of powers and functions**

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

**Votes of no confidence**

93. (1) If the National Assembly by a vote of the majority of its members passes a vote of no confidence in the Cabinet, excluding the President, the President must reconstitute the Cabinet.
- (2) If the National Assembly by a vote of the majority of its members passes a vote of no confidence in the President, the President and the other members of the Cabinet must resign.

## **CHAPTER 6 COURTS AND ADMINISTRATION OF JUSTICE**

**Judicial authority**

94. (1) The judicial authority of the Republic is vested in the courts.

- (2) The courts are independent, and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.
  - (3) No person or organ of state may interfere with the functioning of the courts.
  - (4) Organs of state, through legislative and other measures, must assist and protect the courts, to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.
- (5) ***Option 1***  
**Decisions of the courts are binding and must be respected by all persons and organs of state to which they apply.**
- Option 2***  
**Decisions of the courts are binding and must be complied with by all persons and organs of state to which they apply.<sup>44</sup>**

### Judicial system

95. The courts are:
- (a) The Constitutional Court.
  - (b) The Supreme Court of Appeal.
  - (c) The High Courts, including any high courts of appeal that may be established in terms of an Act of Parliament to hear appeals from High Courts.
  - (d) The Magistrates' Courts.
  - (e) Any other courts established **[or recognised]**<sup>45</sup> in terms of an Act of Parliament, including courts of a status similar to the High Courts or the Magistrates' Courts.

### Constitutional Court

96. (1) The Constitutional Court consists of a President, a Deputy President and nine other judges.
- (2) A matter before the Constitutional Court must be decided by at least eight judges.
- (3) The Constitutional Court -
- (a) is the highest court in all constitutional matters:
  - (b) may decide constitutional matters only,<sup>46</sup> and

<sup>44</sup> The TRT prefers option 2. This formulation will ensure that the provision is not interpreted to deal with extraneous matters such as res judicata and the precedent system.

<sup>45</sup> TRT suggests inclusion of words in brackets to ensure traditional courts are covered.

<sup>46</sup> Consideration is being given to whether or not it is necessary to include a provision similar to 97(2)(b) in 96(2).

- (c) makes the final decision whether a matter is a constitutional matter.
- (4) Only the Constitutional Court may -
  - (a) decide disputes between organs of state at national or provincial level concerning the constitutional status, powers or functions of any of those organs of state:<sup>47</sup>
  - (b) decide on the constitutionality of any parliamentary or provincial Bill, but may do so only where this is required by the Constitution:
  - (c) **declare that Parliament or the President has failed to comply with a constitutional duty;** or
  - (d) declare unconstitutional an Act of Parliament, a provincial Act, and any conduct of the President, **including any Act or conduct in respect of which the Supreme Court of Appeal or a High Court made a finding of invalidity.**
- (5) **The Constitutional Court functions in terms of national legislation, but may make its own rules of procedure.**<sup>48</sup> National legislation and the rules of the Constitutional Court must allow any person, when it is in the interest of justice and with leave of the Constitutional Court -
  - (a) to bring a matter directly to the Constitutional Court; and
  - (b) **to appeal directly to the Constitutional Court from any court.**
- (6) **A constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution.**

### Supreme Court of Appeal

97. (1) **The Supreme Court of Appeal consists of a Chief Justice, a Deputy Chief Justice and the number of judges of appeal determined by an Act of Parliament.**<sup>49</sup>
- (2) **A matter before the Supreme Court of Appeal must be decided by the number of judges determined by an Act of Parliament.**
  - (3) **The Supreme Court of Appeal may decide appeals in all matters, and is the highest court of appeal except in constitutional matters. It may decide only -**
    - (a) **appeals;**
    - (b) **issues connected with appeals; and**
    - (c) **any other matter that may be referred to it in circumstances defined by an Act of Parliament.**

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<sup>47</sup> The wording may need refinement.

<sup>48</sup> The possibility of creating a role for the JSC in approving rules is being considered. This applies to sections 97(3) and 98(2) as well.

<sup>49</sup> There may be a need to consider a way of making this more flexible.



- (4) **The Supreme Court of Appeal functions in terms of national legislation, but may make its own rules of procedure.**

### High Courts

98. (1) **The High Courts may decide -**  
 (a) all constitutional matters except those that only the Constitutional Court may decide; and  
 (b) **all other matters not excluded by an Act of Parliament.**
- (2) **The High Courts function in terms of national legislation, but may make their own rules of procedure.**

### Other Courts

- 98A. All other courts **may decide those matters** determined by an Act of Parliament; but, no Act of Parliament may **allow these courts -**  
 (a) to enquire into or rule on the constitutionality of any legislation or any conduct of the President.  
 (b) **to declare that any organ of state has failed to comply with a constitutional duty.**

### Powers of courts in constitutional matters

99. (1) **A court deciding a constitutional matter within its power may make any order that is just and equitable; but, the court must declare invalid law, conduct or a parliamentary or provincial Bill that is inconsistent with the Constitution, to the extent of the inconsistency.**
- (2) The orders a court may make include -  
 (a) an order determining the date from which any law or conduct is to be regarded as invalid in terms of any declaration of invalidity;  
 (b) if it determines a date in the future, an order stating the conditions on which the responsible authority may correct the defect before that date; and  
 (c) an order stating whether or not or the extent to which any declaration of invalidity invalidates anything done or permitted in terms of the invalidated law or conduct.
- (3) (a) The Supreme Court of Appeal or a High Court may make a finding on the constitutionality of an Act of Parliament, a Provincial Act or any conduct of the President but may not declare the Act or conduct invalid; but, the court may grant a temporary interdict or other temporary relief to a party.  
 (b) Any person or organ of state with a sufficient interest may appeal, or apply directly, to the Constitutional Court to confirm or vary a finding of unconstitutionality by a court in terms of paragraph (a).  
 (c) National legislation must provide for the referral of a finding of

unconstitutionality to the Constitutional Court.<sup>50</sup>

### **Inherent power**

99A. **The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect their own process and to ensure that justice prevails.**<sup>51</sup>

### **Interpretation**

99B. When interpreting any legislation, every court may prefer any reasonable interpretation of the legislation that is consistent with the Constitution.<sup>52</sup>

### **Appointment of judicial officers**

100. *Option 1*

- (1) Any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer.
- (2) The President, after consulting the Judicial Service Commission, appoints the President and Deputy President of the Constitutional Court and the Chief Justice and Deputy Chief Justice.
- (3) The other judges of the Constitutional Court are appointed by the President, after consulting the President of the Constitutional Court, in accordance with the following procedure:
  - (a) The Judicial Service Commission must prepare a list of nominees with three names more than the number of appointments to be made, and submit the list to the President.
  - (b) The President may make appointments from the list, and must advise the Judicial Service Commission, with reasons, if any of the nominees are unacceptable and any appointment remains to be made.
  - (c) The Judicial Service Commission must supplement the list with further nominees and the President must make the remaining appointments from the supplemented list.
- (4) At all times, at least four members of the Constitutional Court must be persons who were judges at the time they were appointed to the Constitutional Court.
- (5) The President must appoint the judges of all other courts on the advice

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<sup>50</sup> **A transitional provision will be provided to ensure that court rules provide for direct access to the Constitutional Court until appropriate legislation is drafted. Further clarification needed on the broadening of this section to include any constitutional issue.**

<sup>51</sup> **Still to be considered.**

<sup>52</sup> **This provision has been moved from section 39 in the Bill of Rights and broadened to apply to the whole Constitution.**

of the Judicial Service Commission.

- (6A) In the appointment of judicial officers account must be taken of the need for the judiciary to reflect broadly the racial and gender composition of South African society.<sup>53</sup>
- (6) Other judicial officers must be appointed in terms of an Act of Parliament.
- (7) Before judicial officers begin to perform their functions, they must take an oath or affirm, in accordance with Schedule 3, that they will uphold and protect the Constitution.

*Option 2*

- (1) Any appropriately qualified woman or man who is a citizen and a fit and proper person may be appointed as a judicial officer.
- (2) A person appointed as the President, the Deputy President or a judge of the Constitutional Court must be -
  - (a) a judge; or
  - (b) qualified to be admitted as an advocate or attorney and, after qualifying, must have practised as an advocate or an attorney or lectured in law at a university for at least 10 years; or
  - (c) a person who, by reason of training or experience, has expertise in the field of constitutional law relevant to the application of the Constitution and the law of the Republic.
- (3) A person appointed as the Chief Justice, the Deputy Chief Justice or a judge must be qualified to be admitted as an advocate or attorney and, after qualifying, must have practised as an advocate or an attorney or lectured in law at a university for at least 10 years.
- (4) The President of the Constitutional Court and the Chief Justice must be appointed by the President on the advice of the Judicial Service Commission.
- (5) The Deputy President of the Constitutional Court and the other judges of the Constitutional Court must be appointed after advice by the Judicial Service Commission and in consultation with the leaders of all political parties in Parliament who wish to participate.
- (6) In the event of no consensus having been reached in terms of subsection (5), the judges must be appointed together by a majority of at least 75% of the members of the National Assembly [and the second House in a joint sitting].

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<sup>53</sup>

The TRT suggests that this provision could be replaced by a general one covering the appointment of members of all constitutional (and statutory?) institutions.

- (7) At all times, at least four members of the Constitutional Court must be persons who were judges at the time they were appointed and no more than three should have qualified for the Court in terms of subsection (2)(c).
- (8) The President must appoint the Deputy Chief Justice and all other judges on the advice of the Judicial Service Commission.
- (9) The appointment of other judicial offices must be made by an independent body established by an Act of Parliament which must ensure that the appointment, promotion, transfer or dismissal of, or disciplinary steps against such judicial officers, take place without favour or prejudice, and that the applicable legislation and administrative directives are applied uniformly and properly, and that no victimisation or improper influencing of these judicial officers occurs.
- (10) Before judicial officers begin to perform their functions, they must take an oath or affirm, in accordance with Schedule 3, that they will uphold and protect the Constitution.

### Acting judges

101. (1) The President may appoint an acting judge to the Constitutional Court if there is a vacancy or if a judge is absent. The appointment must be made on the recommendation of the Cabinet member responsible for the administration of justice acting in consultation with the President of the Constitutional Court and the Chief Justice.
- (2) The Cabinet member responsible for the administration of justice must appoint acting judges to other courts [on the advice of/after consultation with] the senior judge of the court on which the acting judge will serve.
- (3) A person may be appointed as an acting judge more than once but may not serve for a total period of more than six months [**without the approval of the Judicial Service Commission**].<sup>54</sup> A person continues as an acting judge to complete any unfinished case after the expiry of the period of appointment.

### Terms of office and remuneration

102. (1) Constitutional Court judges are appointed for non-renewable terms of up to nine years.
- (2) Other judges hold office until they are discharged from active service in terms of an Act of Parliament.

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<sup>54</sup>

Concerns have been raised about the practical implications of this provision.

- (3) The salaries, allowances and benefits of judges may not be reduced.

### Removal

103. (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 the second House, at a joint sitting], adopt a resolution calling for that judge to be removed, which is supported by at least two thirds of the total number of members [of both Houses].
- (2) The President must remove a judge from office upon adoption of a resolution calling for that judge to be removed.
- (3) The President, on the advice of the Judicial Service Commission, may suspend a judge who is the subject of a procedure in terms of subsection(1).

### Judicial Service Commission

104. (1) There is a Judicial Service Commission, consisting of -
- (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:
  - (d) the Cabinet member responsible for the administration of justice, or that member's nominee:
  - (e) two practising advocates designated by the advocates' profession:
  - (f) two practising attorneys designated by the attorneys' profession:
  - (g) one professor of law designated by the deans of the law faculties at South African universities:
  - [(h) four senators designated together by the second House by resolution adopted by at least two thirds of its members;]<sup>55</sup>
  - (i) four persons, two of whom are practising attorneys or advocates, designated by the President; 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) The Judicial Service Commission has the powers and functions assigned to it in the Constitution and national legislation.
- (3) The Judicial Service Commission may advise the national and provincial  
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- (4) The Commission may determine its own procedure; but, decisions of the Commission must be taken by a majority of its members.

**Other matters concerning courts**

- 105. National legislation may provide for any matter concerning any court or the administration of justice that is not dealt with in the Constitution, including -
  - (a) training programmes for judicial officers;
  - (b) procedures for dealing with complaints about judicial officers; and
  - (c) the participation of people other than judicial officers in decisions.

## CHAPTER 7

### STATE INSTITUTIONS SUPPORTING

### CONSTITUTIONAL DEMOCRACY

#### **Establishment and governing principles<sup>56</sup>**

106. (1) The following state institutions 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.
  - (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 to ensure the independence, impartiality, dignity and effectiveness of these institutions.
- (4) No person and no organ of state may interfere with the functioning of these institutions.
- (5) These institutions are accountable to Parliament, and must report on their activities to Parliament at least once a year.

#### **PUBLIC PROTECTOR**

#### **Functions of Public Protector<sup>57</sup>**

107. (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

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<sup>56</sup> Section 106 agreed to. Proposals to add an Environmental Commissioner, a Commission on Cultural Affairs, the Volkstaat Council's proposal on Cultural Councils, and to constitutionalise the IBA or a similar body in this Chapter still under discussion.

<sup>57</sup> A single national structure for the Public Protector has been agreed to, pending discussions on competences and provinces.



by national legislation.

- (3) The Public Protector may not investigate court decisions.
- (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 to be determined by national legislation require that a report be kept confidential.

### **Tenure**

108. The Public Protector is appointed for a period of seven years.<sup>58</sup>

## **HUMAN RIGHTS COMMISSION**

### **Functions of Human Rights Commission**<sup>59</sup>

109. (1) The Human Rights Commission must -
- (a) promote respect for human rights and the development of a culture of human rights in the Republic;
  - (b) promote the development, protection and attainment of human rights; and
  - (c) monitor the observance of human rights in the Republic.
- (2) The Human Rights Commission has the powers, as regulated by national legislation, necessary to perform its functions, including the power to investigate and to report on the observance of human rights, to take steps to secure appropriate redress where human rights have been violated, to carry out research and to educate.
- (3) The Human Rights Commission must require information from the relevant organs of state, annually, on the measures taken to secure [achieve the progressive realisation of] the rights to access to land, housing, health, food, water, social security and education.<sup>60</sup>
- (4) In its annual report to Parliament the Human Rights Commission must include its assessment of the observance of human rights in the Republic.<sup>61</sup>
- (5) The Human Rights Commission has the additional powers and functions

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<sup>58</sup> **Is the period renewable?**

<sup>59</sup> **Formulation adopted on 8 March 1996 in place of previous one.**

<sup>60</sup> **NP proposes reformulation to more closely mirror the formulation of socio-economic rights in the Bill of Rights. The wording in brackets comes from sections 25 and 26 but would not resemble the present wording in section 24A and 28. "Secure" is a more general term; "implement" is another alternative.**

<sup>61</sup> **Parties to further discuss this sub-clause.**

prescribed by national legislation.

## COMMISSION FOR GENDER EQUALITY

### Functions of Commission for Gender Equality<sup>62</sup>

110. (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 perform its functions, including the power to monitor, to investigate, to research, to educate, to lobby, to advise and to report on issues concerning gender equality.
- (3) The Commission for Gender Equality has the additional powers and functions prescribed by national legislation.

## AUDITOR-GENERAL

### Functions of Auditor-General

111. (1) The Auditor-General must audit and report on the accounts, financial statements and **financial management of** -
- (a) all national and provincial state departments and administrations;
  - (b) all local governments; and
  - (c) any other institution or accounting entity required by national [or provincial] legislation to be audited by the Auditor-General.
- (2) The Auditor-General may also audit and report on the accounts, financial statements and **financial management of** any institution funded from public money, as may be regulated by legislation.
- (3) The Auditor-General must submit audit reports to the legislature that has a direct interest in the audit, and to any other authority prescribed by national legislation. All reports must be made public.<sup>63</sup>

### Tenure

112. (1) The Auditor-General is appointed for a **fixed**, non-renewable term of not less than five years and not more than 10 years.

## ELECTORAL COMMISSION

### Functions of Electoral Commission

113. (1) The Electoral Commission must -
- (a) manage in accordance with national legislation elections of

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<sup>62</sup> Agreed to.

<sup>63</sup> DP reserves its position on this clause. It proposes that "or provincial" be inserted after "national".

- national, provincial and local legislative bodies:
- (b) ensure that they are free and fair; and
  - (c) declare the results of elections within a period **which must be as short as reasonably possible and determined by national legislation.**<sup>64</sup>
- (2) The Electoral Commission has the additional powers and functions prescribed by national legislation.

### **Composition of Electoral Commission**

114. The Electoral Commission must be composed of at least three persons. The number of members and their terms of office must be prescribed by national legislation.

## **GENERAL PROVISIONS**

### **Appointments**

115. (1) The Public Protector and members of any Commission established by this Chapter must be women or men who are South African citizens, fit and proper to hold the particular office, and who comply with any other requirements prescribed by national legislation.
- (2) The Auditor-General must be a woman or a man who is a South African citizen and fit and proper person to hold that office. Specialised knowledge of, or experience in, auditing, state finances, and public administration must be given due regard in appointing the Auditor-General.
- (3) The President must appoint the Public Protector, the Auditor-General and members of any commission established by this Chapter on the recommendation of Parliament.
- (4) Parliament must recommend a person -
- (a) nominated by a committee of Parliament in terms of the rules and orders; and
  - (b) approved by Parliament by a resolution adopted by at least two thirds of the members.<sup>65</sup>
- (5) National legislation must provide for the appointment of an acting Public Protector, Auditor-General or commission member when it is necessary to ensure the effective functioning of the institution.

### **Removal from office**<sup>66</sup>

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<sup>64</sup> Reformulation to avoid specification of exact number of days.

<sup>65</sup> Parties to further consider sub-section (4).

<sup>66</sup> Parties to discuss this section amongst themselves

116.

- (1) The Public Protector, the Auditor-General or a member of a Commission established by this Chapter may be removed from office only on -
  - (a) the grounds of misbehaviour, incapacity or incompetence;<sup>67</sup>
  - (b) a finding to that effect by a committee of Parliament;<sup>68</sup> and
  - (c) the adoption by Parliament of a resolution, calling for that person's removal from office, and supported by at least two thirds of the members.
  
- (2) The President may suspend a person from office upon or after the start of proceedings before a committee of Parliament for the removal of that person, and must remove a person from office upon adoption by Parliament of a resolution calling for that person's removal.

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<sup>67</sup> The TRT proposes "misconduct" in the place of "misbehaviour", in view of previous discussion.

<sup>68</sup> DP reserves its position on the composition of the committee.

## CHAPTER 8 PROVINCES

### Provinces

117. (1) The Republic has the following provinces:
- (a) Eastern Cape
  - (b) Free State
  - (c) Gauteng
  - (d) KwaZulu-Natal
  - (e) Mpumalanga
  - (f) Northern Cape
  - (g) Northern Province
  - (h) North-West Province
  - (i) Western Cape.
- (2) **The boundaries of the provinces are those existing when the Constitution took effect.**

### [Status and duties of provinces

- 117A (1) Provinces are integral parts of the Republic and inseparable from the Republic which is one sovereign state.
- (2) Provincial governments must promote national unity and must pursue peace in their provinces. They must commit themselves to the well-being of all the people of the province, and co-operate in a spirit of ubuntu to reconstruct and develop their provinces.
  - (3) Provinces are founded on respect for and the observation of human rights. They must promote the achievement of equality between men and women and people of all races.
  - (4) Provinces must comply with the principles of constitutional democracy and the rule of law within the meaning of the Constitution to preserve homogeneity among the provinces.
  - (5) In each province the people must be represented by a body elected by general, free, equal and secret ballot.
  - (6) The provisions of the Constitution with regard to majority government, multi-party democracy, regular elections, the franchise, a common voters' roll, proportional or other representation, and the participation of minority parties in the legislative process in a manner consistent with democracy, apply to all provinces equally and undiminished.
  - (7) Provinces must adhere to the separation of powers between the legislature and the executive in the province, with appropriate checks

and balances to ensure accountability, responsiveness and openness.

- (8) Provinces must maintain relations of good neighbourliness with all levels of government of the Republic. They must co-operate with, assist and support the national, other provincial and the local levels of the state.]

### **Application of this Chapter**

118. The provisions of this Chapter apply to all provinces except to the extent that they are modified by a provincial constitution adopted and certified in terms of this Constitution.

## **PROVINCIAL LEGISLATURES**

### **Legislative authority of provinces**

119...<sup>69</sup>

### **Composition and election of provincial legislatures**

120. (1) A provincial legislature consists of the 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.
- (2) The number of members of a provincial legislature must be determined in terms of national legislation and may be no fewer than 30 and no more than 100/80.

### **Membership**

121. (1) Every citizen who is qualified to vote for the National Assembly is eligible to be a member of a provincial legislature, except -
- (a) anyone who is appointed by or is in the service of the state and receives remuneration, other than -
- (i) the Premier and other members of the Executive Council of a province; and
- (ii) **any other office-bearers whose functions are compatible with the functions of a member of a provincial legislature and have been declared compatible with those functions by national legislation:**
- (b) members of the National Assembly or a local government;
- (c) unrehabilitated insolvents;
- (d) anyone declared to be of unsound mind by a court of the Republic; or
- (e) anyone who, after this section takes effect, has been convicted of an offence and 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

<sup>69</sup>

See clause 2 in Chapter 9 which will be moved to this section when finished.

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. A disqualification under this paragraph ends five years after the sentence has been completed.

- (2) A person loses membership of a provincial legislature if that person -
  - (a) ceases to be eligible; or
  - (b) is absent from the legislature without permission in circumstances for which the rules and orders of the legislature prescribe loss of membership.
- (3) Vacancies must be filled in terms of national legislation.

122...

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

123. Before members of a provincial legislature 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 3.

### **Sittings and recess periods**

- 124. (1) The first sitting of a provincial legislature after an election must take place at a time and on a date determined by a judge designated by the President of the Constitutional Court, but not more than 10 days after the election result has been declared. A 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) A provincial legislature may determine where it ordinarily will sit.

### **Elections and duration of Provincial Legislatures**

- 125. (1) A provincial legislature is elected for a term of five years.
- (2) **If a provincial legislature is dissolved in terms of section 125A or when its term expires, the President/Premier, by proclamation, must call and set dates for an election, which must be held within 90 days of the date the legislature was dissolved, or its term expired.**
- (3) **If the results of an election of a provincial legislature are not declared within the period referred to in section 113(1) or if an election is set aside by a court, the President/Premier, by proclamation, must call and set dates for another election, which must be held within 90 days of the expiry of that period or of the date on which the election was set aside.**

- (4) A provincial legislature remains competent to function from the time it is dissolved or its term expires until the day before the first day of polling for the next legislature; **but, if the election results are not declared within the period referred to in section 113(1) or an election is set aside by a court, the legislature as constituted previously again becomes competent to function until the day before the first day of polling in the next election.**

#### **Dissolution of provincial legislatures before expiry of term**

- 125A. (1) The Premier may dissolve a provincial legislature with the approval of the legislature by a vote of the majority of its members.**
- (2) **An Acting Premier must dissolve a provincial legislature if -**
    - (a) **the Premier has resigned after a vote of no confidence in terms of section 147; and**
    - (b) **the legislature fails to elect a new Premier within 21 days of the vote of no confidence.**

#### **Speakers and Deputy Speakers**

126. (1) At the first sitting after its election, or when necessary to fill a vacancy, a provincial legislature must elect a Speaker and a Deputy Speaker from among its members.
- (2) A judge designated by the President of the Constitutional Court must preside over the election of a Speaker. The Speaker presides over the election of a Deputy Speaker.
  - (3) The procedure set out in Schedule 4 applies to the election of Speakers and Deputy Speakers.
  - (4) A provincial legislature may remove its Speaker or Deputy Speaker from office by resolution. A majority of the members of the legislature must be present when the resolution is adopted.

#### **Decisions**

127. (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.
- (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**

128. (1) A provincial legislature may determine and control its internal arrangements and may make rules and orders concerning its business and proceedings, including rules and orders regulating the establishment, composition, powers and functions, procedures and duration of its committees.
- (2) **The rules and orders must provide for the participation of minority parties in the legislative process in a manner consistent with democracy.**
- (3) A committee of a provincial legislature may summon anyone to appear before it to give evidence under oath or affirmation or to produce documents.

**Privileges and immunities of members**

129. (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.
- (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 legislation.

**Assent to Bills**

130. (1) The Premier of a province must either assent to and sign a Bill passed by the provincial legislature or, if the Premier has reservations about the constitutionality of the Bill, refer it back to the legislature for reconsideration.
- (2) If the Premier refers a Bill back to the provincial legislature the following procedure applies:
- (a) The legislature must reconsider the Bill in the light of the Premier's reservations.
  - (b) If the legislature does not reject the Bill and passes it fully accommodating the Premier's reservations, the Premier must assent to and sign the Bill.
  - (c) If the legislature confirms the Bill or passes it without fully accommodating the Premier's reservations, the Premier must either assent to and sign the Bill or refer it to the Constitutional Court for a decision on its constitutionality.

- (d) If the Constitutional Court decides that the Bill is constitutional the Premier must assent to and sign it. If the court decides the Bill is unconstitutional, the Bill lapses.

### **Application by members to Constitutional Court**

- 130A. (1)** At least one third of the members of a provincial legislature may apply to the Constitutional Court for an order declaring that a Bill passed by the legislature or part of the Bill, or if the Bill has been promulgated, the Act, or part of the Act, is unconstitutional.
- (2) An application -
- (a) may not be made before the Premier has assented to and signed the Bill; and
- (b) must be made within 30 days after the Bill has been signed by the Premier.
- (3) When an application is made, the Constitutional Court may order that the Bill may not be promulgated or that the Act or part of it has no force until the Court has decided the application if -
- (a) the interest of justice requires this; and
- (b) the application has reasonable prospects of success.
- (4) If the application is unsuccessful the Constitutional Court must order the applicants to pay the costs unless the application had reasonable prospects of success.

### **Promulgation**

131. (1) A Bill assented to and signed by the Premier of a province must be promulgated and becomes an Act of the province upon its promulgation.
- (2) Provincial Acts must be published in the national Government Gazette.

### **Safekeeping of Provincial Acts**

132. The signed copy of an Act of a provincial legislature is conclusive evidence of the provisions of that Act and must be entrusted for safekeeping to the Constitutional Court immediately after promulgation.

## **PROVINCIAL EXECUTIVES**

### **Executive authority of provinces**

133...<sup>70</sup>

134. (1) The Premier of a province has the powers and functions entrusted to that office by the Constitution and any legislation.

<sup>70</sup>

See clause 10 in Chapter 9 which will be moved to this section when finished.

- (2) The Premier must exercise the powers and perform the functions entrusted to that office in consultation with the other members of the Executive Council, except where -
  - (a) the Executive Council has determined that the Premier may act in consultation with a member or a committee of members; or
  - (b) the Constitution states or implies that the Premier may act alone.
  
- (3) The Premier may act alone when -
  - (a) appointing and dismissing Executive Council members and assigning powers and functions to them;
  - (b) convening Executive Council meetings;
  - (c) assenting to and signing Bills;
  - (d) referring a Bill to the legislature for reconsideration of the Bill's constitutionality;
  - (e) referring a Bill to the Constitutional Court for a decision on the Bill's constitutionality;
  - (f) summoning the provincial legislature to an extraordinary sitting to conduct urgent business; and
  - [(g) dissolving the provincial legislature and calling an election after a vote of no confidence in the Executive Council has been passed by the legislature.]
  
- (4) Decisions of the Premier in consultation with the other members or a member or committee of the Executive Council, must be in writing, signed by the Premier, and countersigned by another member.

### **Election of Premiers**

135. (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 the Premier of the province.
- (2) A judge designated by the President of the Constitutional Court must preside over the election of the Premier. The procedure set out in Schedule 4 applies to the election of the Premier.
- (3) 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, but not later than 30 days after the vacancy occurs.

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

136. A Premier-elect assumes the office of Premier within five days of being elected, by swearing or affirming faithfulness to the Republic and obedience to the Constitution, by solemn declaration in accordance with Schedule 3.

### **Term of office of Premiers**

137. (1) A Premier's term of office begins when the Premier assumes office and ends upon a vacancy occurring or when the person next elected Premier

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.

## **Vacancies**

138...

## **Acting Premiers**

139. (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:
  - (b) a member of the Executive Council designated by the other members of the Executive Council:
  - (c) the Speaker of the provincial legislature:
  - (d) a member of the provincial legislature elected by its members.
- (2) An acting Premier has the responsibilities, powers and functions of the Premier.

## **Executive Council**

140. The Executive Council of a province consists of the Premier and no fewer than five and no more than ten members appointed by the Premier from among the members of the provincial legislature.

## **Continuation of Executive Councils after elections**

141. When an election of a provincial legislature is held, the Executive Council and its members remain competent to function until the person elected Premier by the next legislature assumes office.

## **Oath or solemn affirmation**

142. Before members of the Executive Council of a province begin to perform their functions, they must swear or affirm their faithfulness to the Republic and obedience to the Constitution, by solemn declaration in accordance with Schedule 3.

## **Accountability of Members of Executive Councils**

143. (1) The members of the Executive Council of a province are individually accountable both to the Premier and the provincial legislature, and members of the Council are collectively accountable to the 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 Council.

**Conduct of members of Executive Councils**

144. (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) act in any way that is 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 improperly benefit any other person.

**Temporary assignment of powers and functions**

145. 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**

146. The Premier by proclamation may transfer to a member of the Executive Council
- (a) the administration of any legislation entrusted to another member; or
  - (b) any power or function entrusted by legislation to another member.

**Votes of no confidence**

147. (1) **If a provincial legislature by a vote of the majority of its members passes a vote of no confidence in the province's Executive Council, excluding the Premier, the Premier must reconstitute the Council.**
- (2) **If a provincial legislature by a vote of the majority of its members passes a vote of no confidence in the province's Premier, the Premier and the other members of the Council must resign.**

**PROVINCIAL FINANCIAL AND FISCAL MATTERS<sup>71</sup>****PROVINCIAL CONSTITUTIONS****Adoption and Certification**

154. (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, provided that it does not deviate from the principles embodied in the Constitution, it may -
- (a) establish different legislative and executive structures and

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<sup>71</sup> Sections 148-153 moved to Chapter 14 (Finance).

- procedures; and
  - (b) provide for the institution, role, authority and status of a traditional monarch in the province.
- (3) No provincial constitution and no amendment to a provincial constitution has force or effect unless the Constitutional Court has certified that all the provisions of the provincial constitution or of the amendment are consistent with this Constitution.
- [(4) Any provision in a provincial constitution which requires resources additional to those envisaged in this Constitution must be provided for by the province itself.]

**CHAPTER 9  
NATIONAL AND PROVINCIAL LEGISLATIVE  
AND EXECUTIVE COMPETENCES<sup>72</sup>**

**LEGISLATIVE AUTHORITY**

**Legislative authority of Republic**

1. (1) The legislative authority of the Republic is vested in [Parliament] and confers on [Parliament] the power -
  - (a) to amend the Constitution; or
  - (b) to pass legislation with regard to any matter, including a matter within the functional areas listed in Schedule 5 but excluding any exclusive provincial matter.
- (2) When exercising its legislative authority Parliament is bound only by the Constitution, and must act in accordance with and within the limits of the Constitution.

**Legislative authority of provinces**

2. (1) The legislative authority of a province is vested in its provincial legislature and confers on the provincial legislature the power -
  - (a) to pass a constitution for its province or to amend any constitution passed by it; or
  - (b) to pass legislation in and for its province with regard to -
    - (i) any matter within the functional areas listed in Schedule 5; or
    - (ii) any matter outside these functional areas explicitly delegated to it by national legislation.
- (2) When exercising its legislative authority a provincial legislature is bound only by the Constitution and, if it has passed a constitution for its province, also by that constitution, and must act in accordance with and within the limits of the Constitution and that provincial constitution.
- (3) The passing of a provincial constitution and of any amendments to it is an exclusive provincial [matter].
- (4) Legislation passed by a provincial legislature which is reasonably necessary for or incidental to the effective exercise of its power to legislate with regard to a matter within the functional areas listed in Schedule 5, is deemed to fall within those functional areas.

**Conflicts between national and provincial legislation**

3. (1) In the event of a conflict between national legislation and provincial

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<sup>72</sup> The whole Chapter is still under consideration.

legislation which falls within the functional areas listed in Schedule 5 -

- (a) the national legislation prevails over the provincial legislation if the national legislation -
    - (i) is aimed at achieving an [essential] national objective;
    - (ii) is necessary for the achievement of that objective; and
    - (iii) applies uniformly in or with regard to the country as a whole:
  - (b) the provincial legislation prevails over the national legislation where paragraph (a) does not apply.
- (2) National legislation must be regarded as necessary for the achievement of an [essential] national objective if it -
- (a) deals with a matter that cannot be regulated effectively by legislation enacted by the respective provinces individually:
  - (b) establishes -
    - (i) norms and standards;
    - (ii) structural, regulatory or other frameworks; or
    - (iii) a national policy, aimed at achieving uniformity across the nation with regard to a matter which in the interest of the country as a whole requires uniformity:
  - (c) provides for -
    - (i) the maintenance of national security;
    - (ii) the maintenance of economic unity;
    - (iii) the protection of the common market in respect of the mobility of goods, services, capital and labour;
    - (iv) the promotion of economic activities across provincial boundaries;
    - (v) the promotion of equality or equal opportunities; or
    - (vi) the protection of the environment; or
  - (d) is aimed at preventing unreasonable action by a province which is prejudicial to another province or the country as a whole.
- (3) Unless the contrary is proved, national legislation aimed at achieving an [essential] national objective other than those listed in subsection (2), must be regarded as necessary for the achievement of that objective if it has been supported by the National Council of Provinces [or agreed to in the Mediation Committee] with six provinces having voted in favour of the legislation.

### **Conflicts between national legislation and provincial constitutions**

4. In the event of a conflict between national legislation and a provision of a provincial constitution with regard to -
- (a) a matter where this Constitution specifically requires or contemplates the enactment of national legislation, the national legislation prevails over the affected provision of the provincial constitution; or
  - (b) a matter within the functional areas listed in Schedule 5, section 3 applies as if the affected provision of the provincial constitution were provincial legislation contemplated in that section.



**Conflicts that cannot be resolved**

5. If a dispute concerning a conflict between national legislation and provincial legislation falling within Schedule 5 or between national legislation and a provincial constitution cannot be resolved by the Constitutional Court in terms of sections 3 and 4, respectively, the national legislation prevails over the provincial legislation or constitution.
- 6.
- 7.
- 8.

**EXECUTIVE AUTHORITY****National executive authority**

9. (1) The executive authority of the Republic is vested in the President.
- (2) The national executive consists of the President and the other members of the Cabinet -
  - (a) who must act in accordance with and within the limits of the Constitution; and
  - (b) who may perform any act required to give effect to the Constitution.

**Executive authority of provinces**

10. (1) The executive authority of a province is vested in the provincial executive and confers on the provincial executive the power -
  - (a) to administer all matters within the functional areas listed in Schedule 5 except where provided otherwise in the Constitution or an Act of Parliament;
  - (b) to administer provincial legislation in the province;
  - (c) to administer national legislation in the province where the administration of that national legislation has been assigned to it in terms of an Act of Parliament; and
  - (d) to perform any other function assigned to it in terms of the Constitution or an Act of Parliament.
- (2) The administration of provincial legislation in a province is an exclusive provincial matter; but, this subsection may not be read as limiting sections 3 and 4.
- (3) The provincial executive consists of the Premier and the other members of the Executive Council who must act in accordance with and within the limits of the Constitution and, if a provincial constitution has been passed for the province, also that constitution.

**Executive co-operation**

11. An executive organ of state, by agreement with another executive organ of state at the same or any other level of government, may -

- (a) delegate any of its powers, other than its constitutional powers, to that other organ of state; or
- (b) authorise that other organ of state to perform any act on its behalf.

**National executive intervention in provinces**

12. The national executive may assume the administration of any legislation or the performance of any executive function vested in the executive of a province when it is necessary for -
- (a) the maintenance of national standards or the establishment of minimum standards required for the rendering of services;
  - (b) the maintenance of economic unity;
  - (c) the maintenance of national security; or
  - (d) the prevention of unreasonable action taken by that province which is prejudicial to the interest of another province or the country as a whole.

**CHAPTER 10**  
**LOCAL GOVERNMENT<sup>73</sup>**

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**New provisions for the Chapter being developed.**

## **CHAPTER 11 TRADITIONAL AUTHORITIES**

### **Recognition**

169. (1) The institution, status and role of traditional authorities, according to indigenous law, are recognised.
- (2) A traditional authority which observes a system of indigenous law and was recognised in terms of legislation immediately before the Constitution took effect, may continue to function subject to any applicable legislation and customs.
- (3) The courts must apply indigenous law when that law is applicable, subject to the Constitution and any relevant legislation.

### **Councils of traditional authorities**

170. National or provincial legislation may provide for the establishment of councils of traditional authorities to deal with matters of common interest.

## CHAPTER 12 PUBLIC ADMINISTRATION

### Basic values and principles governing public administration

171. (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:
- (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 with timely, accessible and accurate information.
  - (h) Good human-resource management and career-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 national legislation is not precluded.<sup>74</sup>
- (3) Legislation regulating the public administration may differentiate between different sectors, administrations or institutions in the public administration.

### Public Administration Commission

172. (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.

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<sup>74</sup>

Replacement of "administration" with "service" proposed by NP, still under consideration - flagged for 1996.

- (2) The object of the Public Administration Commission is to promote the basic values and principles of public administration as prescribed by national legislation.
- (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 must account to Parliament.

**Public Service**

173. (1) Within the public administration 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 national legislation. Employees are entitled to a fair pension as regulated by national legislation.
  - (3) No employee of the public service may be favoured or prejudiced only because that person supports a particular political party or cause.

## **CHAPTER 13 SECURITY SERVICES**

### **Governing principles**

174. The following principles govern the national security in the Republic:

- (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 compliance with the law, including international law.
- (c) National security is subject to the authority of Parliament and the Executive.

### **Establishment, structuring and conduct of security services**

175. (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.
  - (3) The security services must be structured and regulated by national legislation.
  - (4) The security services must act, and must teach and require their members to act, in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic.
  - (5) No member of any security service 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 their functions in a manner that furthers, or prejudices, the interests of any political party.

## **DEFENCE**

### **Defence force**

176. (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, in accordance with the principles of international law regulating the use of force.

**Political responsibility**

177. (1) A member of the Cabinet must be responsible for defence.
- (2) A multi-party committee of Parliament must have oversight over all defence matters.

**Command of defence force**

178. (1) The President must appoint a woman or a man as Chief of the defence force, to command the defence force.
- (2) The Chief of the defence force must exercise command in accordance with the directions of the Cabinet member responsible for defence.

**Defence civilian secretariat**

179. A civilian secretariat for defence must be established by national legislation to function under the direction of the Cabinet member responsible for defence, and to administer any matters entrusted to it by that Cabinet member, or by the legislation.

**POLICE****Police service**

180. (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**

181. (1) A member of the Cabinet must be responsible for policing.
- (2) A multi-party committee of Parliament must have oversight over all police matters.

**Control of police service**

182. (1) The President must appoint a woman or a man as National Commissioner of the police service, to control and manage the police service.
- (2) The National Commissioner must exercise control over and manage the police service in accordance with the directions of the Cabinet member responsible for policing.



- (3) The National Commissioner must appoint a woman or a man as provincial commissioner for each province, in accordance with national legislation.
- (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 oversight over the conduct and efficiency of the police service and for cultivating good relations between the police and the rest of the community in its province.

#### **Police civilian secretariat**

183. A civilian secretariat for the police service must be established by national legislation to function under the direction of the Cabinet member responsible for policing, and to exercise any powers and functions entrusted to it by that Cabinet member, or by the legislation.

## **INTELLIGENCE**

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

184. (1) The President may establish an intelligence service or services.
- (2) The President must appoint a woman or a man 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**

185. National legislation must establish and regulate the objects, powers and functions of the intelligence services established in terms of section 184(1) and must provide for -
- (a) a multi-party committee of Parliament to have oversight over the budgets of those services;
  - (b) civilian monitoring of the activities of those services by an inspector 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, including any intelligence divisions of the defence force and the police service.

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  - (b) civilian monitoring of the activities of those services by an inspector 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, including any intelligence divisions of the defence force and the police service.

## CHAPTER 14 FINANCE

### GENERAL FINANCIAL MATTERS

#### National Revenue Fund

1. (186) (1) There is a National Revenue Fund into which all **money** received by the national government must be paid **except money reasonably excluded by an Act of Parliament.**
- (2) No money may be withdrawn from the National Revenue Fund except in terms of an appropriation by an Act of Parliament; but, a province's equitable share of [revenue collected nationally] is a direct charge against the National Revenue Fund.

#### Equitable sharing and allocations to provinces.

2. (193) (1) National legislation must provide for -
  - (a) **the equitable division of the [revenue collected at national level] between the national and provincial levels of government;**
  - (b) **the determination of provinces' equitable shares of this revenue; and**
  - (c) any other allocations to provinces from national revenue and any conditions on which those allocations may be made.
- (2) Legislation referred to in subsection (1) may be enacted only after the provincial governments have been consulted and any recommendations of the Financial and Fiscal Commission have been considered, and with regard to -
  - (a) the national interest:
  - (b) any provision that must be made in respect of the national debt:
  - (c) the needs and interests of the national government determined by objective criteria:
  - (d) **the functions of the provinces:**
  - (e) the fiscal capacity and efficiency of the provinces:
  - (f) **developmental** and other needs as well as economic disparities within and among the provinces:
  - (g) obligations of the provinces in terms of national legislation:
  - [(h) the functions of local governments within each province;]** and
  - (i) other interests based on objective criteria.
- (3) The allocation of revenue by the national government -
  - (a) to a provincial or local government may be made only in terms of an appropriation by an Act of Parliament; and

- [(b) to a local government must be made, ordinarily, through the provincial government of the province in which the local government is located.]

### National and provincial budgets

3. (187) (1) National legislation must prescribe the format of national and provincial budgets **and when they must be introduced in Parliament and the provincial legislatures.**
- (2) The national and provincial budgets must contain estimates of revenue and expenditure and **proposals for financing any potential deficits** for the period to which they apply, **differentiating between capital and current items.** The budgets and budgetary process must promote transparency, accountability and effective financial management of the **economy, debt and** the public sector as a whole.
- (3) **The national and provincial budgets must be accompanied by statements of borrowing intended for purposes other than meeting budgetary deficits.**

### Treasury control

4. (188) (1) National legislation must -
- (a) prescribe effective measures to ensure transparency, uniform and generally accepted accounting practice and expenditure classifications, expenditure control, and uniform treasury norms and standards at all levels of government:
- (b) establish a national treasury and prescribe the framework within which provincial treasuries must carry out their financial responsibilities; and
- (c) confer on the national treasury effective powers to stop the transfer of funds to any organ of state in the event of serious or persistent financial maladministration.
- (2) (a) **A decision by the national treasury to stop the transfer of funds to a province lapses unless it is approved by Parliament within 30 days.**
- (b) **Before Parliament may approve the decision -**
- (i) **the Auditor-General must report to a parliamentary committee:**
- (ii) **the committee must give the province an opportunity to state its case; and**
- (iii) **the committee must compile a report and submit it to Parliament.**
- [(c) **A majority of the members of Parliament must be present when Parliament approves the decision.]**

### Contracts for goods and services

5. (189) (1) **Organs of state must contract for goods and services in accordance with national and provincial legislation which provides for -**
- (a) independent tender boards; and
  - (b) a fair, public and competitive tender system.
- (2) **No person and no organ of state may interfere with the functioning of a tender board.**
- (3) **Decisions of a tender board must be recorded and open to public inspection.**

#### **Government guarantees**

6. (190) (1) **The national government or a provincial or local government may guarantee a loan only if the guarantee complies with the norms and conditions for such a guarantee set out in national legislation.**
- (2) **National legislation referred to in subsection (1) may be enacted only after any recommendations of the Financial and Fiscal Commission have been considered.**
- (3) **Each year the Cabinet member, the Executive Council member in each province and the member of each local government responsible for finance must table, in their respective legislatures, a list of all outstanding guarantees issued by their governments.**

#### **Remuneration of persons holding public office**

7. (192) (1) **National legislation must provide for the determination of any salaries, allowances or benefits of the following:**
- (a) **Members of Parliament and the Cabinet, and Deputy Ministers.**
  - (b) **Judges.**
  - (c) **The Public Protector and the Auditor-General, and members of any Commission provided for in the Constitution.**
  - [(d) **Traditional authorities and members of any councils of traditional leaders.]**
- (2) **National legislation must determine the upper limits for the determination of any salaries, allowances or benefits of holders of any of:**
- (a) **Members of provincial legislatures and Executive Councils.**
  - (b) **Members of local governments.**
- (3) **National legislation must provide for the establishment of an independent commission to make recommendations -**
- (a) **to Parliament on any legislation concerning the salary,**

**allowances and benefits of members of Parliament and the Cabinet, Deputy Ministers, members of provincial legislatures and Executive Councils, members of local governments, and traditional leaders and members of any councils of traditional leaders; and**

- (b) to the national and provincial executives, local governments and any other authorities on the implementation of that legislation.

### **FINANCIAL AND FISCAL COMMISSION**

#### **Establishment**

8. (194) (1) There is a Financial and Fiscal Commission for the Republic, which is independent and subject only to the Constitution and the law, and which must be impartial.
- (2) **No person or organ of state may interfere with the functioning of the Commission.**
- (3) **National legislation regulates the functioning of the Commission.**

#### **Functions**

9. (195) (1) The Commission may give advice and make recommendations to Parliament, provincial legislatures and any other authorities determined by national legislation regarding -
- (a) the financial and fiscal requirements of the national, provincial and local governments:
  - (b) financial and fiscal policies:
  - (c) criteria for the allocation of financial and fiscal resources:
  - (d) equitable allocations to national, provincial and local governments from revenue collected at national level:
  - (e) any taxes, levies, imposts, and surcharges that a provincial [or local] government intends to impose:
  - (f) the raising of loans by a provincial or local government and the norms and conditions that apply to those loans; and
  - (g) any other matter assigned to the Commission by the Constitution or national legislation.
- (2) In performing its functions, the Commission must consider **all relevant factors including those listed in section 193(2).**

#### **Appointment of members**

10. (196) (1) **The Commission consists of the following women and men appointed by the President -**
- (a) **a chairperson and a deputy chairperson who are full-time members:**
  - (b) **a person for each province nominated by the Executive Council of the province; and**



- (c) **seven additional members, some of whom must be experts in local government finance.**
- (2) **Members of the Commission must have appropriate expertise [and may not hold office in any political organisation or party].**

### **Reports**

11. (197) The Commission must report regularly both to Parliament and to provincial legislatures [as prescribed by national legislation.]

## **CENTRAL BANK**

### **Establishment**

12. (198) The South African Reserve Bank is the central bank of the Republic and is regulated by national legislation.

### **Primary object**

13. (199) (1) The primary object of the South African Reserve Bank is to protect the value of the currency of the Republic in the interests of balanced and sustainable economic growth in the Republic.
- (2) The South African Reserve Bank, in the pursuit of its primary object, must perform its functions independently and without fear, favour or prejudice; but, there must be regular consultation between the Bank and the Cabinet member responsible for national financial matters.

### **Powers and functions**

14. (200) 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.

## **PROVINCIAL FINANCIAL MATTERS**

### **Provincial Revenue Funds**

15. (153) (1) There is a Provincial Revenue Fund for each province into which all **money** received by the provincial government must be paid **except money reasonably excluded by an Act of Parliament.**
- (2) No money may be withdrawn from a Provincial Revenue Fund except in terms of an appropriation by a provincial Act; [but, revenue allocated to a local government through a province in terms of sections 193 is a direct charge against the provincial revenue fund.]

### **Provincial funding**

16. (148) (1) A province -
- (a) is entitled to an equitable share of [revenue collected

nationally] **and determined in terms of section 193** to enable it to provide services at affordable standards, and to exercise its powers and to perform its functions:

- (b) may receive other allocations from national revenue, either conditionally or unconditionally; and
  - (c) may raise additional revenue from taxes, loans **and user charges** as provided in sections 150 and 151.
- (2) Additional revenue raised by provinces may not be deducted from their share of revenue collected nationally, or from other allocations made to them out of national revenue. Equally, there is no obligation on the national government to compensate provinces that do not raise revenue commensurate with their fiscal capacity and tax base.
- (3) A province's equitable share of revenue collected nationally must be transferred to the province expeditiously and without deduction except **when the transfer has been stopped in terms of section 188.**

#### Provincial taxes

17. (150) (1) **A provincial legislature may -**
- (a) **impose taxes, levies and duties excluding income tax, value-added tax, general sales tax and customs duties; and**
  - (b) **impose flat-rate surcharges on the tax bases of taxes, levies and duties imposed by national legislation, excluding those of corporate income tax, value-added tax and customs duties:**
- (2) **The power of a provincial legislature to impose taxes, levies, duties and surcharges -**
- (a) **may not be exercised in a way that materially prejudices national economic policies, interprovincial economic relations or the national mobility of goods, services, capital or labour; and**
  - (b) must be regulated by national legislation which may be enacted only after any recommendations of the Financial and Fiscal Commission have been considered.

#### Provincial loans

18. (151) (1) A province may raise loans for capital expenditure within a framework and in accordance with reasonable norms and conditions provided for in national legislation.
- (2) A province may raise loans for current expenditure only when necessary for bridging purposes during a fiscal year and only if any reasonable conditions prescribed by national legislation are

complied with. These loans must be redeemed within 12 months.

- (3) National legislation referred to in subsections (1) and (2) may be enacted only after any recommendations of the Financial and Fiscal Commission have been considered.
- (4)

## **LOCAL FINANCIAL MATTERS**

### **Local Government Finance**

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## **CHAPTER 15 GENERAL PROVISIONS**

### **International agreements<sup>75</sup>**

201. (1) The Republic may be bound by international agreements which require ratification or accession under international law only if Parliament agrees by resolution in both the National Assembly and [the second House]. In both the National Assembly and [the second House], a majority of the members must be present for the resolution to be passed.
- (2) An international agreement to which the Republic becomes a party and which does not require ratification or accession under international law must be tabled in the National Assembly and [the second House] within a reasonable time; but, an Act of Parliament may provide that an agreement that is published in the national Government Gazette need not be tabled.
- (3) An international agreement becomes law in the Republic when it is enacted as law in terms of an Act of Parliament and published in the national Government Gazette.

### **Customary international law**

202. Customary international law forms part of the law of the Republic except when it is inconsistent with the Constitution or an Act of Parliament.

### **Application of international law**

203. Every court must presume that the law is consistent with customary international law and the Republic's obligations under any international agreement unless it is established that it is not.

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**International Agreements: DP raised issue of whether national government could use this to the detriment of powers of government at provincial and local level and proposed addition of a qualification - flagged for 1996.**