Introduction

For many years apartheid took away the human rights of most people living in South Africa. The majority of people did not have a say in how they were governed. Security laws gave the police lots of power to arrest and detain people. Banning and censorship silenced people.

Discrimination meant that most people got third-rate education and health care. These are a few examples of how people’s human rights were abused.

In 1994 the first general election was held in South Africa. For the first time everyone who was a citizen of South Africa could vote in the elections. Then the Constitutional Assembly met and drew up a Constitution that represents the interests and needs of all the people of South Africa. They included a Bill of Rights in the Constitution, which gives people rights that can't be taken away from them.

This chapter explains what a Constitution is and how it controls the power and authority of the government. It also explains what human rights are, what the Bill of Rights is, and the rights that are in the Bill of Rights. It talks about ways to protect human rights.

What is a constitution?

A constitution of a country sets out:

- the social values that the country believes in
- the structures of government
- what powers and authority a government and government bodies have
- the rights of citizens
- the relationship between government and citizens
- aspects of the relationships between citizens

A constitution is the highest law in the land and it must be respected by all government bodies. It is higher than any parliament and it can override any law that parliament makes if the law goes against the constitution. No law can go against the constitution, whether it is a customary law or a law that parliament makes.

The South African Constitution of 1996 is a document that consists of 14 chapters. It says how the government should rule the country and it has a Bill of Rights that protects the human rights of all citizens.

Democracy

Democracy means that everyone has a say about how the country is run. In a democracy, the government is put into power by its citizens. The adult citizens of a democratic country elect their government. One way they do this is by choosing people to represent them in a parliament. In a multi-party system, the party that gets the most votes (the majority) governs the country.

There are certain characteristics that indicate a democracy. These are listed below.

Aspects of democracy

Citizens can participate in government

It is everyone’s right and duty to participate in government.

All people are equal before the law

There is no legal discrimination based on race, religion, gender or other reason. Groups and individuals have a right to their own cultures, languages, beliefs and so on.
Political tolerance

Various opinions, beliefs, cultures, religions and so on need to be tolerated. So, while the majority of the people rule in a democracy, the rights of the minority must still be protected.

Accountability

Officials that are elected and appointed in government positions are accountable to the people for their actions and decisions.

Transparency

In a democracy, people and the media (newspapers, TV, radio) can get information about what government decisions are being made, who is making the decisions and the reasons for the decisions.

Regular, free and fair elections

Citizens choose their own representatives for government. They elect these officials in a free and fair way, without corruption. For example, votes are secret. Elections are held regularly (at least every 5 years).

Economic freedom

People can own property and businesses and they can choose their own work and join labour unions.

Controlling abuse of power

There must be ways to prevent government officials from abusing their power. The courts are independent from the government, and there are other bodies that have the power to act against corrupt government officials.

Human rights

Democracies aim to respect and protect the human rights of all citizens. There may be a Bill of Rights to protect people’s rights.

Multi-party system

A multi-party system means that more than one political party can participate in elections, so that people can choose who they want to represent them in government.

The rule of law

No one is above the law, including the President. This means that the law must treat everyone in an equal and fair way.

History of constitutions in South Africa

There have been four Constitutions in South Africa:

- In 1910 Britain decided to withdraw from the government of South Africa and handed the country over to the white residents of South Africa. These people were the British settlers and the Boers. The first Constitution for the Union of South Africa was adopted in 1910. This gave rights to the white minority but took away the right to vote of the majority of South Africans.
- In 1960 the white government held a referendum to decide whether South Africa would become a Republic. On 31 May 1961 South Africa was declared a Republic and the government adopted the second Constitution. This also took away the rights of black people.
- In 1983 the government passed the third Constitution. This Constitution created the tricameral parliament, which meant there was a separate parliament for the White, Coloured and Indian groups. This Constitution
excluded black people and automatically made them citizens of the homeland where they were born. They had no rights outside these homelands.

- In 1994, twenty-six parties negotiated and adopted an interim Constitution, that gave the vote to everyone. This Constitution lasted for two years. During that time the elected government worked as the Constitutional Assembly and had to draw up a final Constitution.

### Writing the final Constitution

#### CODESA

On 2 February 1990, the National Party government unbanned political parties, released many political prisoners and detainees, and unbanned many people, including Nelson Mandela.

On 20 and 21 December the first session of CODESA (Convention for a Democratic South Africa) was held. There were 19 political groups at this event. All parties agreed to support the Declaration of Intent, which said that they would begin writing a new Constitution for South Africa.

On 15 May 1992 CODESA 2 met at the World Trade Centre. After three days it was clear that there were many tensions. The ANC and COSATU decided to have a campaign of 'rolling mass action'. The first stayaway was on 16 June. On 17 June people marching in Boipatong were shot and many people were killed. After this the ANC stopped talks.

#### The Multi-party Negotiating Process

In March 1993 full negotiations began at the World Trade Centre. The parties present decided to use the name MPNP - Multi-party Negotiating Process - instead of CODESA. There were twenty-six parties taking part in the MPNP. The MPNP had to write and adopt an interim Constitution to say how the government would govern after the elections on 27 April 1994. The MPNP drew up the Interim Constitution which was to last for two years. The MPNP also drew up and adopted the 34 Constitutional Principles. These principles would guide the Constitutional Assembly (CA) which had to draw up the final Constitution.

#### The Constitutional Principles

All the parties at the MPNP agreed on the 34 Constitutional Principles when they were drawing up the interim Constitution. They agreed that the CA had to follow these principles when it was writing the final Constitution. If the final Constitution didn't follow and include all the Constitutional Principles then the Constitutional Court would not be able to certify the Constitution. For example, one of the Constitutional Principles was that the final Constitution had to include a Bill of Rights. If it didn't have a Bill of Rights, then the Constitutional Court would not be able to certify it.

#### The Constitutional Assembly (CA)

After the elections in 1994 the new Parliament - working as the Constitutional Assembly (CA) - began writing the final Constitution.

After two years, on 8 May 1996, the CA adopted the final Constitution. But this Constitution still had to be certified by the Constitutional Court. This meant that the Constitutional Court had to make sure that the final Constitution followed and included all the 34 Constitutional Principles that the MPNP had agreed on.

#### The Constitutional Court's first hearing

The Constitutional Court had its first hearing about the Constitution in July 1996. In September the judges of the court said the Constitution did not follow all of the 34 Constitutional Principles and it refused to certify the Constitution.

So, the CA came together again and made some changes to the Constitution. In October 1996 they asked the Constitutional Court to check the changes. This time the Constitutional Court agreed to certify the Constitution. The final Constitution was passed by Parliament and became law on 18 December 1996.
The South African Constitution

Why do we need a Constitution?

Our Constitution describes the social values of the country, and sets out the structures of government, what powers and authority a government has, and what rights citizens have. The Founding Provisions of our 1996 Constitution set out the principles of democracy in South Africa.

See Chapter 1: Founding provisions

Because the Constitution is the highest law in the land, it stops each new government from passing their own laws that contradict the Constitution. It is much more difficult to change the Constitution than any other law. The Constitution protects democracy in South Africa.

A government should never have unlimited power. Even governments which have been democratically elected can abuse the power that they have been given. There are cases of governments who were elected in democratic elections, and then refused to allow further elections. They made themselves permanent rulers. Some governments kill people who are against them so that they can stay in power. The Constitution guards against governments in the future abusing the powers that they will have.

Our Constitution helps to guard against abuse of power by:

- having rules about when elections should happen and what happens to parties that lose
- making it very difficult to change the Constitution
- making sure that no person or government body has too much power
- splitting power among different branches of government (the separation of powers)
- setting out the human rights that people have in a Bill of Rights
- creating independent courts and commissions that will protect people’s rights, as well as monitor the government to make sure that it is doing its work properly
- making it compulsory for all government bodies to be accountable and transparent to the public

The relationship between our Constitution and other laws

The Constitution is a law passed by Parliament and it is the highest law in the land. All other laws must follow it. Other laws can be divided into statutes, common law and customary law:

**Statutes** are laws which are made by government. Laws made by the national parliament are called Acts of Parliament. Laws made by Provincial legislatures are called Ordinances, and laws made by Municipal Councils are called by-laws.

**Common law** means laws that have not been made by parliament or any other government. They are unwritten laws. Common law is based on Roman Dutch law (laws that were brought by the Dutch when they arrived in South Africa). The courts used these laws and developed them when they made decisions.

**Customary laws** are also unwritten laws. They are laws that apply to certain cultures or ethnic groups.

All these laws have to follow the Constitution. In other words, they cannot go against what the Constitution says. So, new laws must follow the Constitution and the government must change old laws or parts of old laws if they don't follow the Constitution. If a customary law or common law goes against the Constitution then a court will say it is invalid. In other words, it can't apply in the situation.

**Example**
Mary Sibiya's husband dies. There is a customary law that says women can't inherit land from their husbands who have died. Mary is told by her husband's eldest son that he owns the land now that his father is dead. Mary wants to take her case to court because she thinks it is unfair. In this situation the court would look at the customary law and at what the Constitution says. If it thinks the customary law goes against the right to equality and non-discrimination then it will say the law is invalid.

Changing or amending our Constitution

The Constitution is much more difficult to change than other laws. Parliament can change a written law (statute) if more than 50% of the members of Parliament vote to change it.

Section 74 of the Constitution says that if Parliament wants to change the Constitution then:

- at least two-thirds (66%) of the members of Parliament must vote to change it
- at least 6 provinces in the National Council of Provinces must vote to change it

See The National Council of Provinces (NCOP)

Section 1 of the Constitution says that South Africa is one sovereign, democratic state founded on values of human dignity, equality, human rights and freedoms. It also says that the Constitution is supreme and that there must be regular, free and fair elections where everyone can vote.

If Parliament wants to change Section 1, or Section 74 which says how Parliament can change the Constitution, then:

- at least 75% of the members of Parliament must vote to change it
- at least 6 provinces in the National Council of Provinces must vote to change it

Section 1 and Section 74 are very important sections, which is why the Constitution makes it very difficult to change them.

Read Section 74 of the Constitution

The separation of powers

The separation of powers in the Constitution means the government's functions and power is split into 3 branches. These branches are independent of each other and they keep a check on each other. Separation of powers is an important part of democracy because it prevents any elected official or government body from abusing their powers. The 3 branches are:

- the Legislature which makes the laws
- the Executive which enforces (carries out) the laws
- the Judiciary that interprets the laws

The legislature

The national legislature (the legislature for the whole country) is also called Parliament. Parliament makes new laws and changes old laws for the whole country. Parliament is made up of the National Assembly and the National Council of Provinces. Both of these bodies are responsible for making laws.

Each province also has a legislature called a Provincial legislature which makes laws for each province.

The legislatures at national and provincial level are elected by people in national and provincial elections.
The executive

The national executive is made up of the President, the vice-president and the Cabinet. The national executive is responsible for carrying out the laws, in other words, for putting the laws written by the legislature into action.

The Cabinet is made up of Ministers, such as the Minister of Land and Agriculture. Each Minister governs a department with public servants doing the administration.

The Ministers cannot make their own laws although they can draft new laws or change old laws and ask parliament to pass these. Ministers must make sure that the policies of the government are followed. Parliament can also ask ministers to explain why they are carrying out policy in a particular way. In this way the Executive is accountable to the legislature.

Each province also has its executive. The Provincial executives are made up of a Premier and an Executive Council.

The judiciary

The judiciary is made up of judges and magistrates. They make decisions in court cases, based on the laws. These decisions then help to explain what the law means in actual circumstances. In this way, the courts check the laws that the legislature makes. They also make sure they do not go against the Constitution. The Constitutional Court has the power to say that a law is invalid if it goes against the Constitution.

People can take cases to court if they believe the actions of the executive go against the law or the Constitution. In this way, the courts act as a check on the work of the executive.

The Judiciary must be independent of the Executive and the Legislature. In this way it can make decisions that are fair, even if this goes against what the Legislature and Executive want. An independent body called the Judicial Services Commission appoints judges so these judges are independent of the government in power.

Example

1. Parliament (the legislature) writes a new law that says all children at school must get a free meal at lunch time. The Minister of Education (the Executive) gives the department of education instructions to carry out the new law. But when Thokozile Mkhize goes to school she doesn't get a free lunch. The school refuses to give lunch to any of the students. Thokozile's father and mother go to court to demand that the school give the students lunch. The court tells the school to do this because this is what the law says.

2. Parliament passes a law that says doctors who are Rastafarians cannot work in state hospitals. The Department of Health gives instructions to all hospitals to dismiss all Rastafarian doctors. These doctors go to court and say that this law is invalid because it discriminates against people on grounds of their religion and it goes against their rights in the Constitution. The court agrees and so the law is declared invalid.

The levels of government

The government of South Africa is divided into national, provincial and local levels.

- National government makes and carries out laws about issues which affect the whole country. These are issues like economic policy, defence and relationships with other countries. National parliament makes laws called acts, which the whole country has to follow.
n There are some issues that both national and provincial government can make and carry out laws about. Schedule 4 of the Constitution lists those issues. These are things like health, welfare and education. However, national government is responsible for setting national standards on these issues, so laws written by provinces must follow national standard-setting legislation.

See Schedule 4

- The 9 provincial governments deal with things that affect their own provinces. Schedule 5 of the Constitution lists the issues that provincial government is responsible for. Provincial legislatures make their own laws called ordinances. People in each province have to follow the laws for that province. The provinces can draw up their own constitutions, but these constitutions cannot go against the national Constitution.

See Schedule 5

- Local governments deal with things that affect the local area that they control. Part B of Schedules 4 and 5 of the Constitution says what things local government is responsible for. This includes collecting rubbish, parking, electricity and parks. Laws written by local governments are called by-laws. These have to be followed by people in that area.

See LOCAL GOVERNMENT

ELECTING GOVERNMENTS

There are different ways to elect representatives to parliament. The Constitution says people must be elected according to the system of proportional representation.

PROPORTIONAL REPRESENTATION

This means that parties get a certain number of seats in parliament according to the percentage of votes that they get in an election. So, for example, if your party gets 15% of all the votes in the country then it gets 15% of the seats in Parliament.

There are 400 seats in the national parliament. So for every 0.25% of the vote a party gets 1 seat. This example shows how seats are allocated.

**Example**

<table>
<thead>
<tr>
<th>Party Name</th>
<th>% of Votes</th>
<th>Seats</th>
</tr>
</thead>
<tbody>
<tr>
<td>African National Congress</td>
<td>62.5%</td>
<td>250</td>
</tr>
<tr>
<td>National Party</td>
<td>20%</td>
<td>80</td>
</tr>
<tr>
<td>Inkatha Freedom Party</td>
<td>10%</td>
<td>40</td>
</tr>
<tr>
<td>Pan-Africanist Congress</td>
<td>1.75%</td>
<td>7</td>
</tr>
</tbody>
</table>

CONSTITUENCY-BASED ELECTIONS

This is another way to elect a government. According to this system, the country is divided up into voting areas called constituencies. Each political party chooses one person to represent the party in each constituency. This person is
called the party's candidate. People in the constituency vote for the candidate of their choice. So, a person only goes to parliament if he or she gets the most votes in that constituency.

<table>
<thead>
<tr>
<th>What does proportional representation mean?</th>
<th>What does the constituency-based system mean?</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Only members of parties can stand for election.</td>
<td>• Independent candidates, who don't belong to any party, can stand for parliament. They declare themselves candidates in a particular constituency.</td>
</tr>
<tr>
<td>• People vote for the party they like, not for a person they like. Each party chooses its own list of candidates for parliament.</td>
<td>• People vote for a candidate, either because they like the party that the candidate represents or because they like the candidate as a person.</td>
</tr>
<tr>
<td>• The party holds all its seats in parliament. The party appoints its own members to take those seats, according to party lists. It can appoint a different member to take over a seat. So parties have central control over the selection of Members of Parliament (MPs).</td>
<td>• Individual MPs hold seats.</td>
</tr>
<tr>
<td>• MPs do not represent the voters of a specific constituency or area.</td>
<td>• MPs represent the voters in a specific constituency.</td>
</tr>
<tr>
<td>• MPs are directly accountable to their party.</td>
<td>• MPs are directly accountable to people in their area who have voted for them.</td>
</tr>
<tr>
<td>• If an MP resigns or is expelled from the party then he or she loses the seat. The party then appoints another person in that person's place. Voters know that the party they voted for will keep its seats, even if individual MPs change parties.</td>
<td>• MPs keep their seats and can move from one party to another if they choose. The political party does not have the power to take away their seat. Voters can't be sure that the MP they voted for will stay with the same party.</td>
</tr>
<tr>
<td>• Minority parties can win seats if they have enough voters in the country altogether who support them, even if they would not have enough support to win in any one area.</td>
<td>• Minority parties are likely to suffer in an election based on this system, because they may not have enough voters who support them in any one constituency.</td>
</tr>
</tbody>
</table>

### Summary of the Constitution

**Preamble**

We, the people of South Africa, Recognise the injustices of our past; Honour those who suffered for justice and freedom in our land; Respect those who have worked to build and develop our country; and Believe that South Africa belongs to all who live in it, united in our diversity.

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

Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law; Improve the quality of life of all citizens and free the potential of each person; and Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

May God protect our people.

Nkosi Sikelel' iAfrika. Morena boloka setjhaha sa heso.

God seen Suid-Afrika. God bless South Africa.

Mudzimu thatutshedza Afrika. Hosi katekisa Afrika.
Chapter 1: Founding provisions

Section 1

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

- human dignity, equality, advancement of human rights and freedoms
- non-racialism and non-sexism
- the Constitution will be supreme
- the rule of law will be supreme
- all adults will be able to vote
- there will be a common voter’s roll
- there will be regular elections
- there will be a multi-party system of democratic government to make sure there is accountability and openness

Section 2

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

Section 3

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

See CITIZENSHIP

Section 4

The national flag will be black, gold, green, white, red and blue.

Section 5

The national anthem will be decided by the President.

Section 6

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

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

Chapter 2: The Bill of Rights

Section 7: Introduction

Chapter 2 contains the human rights which will be protected in South Africa. These are put in the Constitution for these reasons:

- to make them law so that people can use them in court to protect themselves
- to make them difficult to change
The Bill of Rights can only be changed by a Bill passed by:

- the National Assembly, if at least two-thirds (66%) of the members of Parliament vote for it AND
- the National Council of Provinces, if at least 6 provinces vote for it.

See Changing or amending our Constitution

Section 7 also says the government must respect, protect, promote and fulfill the rights in the Bill of Rights.

Section 8: Application of the Bill of Rights

The Bill of Rights applies to all laws. It must be followed by all branches of government and all government bodies. This means it must be followed by:

- the legislatures (bodies that make laws)
- the executive (bodies that carry out the laws)
- the judiciary (the courts)

See The separation of powers

It must be followed by these government bodies at all levels, in other words, National, Provincial and Local government level.

See The levels of government

Vertical and horizontal application of the Bill of Rights

The Bill of Rights applies to all matters between citizens and the Government. This means it applies in a vertical way between government and citizens. It protects citizens from things done to them by the government.

The Bill of Rights also works in a horizontal way. This means it applies to matters between ordinary people or businesses, but only if this makes sense. It protects people from things done to them by other people.

Example

1. A restaurant owner says men must wear a jacket and tie in his restaurant. He puts Peter out of his restaurant when he takes off his jacket and tie. Peter complains that he has a right to dress however he likes. The restaurant owner says it is his property and he has a right to put people out if he doesn't like what they are doing.

2. The same restaurant owner also refuses to allow women to come into his restaurant. He says his restaurant is only for males. Shinaaz comes into the restaurant for a meal. He tells her to leave. She complains and says he is discriminating against her because she is a woman. The restaurant owner says it is his right to do what he likes with his property.

In both these examples each person has rights that are in the Bill of Rights. Each person feels that their rights are more important than the other person's rights. The courts will have to decide whose rights are more important in each situation by taking into account the rights, the prejudice that each person could suffer in each situation and the duties attached to the rights.

It will be up to the courts to decide whose right is more important in each situation. The Constitutional Court has said each case will be decided on its own merits. People can also use ordinary laws that protect their rights, for example the Employment Equity Act that protects workers’ right to equality.
Section 9: Right to equality

1. Everyone is equal before the law and has the right to equal protection and benefit of the law.

Being equal before the law means all laws may not unfairly discriminate against anyone. Everyone is entitled to equal rights and freedoms. This also means there should be equal representation on legislative bodies (in other words, bodies that make our laws). In this way we can make sure that all the different needs of the people of the country are shown in the laws.

The right to 'equal protection before the law' means people have a right to the same opportunities and to have equal access to resources, which would allow them to be equal in the future.

2. The government must take active steps to change the inequalities of the past.

The government must make laws that provide benefits for people who continue to suffer from inequalities as a result of past laws. This is called affirmative action.

Affirmative action means taking positive action to protect or help a person or group who has been prejudiced or disadvantaged in the past. People sometimes call this 'fair discrimination'. Section 8 of the Constitution allows affirmative action. It accepts that if we want to achieve equality it will be necessary to take positive steps to help undo the imbalances and disadvantages for individuals and groups that were caused by discrimination and oppression in the past. But, the circumstances of the person or group must justify the affirmative action.

The Employment Equity Act puts the right to equality into practice in the workplace. The Employment Equity Act makes it compulsory for employers who employ more than 50 people to introduce affirmative action measures to fix past discriminatory practices. It says people from designated groups (black people - including African, coloured and Indian - women and people with disabilities) must be given equal employment opportunities and they must be equitably represented in all work categories and levels.

The Affirmative Action in the Public Service Act covers employment in the public sector (the government service). Under the Act all government departments must have affirmative action programmes. The affirmative action programme must set out steps to make the department more equally representative of previously disadvantaged groups (specifically black people, women and people who are disabled).

3. It is against the law to discriminate against anyone on any of the following grounds:

- race and colour
- sexual orientation: being gay, lesbian or heterosexual
- marital status: being single, married or divorced
- gender: social and cultural male or female roles (for example, where a woman can't get a certain job just because she is a woman) sex: physical differences between men and women (for example, a woman is discriminated against because she is pregnant)
- pregnancy
- age
- disability
- ethnic origin: being from a particular background, such as a clan or language group
- culture: having a shared culture and traditional practices
- language
- religion, conscience, belief
- birth

4. No person can unfairly discriminate against another person, directly or indirectly, on any of the grounds under (3).

The government is supposed to pass laws that will prevent or stop unfair discrimination.
The Promotion of Equality and Prevention of Unfair Discrimination Act (passed in February 2000) says what discrimination is against the law in different areas of society. The Act also says how people who have been discriminated against can be compensated, for example by being paid money.

Under the Act there is a general prohibition against unfair discrimination. It divides the prohibition into the following sectors:

- employment
- education
- health care
- land, housing and accommodation
- insurance
- pensions
- goods, services and facilities
- associations and partnerships
- clubs
- professions
- the media

The Act defines each sector and says what discrimination is not allowed in each sector. If someone is charged with unfair discrimination it is up to the person who is doing the discriminating (not the person discriminated against) to prove that the discrimination was reasonable and justifiable.

The Act says Equality Courts in each province will become part of a magistrate's court. These courts can hear cases of discrimination and have powers to conciliate and mediate, grant interdicts, order payment of damages or order a person to make an apology.

5. Discrimination on any of these grounds is unfair unless the person or state can say why it is fair.

**Case study**

A case of unfair discrimination was brought against the President when he said that certain women and children should be released from prison as part of an amnesty programme. Hugo, the person bringing the claim of unfair discrimination, said it was unfair that men weren’t given the same treatment as women.

The argument brought by the President against Hugo was that the women were needed to look after the children and that is why it was fair that they should be released rather than the men. The court said the action taken by the President was not unfair.

**Section 10: Right to human dignity**

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

**Section 11: Right to life**

Everyone has the right to life.

The Criminal Procedure Act now includes the right for police to 'shoot to kill' in certain situations. It is likely that this new section will be challenged in the Constitutional Court because it might go against a person's right to life. However, people could argue that because there is so much violent crime in South Africa the right to life could be limited under Section 36 of the Bill of Rights (the limitations clause), because it is reasonable and justifiable in an open and democratic society.

**The death penalty**

The debate about the death penalty is based on the right to life, and the right not to be treated or punished in a cruel, inhuman or degrading way (section 12). Those who are against the death penalty argue that the state cannot execute
(kill) criminals even if they have taken someone else's life. Others who want to keep the death penalty say that the death penalty can be allowed because someone who has taken another human being's life has given up the right to their own life.

The Constitutional Court has said that the death penalty goes against a person's right to life. So, a court cannot pass the death sentence against anyone.

**Termination of pregnancy (abortion)**

The debate about abortion is based on the right to life, and the right for women to make decisions about reproduction (having children) and to have control over their own bodies (Section 12). People who argue against abortion say the unborn baby has the right to life from the moment the egg is fertilised. People who argue for abortion say that women have the right to make decisions about their own bodies, and that the decision as to when life begins (in the womb or at birth) is for each individual to make.

Parliament has passed a law called **The Choice on Termination of Pregnancy Act**. Up to a certain stage of pregnancy, women can now choose to end a pregnancy. Government hospitals should provide facilities to carry this out.

**Section 12: Freedom and security of the person**

This includes the following rights:

- not to be put in prison without good reason
- not to be detained without trial
- to be free from all kinds of violence in both public and private areas
- not to be treated or punished in a cruel, inhuman or degrading way. Torture is not allowed.
- to make decisions about reproduction (having children)
- to have control over our own bodies
- not to be forced to have medical or scientific experiments done on people

**Violence and abuse in the home**

Everyone has the right to be free from all forms of violence in the home. This right ensures that the government and the police must take measures to prevent domestic violence, for example, abuse of women and children in the home.

**Corporal punishment**

This means giving beatings or whippings for punishment. The Constitutional Court has decided that punishing people and children by whipping them or giving them a caning goes against this right.

The Abolition of Corporal Punishment Act (1998) says beating a child as a form of punishment is illegal because it goes against a child's right to dignity and his/her right not to be treated in a degrading way.

**Section 13: Slavery, servitude and forced labour**

No form of slavery or forced labour is allowed.

**Section 14: Right to privacy**

Everyone has the right to privacy, including the right not to:

- be body-searched without a court order
- have your home searched without a court order
- have your things taken from you
- have your letters opened or your telephoned tapped
The Interception and Monitoring Prohibition Amendment Act (1996) prevents people's conversations being intercepted.

Section 15: Freedom of religion, belief and opinion

Everyone has the right to believe or think what they want, even if their opinion is different to the government. Everyone has the right to practise the religion they choose.

Government institutions, like schools, can follow religious practices (like having prayers in the morning) but this must be done fairly and people cannot be forced to attend them.

A person can also get married under the laws of their religion. But these cannot go against the Bill of Rights. For example, a woman who marries according to customary law does not lose her rights of equality when she gets married.

Section 16: Freedom of speech and expression

Everyone has the right to say what they want, including the press and other media.

Limiting this right

There are certain kinds of speech that are not protected. These are:

- propaganda for war
- inciting (encouraging) people to use violence
- hate speech

Hate speech means spreading hatred and encouraging people to act violently or harmfully towards other people because of their race, gender, ethnic origin or religion. In other words, hate speech encourages people to discriminate against other people.

Section 17: Freedom of assembly, demonstration, picket and petition

Everyone has the right to assemble with other people, hold a demonstration, picket or present petitions. They must do this in a peaceful way and they may not carry weapons.

The Regulation of Gatherings Act (1993) says organisers of a demonstration must give the authorities at least 7 days notice. The organisers must give the names, purpose of the event, the place of the gathering or the route of the march and the numbers of people expected to take part. The police can disperse a crowd, using reasonable force, if they believe there is a danger to people or property.

Section 18: Freedom of association

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

Section 19: Political rights

Everyone has the right and is free to make political choices, such as the right to:

- form a political party
- join any political party
- encourage other people to join a political party
- campaign for a political party or cause

Elections
Every adult citizen has the right to free, fair and regular elections. They have the right to:

- vote in these elections
- vote in secret in elections
- stand for election

**Section 20: Citizenship**

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

See CITIZENSHIP

**Section 21: Freedom of movement and residence**

Everyone has the right to:

- move anywhere in South Africa
- leave South Africa if they choose

Every citizen has the right to:

- enter South Africa and stay there
- live anywhere in South Africa
- have a passport

**Section 22: Freedom of trade, occupation and profession**

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

See LABOUR LAW
See SMALL BUSINESS LAW

**Section 23: Labour relations**

Everyone has the right to fair labour practices.

Workers have the right to:

- form and join trade unions
- join in the activities and programmes of the trade union
- strike

Employers have the right to:

- form and join employers' organisations
- join in the activities and programmes of the employers' organisation

Trade unions and employers' organisations have the right to:

- make decisions about their own administration, programmes and activities
- organise
- form and join a federation
- engage in collective bargaining

The right to strike and lock-out
The right for workers to strike is written in the Constitution. The right for employers to lock out their workers is not included in the Constitution. But, this does not mean that employers do not have the right to lock-out. The Labour Relations Act says that employers have the right to lock-out in certain situations.

See LABOUR LAW

Section 24: Environment

Everyone has the right to:

- an environment that is not harmful to their health or well-being
- have the environment protected for present and future generations

The government must pass laws that:

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

See ENVIRONMENTAL LAW

Section 25: Property

No one can have their property taken away from them unless this is done according to a law.

Expropriating private property

This means the government takes a person's land away from them. Property can be expropriated by the government if:

- the government wants to use the land for public purposes or
- it is in the public's interest, for example, if the government needs the land for its land reform programme.

If the government takes land from a person they must pay this person for it. This is called compensation.

There are certain things to think about when a landowner and the government are deciding how much compensation to pay for the land. These are:

- the history of how the property was bought and what it was used for before
- how much the owner has improved the property
- what the property is being used for now
- the market value: what the price of the property would be if a private person or business bought it
- how much the government can pay: how much money the government has in its budget to pay for the property
- what the government wants to do with the property

Example

The government wants to build a dam to provide water for a community. They want to build the dam on your property. The government can take the land from you but they must pay you for the land. The amount of money the government will pay can either be agreed between you and the government, or it can be decided by a court if you cannot agree.

Land Reform
Section 25 also deals with land reform. It says the government must make laws and take other steps, to help people or communities to get land to live on, and to claim back land, if they lost it after 1913 and they lost it because of an apartheid law. Up to December 1998, in such cases people were able to claim the land back or compensation for the land.

See LAND AND HOUSING, Land restitution: access to land if your land was taken away by an apartheid law

Labour tenants

If a person has been living on land which they were not allowed to own because of apartheid laws, they will now be able to own this land or be paid compensation for it. An example of this is people who live on farms as labour tenants. The Extension of Security of Tenure Act has been passed by the government which gives labour tenants certain rights in terms of Section 25.

See LAND AND HOUSING, Extension of Security of Tenure Act

Section 26: Right of access to housing

Everyone has the right to have access to adequate housing. The government must take reasonable steps within its available resources to provide people with housing and access to land.

Limitations on this right

Section 26 says the government must take steps to provide housing ‘within its available resources’. This means the government has a duty to provide what it can afford.

In a recent court case, Irene Grootboom took the government to court on grounds that Section 26 of the Constitution says people have a right to have access to housing. The Constitutional Court said there are three parts that make up the government's obligation to provide housing.

These are:

- what are reasonable measures that the government should take
- what steps should government take to steadily implement this right in stages over time
- what resources are available to make this possible

The Court ordered the government to take positive steps to meet its obligations under section 26(2) of the Constitution, particularly where people are living in inhumane conditions or crisis situations.

Evictions

No one can be evicted from their home or have their home demolished, unless a court has heard the person's case and decided that he or she must leave. In this case the court must give a court order.

See LAND AND HOUSING

Section 27: Right of access to health care, food, water and social security

Everyone has the right to have access to:

- health care services (including child birth facilities)
- enough food and water
- social security (which means support for people who can't support themselves or their dependants)

The government must pass laws and have policies that provide welfare assistance for the people who need it the most.

See SOCIAL WELFARE
Limitations on these rights

Section 27 says the government must take steps ‘within its available resources’. This means the government must only provide what it can afford. But, the section says the government must improve these services over time.

Emergency medical treatment

Everyone is allowed to have emergency medical treatment.

Section 28: Children’s rights

A child is anyone who is under the age of 18. Every child has the right:

- to a name and a nationality from the day they are born
- to proper care by parents or a family member, or by someone else if the child has to be taken away from the family
- to enough food, shelter, basic health care and social services
- to be protected from being mistreated, neglected or abused
- not to be forced to work or given work which is not suitable for a child
- to have a lawyer paid for by the government, if the child has to appear in court
- not to be used in wars
- to be protected during times of war

Whenever a decision is made about a child, the most important thing that must be thought about is what would be in the best interests of the child.

See FAMILY LAW AND VIOLENCE AGAINST WOMEN

Children’s rights if they are detained

A child may only be detained if it is absolutely necessary, and it must be for the shortest possible time. A child has the right to be kept separately from other detained people who are over 18. The child must be treated and kept in conditions that take into account the child’s age. A detained child also has all the rights of any other detained person.

See Section 35: Arrested, detained and accused persons

Section 29: Education

Everyone has the right to:

- a basic education, including adult basic education
- further education, which the government must make available and accessible

Everyone has the right to be taught at a government school in their own language but only if this is practical and if the government can afford it.

The government must take steps, for example by passing laws, that will help people who want further education.

Section 30: Language and culture

Every person has the right to use their own language and follow the culture that they choose. A person has the right to enjoy their culture, use their language and form their own cultural associations in civil society. But they cannot do anything that goes against the rights that other people have.

Section 31: Cultural, religious and linguistic communities

Communities have the right to enjoy a shared culture, practise a shared religion and use their language. But they cannot do anything that goes against the rights that other people have.
Section 32: Access to information

Everyone has the right to have access to:

- information which the government has
- information that someone else has if they need it to protect any of their rights

Example

In the past accused people were not allowed to have access to the police dockets that included witnesses' statements, reports of the investigation, and other information about their cases, unless the state agreed to give it to them. Now the Constitutional Court has said an accused person has the right to access to the docket, because Section 32 of the Bill of Rights gives people the right of access to information they need to protect or exercise their rights.

Section 32 says the government must pass laws that will put this right into practice. What was proposed as the Open Democracy Bill has been passed as two different Acts, called The Promotion of Access to Information Act and the Protection of Disclosures Act. The Department of Justice has to take responsibility for drawing up easy-to-use guides that explain how these Acts work and how to use them.

The Promotion of Access to Information Act aims to create an accountable government and to help society participate in the process of governing. The Act gives ordinary citizens a right of access to all kinds of government information, providing very limited reasons why officials can refuse to give such information. It also says every government and private body must appoint someone as their Information Officer. A person who wants information must go to the Information Officer with a formal request for information. This Act is a good weapon against corruption and makes the government transparent and accountable.

The South African Human Rights Commission has to produce an easy-to-use guide that explains how to use this Act and the remedies that are available to people if a government or private body refuses to give them the information they want.

See Resources for South African Human Rights Commission contact details

The Protection of Disclosures Act gives protection to 'whistle-blowers' - people who speak out against corruption, dishonesty or bad administration and who believe at the time that what they are saying is the truth. They are protected from internal disciplinary action, intimidation and harassment if they have 'blown the whistle' on someone or a business.

Section 33: Just administrative action

This protects people against unlawful, unjust and unreasonable decisions from government officials or departments.

The government official or department must give a person written reasons for decisions that are made which affect that person.

The government must pass laws that will put this right into practice. These laws must:

- provide for the review of the actions of the government official (or department). This means a court of law or an independent body must decide whether the action did go against a person's rights.
- make it a duty of the government and all government bodies to put this right into practice, be just and promote an efficient administration

The Promotion of Administrative Justice Act has been passed. Under the Act all decisions of every administration at every level of government will have to comply with the rules that are in the Act. All decisions made by government officials and departments will have to be lawful, procedurally fair and reasonable. The Act applies to all government bodies and private people who exercise public powers or perform public functions.
A person whose rights have been wrongly affected can ask for reasons to be given in writing to explain the administrative action taken. The Act says a court (established under the Act) will have the power to review administrative actions in certain situations. These courts have not yet been set up.

Section 34: Access to courts

Everyone has the right to have any legal problem or case decided by a court or an independent body.

See COURT CASES

Section 35: Arrested, detained and accused persons

Arrested people

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

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

Detained people

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

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

Accused people

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

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

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

See COURT CASES

Section 36: Limitations on rights

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

These are the factors that a person or court must taken into account if a right is to be limited:

- the nature of the right
- the importance of the purpose of limiting the right
- how much the right will be limited
- the relation between the limitation and its purpose
- whether there are better ways to achieve the same purpose

See Conflicts in rights

Section 37: States of emergency

It may be necessary for a government to declare a state of emergency to deal with a major problem facing the country. During a state of emergency the Bill of Rights is usually affected.

The government can only call a state of emergency when:

- the life of the nation is threatened by war, invasion, disorder, natural disaster or other public disorder, AND
- the state of emergency is necessary to restore peace or order

The state of emergency and any laws passed as a result of the state of emergency can only last for 21 days, unless the National Assembly extends this. At least two-thirds (66%) of the members of the National Assembly must agree to extend this. They can extend it for 3 months at a time.

There are certain rights that cannot be limited at all, even during a state of emergency. Some of these are:

- the right to human dignity
- the right to life
- the right to equality (race and sex only)
- freedom from torture

Section 38: Enforcing rights

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

- anyone representing themselves
- anyone acting on behalf of another person who cannot take the case to court
- anyone acting as a member of a group, or in the interests of a group or class of people
- anyone acting in the public interest
- an association acting in the interests of its members
Section 39: Interpreting the Bill of Rights

When the courts are deciding a case on the Bill of Rights, they must promote the values of an open and democratic society based on freedom and equality. They must look at international laws (such as the Universal Declaration on Human Rights) and at the way courts in other countries have decided similar cases.

Chapter 3: Co-operative government

Government works at national, provincial and local levels.

& See The levels of government

All levels of government must:

- keep the peace and national unity of South Africa
- look after the well-being of the people of South Africa
- be effective, transparent and accountable to the Republic as a whole
- be loyal to the Constitution and to South Africa
- respect the status, institutions, powers and functions of government in other areas
- not take on powers that the Constitution doesn't give them
- use their powers and perform their functions in a way that doesn't interfere with government in another area
- co-operate with each other by assisting, supporting, consulting with each other on things of common interest

Chapter 4: Parliament

This chapter looks at:

- the National Assembly
- the National Council of Provinces
- how a bill becomes law

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

Parliament has 2 houses:

- the National Assembly
- the National Council of Provinces

The National Assembly

How is the National Assembly made up?

The National Assembly consists of between 350 and 400 Members of Parliament. The people of South Africa vote in general elections for people to represent them in the National Assembly. Only people who are 18 years or older can vote in an election. General elections are held every 5 years.

Members of the National Assembly are elected according to the system of proportional representation. This means people vote for the party and not for a person.

See Proportional representation

Who can be a member of the National Assembly?

To be a member of the National Assembly a person must be:
a South African citizen
allowed to vote
of sound mind

Permanent delegates to the National Council of Provinces or members of a provincial legislature or municipal council cannot be members of the National Assembly.

If a member of the National Assembly joins another party then he or she will have to leave the National Assembly. Another person from the party that the person has left will take over the seat.

See What does proportional representation mean?

**How does the National Assembly make decisions?**

The National Assembly makes decisions by voting. If the decision is about a new law (a bill), more than half of the members of the National Assembly must be present before there can be a vote. If the decision is about anything else, at least one third of all the members must be present. The President is not allowed to vote in the National Assembly.

**The National Council of Provinces (NCOP)**

The NCOP represents provincial and local government interests in Parliament and in the Executive. It works with the National Assembly to make and pass new laws and to change old laws.

**How is the NCOP made up?**

The NCOP has 90 members. Each Province sends 10 delegates. The 10 delegates are:

- 4 special delegates, including the Premier of the Province
- 6 permanent delegates

The NCOP elects a Chairperson and two Deputies.

**Making laws**

The National Assembly can pass laws on any matter, including a matter in the functional areas listed in Schedule 4. But it cannot pass laws on a matter in the functional areas listed in Schedule 5, unless it becomes necessary for reasons such as maintaining national security.

See Schedule 4

**How a bill becomes an act**

A bill is a draft law that has not been passed by Parliament. ‘Passed’ means approved. An act is a law that has been passed by Parliament.

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

See Schedule 4

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

These are the general rules about how a bill becomes an act:
1. The National Assembly looks at a bill, and sends it to a parliamentary portfolio committee for consideration. Parliamentary portfolio committees specialise in the same area as each government department. For example, there is a portfolio committee for health, prison services, defence, and so on.

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

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

4. The NCOP considers the bill.

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

**If the bill is about something that only the National Assembly can make law on:**

The NCOP can approve the bill, or can suggest changes but the National Assembly decides what the bill finally says.

Each member of the NCOP has one vote, and a simple majority of members is needed to approve the bill. (A simple majority means half the votes plus at least one vote must be for the bill.)

**If the matter is one that provinces can make law on:**

The NCOP can approve the bill, suggest changes or reject the bill.

To approve the bill, each province has one vote and at least five of the nine provinces must vote in favour of the bill.

If the NCOP suggests changes or rejects the bill and the National Assembly doesn't agree, the NCOP can refer the bill to a mediation committee to resolve any differences.

- The mediation committee consists of 9 members of the NCOP and 9 members of the National Assembly.
- If the mediation committee resolves the differences, it refers the bill to the National Assembly to be passed.
- If the National Assembly and NCOP still can't agree, then the National Assembly has to have a special vote to make the bill law. It will only become an act if it gets a two-thirds (66%) majority in the National Assembly.

5. The National Assembly passes the bill.

6. The bill is sent to the President. He or she signs it and it gets published in the Government Gazette. When this has happened, the bill becomes law and is called an Act of Parliament.

**Changing the Constitution**

See Changing or amending our Constitution

**What happens if a Bill is, or might be, unconstitutional?**

- Members of the National Assembly can apply to the Constitutional Court for an order to declare that all or part of an Act of Parliament is unconstitutional. At least one third of the members of the National Assembly must support this application. The application must be made within 30 days of the date on which the President signed the Act.
- If the President thinks a bill goes against the Constitution, the President can refuse to sign it and send it back to Parliament for them to look at it again.
- If Parliament makes the changes suggested by the President, the President must sign the bill.
- If Parliament does not make these changes, the President can either sign the bill or send it to the Constitutional Court, for the Court to say whether or not the law goes against the Constitution.
- If the Constitutional Court is satisfied with the bill, the President must sign it.
- If the Constitutional Court is not satisfied with the bill, it will be sent back to Parliament. Parliament can either change the bill or let it fall away.
Chapter 5: The President and the national executive

The national executive is the body which puts the laws written by Parliament into action. The executive cannot make new laws. The national executive is called the Cabinet. The Cabinet consists of the President, the Deputy President and ministers.

The President

The President is the head of state, head of the Cabinet and Commander-in-chief of the Defence Force.

The President is elected by the National Assembly from among its members.

The Cabinet

The Cabinet consists of the President, the Deputy President, and all the ministers, for example, the Minister of Education, the Minister of Health, and so on. Each minister has a government department that he or she is in charge of.

The President selects and appoints the Deputy President and the ministers in the Cabinet. The President can also appoint Deputy Ministers to assist members of the Cabinet. The President can dismiss any of these people he or she has appointed.

The Deputy President and the ministers are all accountable to the President and to Parliament. The executive has to follow the policies of the government. For example, the Minister of Education and his or her department must carry out all the laws that Parliament makes about education and must carry out the policies of the government on education. The different departments can refer bills to Parliament to have them made into laws.

Chapter 6: Provinces

There are 9 provinces:

- Eastern Cape
- Free State
- Gauteng
- Kwazulu-Natal
- Mpumalanga
- Northern Cape
- Northern Province
- North West
- Western Cape

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

Provincial legislatures

The provincial legislatures write laws called ordinances for their provinces. Only people living in the province and people visiting it will have to follow these laws. The kinds of laws provincial legislatures are allowed to pass are discussed under Powers of the provinces below.

Members of provincial legislatures are elected during the national general elections which take place every 5 years. There will be between 30 and 80 members in each provincial legislature.

Provincial executives

The provincial executives are made up of the Premier and the Executive Council of that province. The Executive Council consists of the Premier and not more than 10 others appointed by the Premier.
Powers of the provinces

Provincial governments have certain powers to make decisions for their provinces. Provinces can make their own constitutions and their own laws, but these must follow the national Constitution.

Provincial legislatures can pass laws on any matter in the functional areas listed in Schedules 4 and 5 of the Constitution.

See Schedule 4
See Schedule 5

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

Chapter 7: Local government

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

Who can vote in local government elections?

Municipal councils are elected every 5 years in local elections. People who can vote must live in the area covered by the local government or own property in the area, and they must be registered as a voter in the area.

Powers of local government

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

See Schedule 4
See Schedule 5
See LOCAL GOVERNMENT for information on local government powers and duties

Chapter 8: Courts and administration of justice

The Constitution says the courts are independent. This means that the national executive and Parliament cannot interfere in what the courts do. Everyone, including the government must follow the decisions of the courts.

The courts are:

- the Constitutional Court
- the Supreme Court of Appeal
- the High Courts
- magistrate’s courts
- other courts set up by acts of Parliament, for example, the Labour Court, the Small Claims Court

The Constitutional Court

The Constitutional Court is made up of a President, a Deputy President and nine other judges. The judges can only be judges in this court for up to 9 years. The Constitutional Court is the highest court to hear cases about the Constitution. All other courts must follow the decisions of the Constitutional Court. For example, the Constitutional Court says the death penalty is not allowed because it goes against people's right to life, so no other court can sentence anyone to death.
What cases can go to this court?

There are certain cases that only the Constitutional Court can make decisions about. Some of these cases are:

1. Disputes over constitutional matters between government bodies and between different levels of government, for example, between a national and a provincial body.
2. Whether laws passed (or about to be passed) by parliament or provincial governments go against the Constitution.
3. If any conduct of the President goes against the Constitution.

Hearing cases about the Constitution

Any court can hear a case about the Constitution, including cases about abuses of rights. Courts can do the following:

- remove a law which is unconstitutional
- stop any conduct which is unconstitutional
- give the body which made the law time to change the law

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

Who can take a case to the Constitutional Court?

Anyone can take a case directly to the Constitutional Court. But it is often difficult for a person who is not a lawyer to do this because of the legal questions involved. So, it would be better to get a lawyer to help take a case to Court.

Taking a case to the Constitutional Court

Anyone who wants to bring a case to the Constitutional Court must usually start in a High Court. In certain cases the state will provide Legal Aid. A High Court will hear the case and it has the power to make a decision. The person can usually appeal against a decision of the High Court. The appeal will be heard in the Constitutional Court.

See Resources for Constitutional Court contact details

Proceedings in the Constitutional Court

The Constitution says that at least 8 judges must hear any case that goes to the Constitutional Court. Decisions of the Court are reached by a majority vote of the judges hearing a case.

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

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

Sessions of the Constitutional Court are open to the public and press.

Constitutional Court examples

1. A provincial law (ordinance) says the province must only employ female teachers. All male teachers must be dismissed. A male teacher takes his case to the High Court. The High Court cannot remove this law. But the judges of the High Court can say that they think the law goes against the Constitution. They can decide that the teacher cannot be fired until the Constitutional Court has decided whether the
The male teacher, or another male teacher, or the Provincial Department of Education, can ask the Constitutional Court to decide whether the law goes against the Constitution or not.

2. In a real case that went to the Constitutional Court, Mr Soobramoney was a diabetic who suffered from heart disease and kidney failure. He applied to a state hospital for special treatment involving the use of a very expensive machine. Because of the shortage of machines and staff, the hospital only admitted patients who could be cured, or those who needed a kidney transplant. Mr Soobramoney did not fit either of these two categories. He was told that he did not qualify for the treatment.

He applied to the Durban High Court claiming that he had a right to receive treatment from the hospital because:

- Section 27 of the Bill of Rights says no one can be refused emergency medical treatment
- Section 11 says he has a right to life

The High Court turned down his application.

Mr Soobramoney appealed to the Constitutional Court. The Court said his case was not an emergency that would allow him to receive emergency medical treatment. It also said that even though Mr Soobramoney had the right to have access to health care, the state only had to provide what it could afford. In this case the state could not afford to give him the treatment. The Court turned down the appeal.

**The Supreme Court of Appeal**

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

**High Courts**

Each province has a High Court. Some provinces may also have ‘branches’ called local divisions.

If a person is unhappy about a decision of a High Court he or she can appeal to:

- the Constitutional Court if it is a constitutional matter
- the Supreme Court of Appeal in any other matter

**Magistrate’s Courts**

Each area in the country has its own magistrate’s court. These courts deal with less serious criminal and civil courts. If a person is unhappy with the decision of a magistrate he or she can appeal to a High Court of that province.

**How judges are chosen**

The President consults the Judicial Services Commission and leaders of parties in the National Assembly. The President then appoints the President and Deputy President of the Constitutional Court, and the Chief Justice. The Judicial Services Commission is made up of the following people:

- the Chief Justice
- the President of the Constitutional Court
- a Judge President of a High Court
- the Minister of Justice
- 2 advocates
- 2 attorneys
- a professor of law
Chapter 9: State institutions that support constitutional democracy

The Constitution says there will be 7 government institutions to protect people from abuse by the government. They are referred to as the protection mechanisms. It is their job to make sure that the government does its work properly.

See Protecting human rights

These institutions are independent and report to Parliament at least once a year. They are:

- the Public Protector
- South African Human Rights Commission
- Commission for Gender Equality
- the Auditor General
- Independent Electoral Commission
- Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities
- Independent Communications Authority of South Africa

The Land Claims Commission has been set up to protect people's land rights under Section 25 of the Bill of Rights.

See Land Claims Commission (LCC)

Chapter 10: Public administration

Public administration refers to people who work for the government, also called the public service. This includes the police, army and people who get a salary from the government, including all the government departments such as the Department of Education.

The public service

The public service must put the policies of the government into practice. People who work in the public service will get a pension. Employees of the public service cannot be treated better or worse than others just because they support a political party.

The Public Administration Commission

This is an independent body. It is made up of one representative from each province and it must account to Parliament. Its job is to monitor, evaluate and oversee the organisation and administration of the public service. For example, it investigates grievances of employees in the public service, it ensures that public officials follow correct procedures, and so on.
Chapter 11: Security services

The security services will consist of one defence force, a police service and an intelligence service. No other army apart from the South African army will be allowed. National security is controlled by parliament and the national executive.

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

See COURT CASES, Independent Complaints Directorate (ICD)

Chapter 12: Traditional authorities

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

The Constitution establishes a National Council of Traditional Leaders and Provincial Councils of Traditional Leaders. These councils allow traditional leaders to play an advisory role on matters relating to traditional leaders and customary law in national and provincial governments.

Chapter 13: Finance

The National Revenue Fund

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

The Financial and Fiscal Commission

This Commission is an independent body, that is subject only to the Constitution and the law. It must not be biased in its work. It can advise and make recommendations to any level of government about how to spend their money. It can also give advice about how much money should go to provincial and local governments. It must follow all laws and the Constitution.

How taxes are budgeted

The government gets taxes and levies from people who work (income tax), from companies and from VAT (the tax that people pay on goods that they buy). This money goes into the National Revenue Fund.

The Minister of Finance and the Department of Finance prepare the budget for the country. The national budget says how the money in the National Revenue Fund will be allocated.

The Finance and Fiscal Commission advises the government on how much money should be allocated to the provincial and local governments.

The budgets are debated in Parliament. Parliament can approve or reject how the money will be allocated.

The money that has been budgeted for the different departments, such as housing, education, environment, is given to these departments.

Chapter 14: General provisions

International agreements only become law in South Africa once they are made law by an act of Parliament and they are published in the Government Gazette.
Schedule 4

Concurrent functional areas of national and provincial legislatures

The National Assembly and provincial legislatures can pass laws on any matter, including a matter in the functional areas listed in Schedule 4.

Part A

Administration of indigenous forests
Agriculture
Airports (not international or national)
Animal control and diseases
Casinos, racing, gambling and wagering, excluding lotteries and sport pools
Consumer protection
Cultural matters government
Disaster management
Education at all levels, excluding tertiary education
Environment
Health
Housing
Indigenous law and customary law
Industrial promotion
Language policy and the regulation of official languages

Part B

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

Air pollution
Building care regulations
Child care facilities
Electricity
Ferries, jetties, piers and harbours
Firefighting
Local Municipal airports

Schedule 5

Functional areas that belong only to the provinces

Part A

Abattoirs
Ambulance services
Archives that belong to the provinces
Libraries (but not national libraries)
Liquor licences
Museums (but not national museums)

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

| Beaches and amusement facilities | Local sport facilities |
| Billboards and display of advertisements in public places | Markets |
| Cemeteries, funeral parlours and crematoria | Municipal parks and recreation facilities |
| Cleansing | Control of public nuisances |
| Control of businesses that sell liquor to the public | Noise pollution |
| Facilities to accommodate and bury animals | Pounds |
| Fences | Licensing of dogs |
| Licensing and control of businesses that sell food to the public | Refuse removal and refuse dumps |
| Street trading | Street lighting |
| Traffic and parking |

**Human rights**

**What are human rights?**

Human rights are also called natural rights. It is argued that they belong to people just because they are human beings. People are entitled to them regardless of where they live in the world or of their position in society. It doesn't matter what a person's race, sex, age, class, language, beliefs, culture or religion is, or how much money or education a person has, we all have the same human rights.

There are many international documents that deal with human rights, for example, the Universal Declaration of Human Rights. Many countries with different social, political and economic systems have signed this document. This means that even though they may have different ways of doing things and different beliefs, they believe basic human rights apply to everyone.

Most people would support human rights that are based on basic values, such as respect for human life and human dignity. But not all people agree on the interpretation of such rights and how they should be put into practice. There is also debate about which human rights are most important and which are less important.

The Bill of Rights in our Constitution is the outcome of constitutional negotiations. It contains the human rights that will be protected in South Africa.

**Legal rights and moral rights**

Legal rights are rights laid down in laws. Laws are made by parliament and they may give people certain rights. For example, it was once a legal right to own slaves because there were laws that allowed this, even though it went against the human rights of the people who were slaves.

There are also moral rights. For example, even though people over a certain age may have a legal right to drink alcohol, others may believe that they do not have a moral right to do so. Different people have different ideas of what is moral and what isn't moral. Some communities may practise moral codes that go beyond what the law says.

During the apartheid years many people did not have a legal right to use certain community facilities but they had a moral and human right to do so.

People may engage in campaigns to turn what they believe are moral rights or human rights into legal rights.

**Different categories of human rights**

People often divide human rights into different categories for the sake of convenience.

These are some of the categories of rights:
• rights of equality
• civil rights
• political rights
• social and economic rights
• legal process rights

All categories of rights are also closely linked to rights of equality. We all have an equal right to all rights.

Many rights overlap with other rights. To be able to use political rights effectively, people must have civil rights, such as the right to attend political meetings, to hold demonstrations, to have freedom of speech, and to be free to move anywhere. Social and economic rights are also linked to political rights: the right to vote and join political parties may be meaningless if people don’t have food to eat, a roof over their heads, running water and so on.

Rights of equality

This right means everyone is equal before the law and has the right to equal protection and benefit of the law. People cannot be discriminated against because of their race, gender, culture, and so on.

Civil rights

These are examples of civil rights and freedoms:

• right to human dignity
• right to life
• right to freedom and security of the person (no detention without trial, no torturing)
• no slavery or forced labour
• right to privacy
• freedom of speech and expression
• freedom of religion, belief and opinion
• freedom of assembly, demonstration and petition
• freedom of association
• right to to be citizens of the country where you are born
• freedom of movement and residence
• right to use the language of your choice and to participate in the cultural life of your choice

Political rights

These are examples of political rights and freedoms:

• right to make free political choices
• right to free, fair and regular elections
• right to vote
• right to vote in secret
• right to stand for election

Social and economic rights

These are examples of social and economic rights and freedoms:

• right to a clean and healthy environment
• right to own property
• right to have access to housing and land
• right to have access to health care, water and social security
• childrens’ rights to be cared for, given a secure home, and so on
• right to education
• freedom of occupation - the right to work and to choose your work
• right to fair labour practices
• right to form and join trade unions
- right to strike

Some social and economic rights are rights that need money to help people to use them. The government must spend money on making water, electricity, housing, land, education and so on available to all South Africans. If the government doesn't have much money to spend on these things then people won't be able to use their rights. Our Constitution allows these rights to be limited to what the government can reasonably afford.

See Section 26: Right of access to housing

Legal process rights

These are rights that help people when they deal with the law, for example:

- right of access to information that is held by the State or another person, that will help you protect your rights
- right to lawful administrative action - government officials must act in a way that is lawful and just
- right to have access to courts
- rights for people who are arrested, detained and accused

International documents on human rights

Human rights are set out in many international documents. When a country ratifies a document, it agrees to be bound by the rules in the document and makes the document a part of its own laws. If a country has signed but not ratified a document it means it supports the rules in the document and promises not to commit acts which would defeat the purpose of that document. It can mean the country plans to go through a process in order to ratify the document later.

South Africa has signed some international documents and ratified others. These are some of the most important international human rights documents:

- 1948 Universal Declaration of Human Rights (not legally binding on governments but it has moral and political authority in international communities) South Africa has not signed nor ratified it.
- 1953 Convention on the Political Rights of Women South Africa has signed it.
- 1957 Convention on the Nationality of Married Women South Africa has signed it.
- 1966 International Covenant on Economic Social and Cultural Rights South Africa has signed but not ratified it.
- 1966 International Covenant on Civil and Political Rights South Africa has signed but not ratified it.
- 1966 International Convention on the Elimination of All Forms of Racial Discrimination South Africa has signed but not ratified it.
- 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) South Africa has signed and ratified it.
- 1981 African Charter on Human and People’s Rights South Africa has signed and ratified it.
- 1984 Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment South African has signed but not ratified it.
- 1989 Convention on the Rights of the Child South Africa has signed and ratified it.
- 1996 International Labour Organisation Conventions: Convention Concerning Forced or Compulsory Labour Convention Concerning the Abolition of Forced Labour Convention Concerning Discrimination in Respect of Employment Occupation South Africa has signed and ratified these.

Summary of the Universal Declaration of Human Rights

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<td>1. Right to equality</td>
<td>16. Right to own property</td>
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Summary of the Convention on the Elimination of all Forms of Discrimination Against Women

Article

1. All people are equal and discrimination against a person because of sex or gender is not allowed.
2. The state condemns all forms of discrimination against women and must take policy measures, such as changing or removing all laws that discriminate against women, to make sure that discrimination is stopped.
3. Women are guaranteed basic human rights and freedoms. The state must use all possible measures to improve the position of women in all areas of their lives.
4. Affirmative action. The state may give women special treatment in employment, education, housing and other areas in order to correct the effect caused by discrimination against women. This must carry on until the discrimination ends.
5. The state must take measures to correct the attitude that women are less important than men or that women must act in a certain way because they are women. The state must use education to make people aware that bearing, raising and protection of children is a common and equal responsibility for men and women and society as a whole.
6. The state must make sure that women are not exploited as prostitutes.
7. The state must make sure that women and men have equal rights to represent their country in other countries and to take part in the work of international organisations.
8. Men and women have equal rights of citizenship. The rights of a married woman must not depend on her husband's citizenship or on where he lives.
9. There must be no discrimination against women and girls in education.
10. The state must remove discrimination against women in work.
11. The state must take steps to make sure there are enough health care services and family planning programmes.
12. The state must make sure there is social and economic equality between women and men. Women and men must have equal rights to:

- vote and stand for elections
- take part in making government policy and holding positions at all levels of government
- participate in the activities of non-governmental organisations.

13. The state must take special steps to help rural women with the special problems they have.
15. Women and men must have the same rights under any laws. The law must treat women and men equally.
16. The state must take steps to end discrimination against women in marriage and family life.

Summary of the African Charter on Human and People's Rights

**Article**

2.3. Equal treatment for all
4. Right to life
5. Right to dignity
6. Right to freedom and security
7. Right to a free trial
8. Freedom of conscience
9. Freedom of expression
10. Freedom of association
11. Freedom of assembly
12. Right to travel and to seek asylum
13. Right to participate in one's government
14. Right to own property
15. Right to work under satisfactory conditions
16. Right of access to health
17. Right to education
18. Right of family to be protected

19-24. These articles recognise the rights of entire peoples. This means:

- all peoples are equal and entitled to the same respect and rights
- there are no circumstances that justify the domination or oppression of one people by another
- all peoples have the right to exist, to self-determination and to choose their political status
- all peoples may pursue their economic and social development according to any principles they choose

**Article**

1,2,5,26. These articles cover the duties of the state. The state must recognize the rights, duties and freedoms in the Charter. They must pass laws that give effect to the rights. States must promote and respect the rights in the Charter. They must guarantee the independence of the courts and allow human rights organisations to develop.

27-29. These articles cover the duties of individuals towards the community and state. Each person must exercise his or her rights and freedoms without damaging the rights of others. The Charter says your individual duties are to:

- treat others without discrimination
- preserve the harmony and development of the family
- work in the best way possible
- pay taxes
- preserve and strengthen ‘positive African cultural values’ in a ‘spirit of tolerance, dialogue and consultation’
- promote African unity

Summary of the Convention on the Rights of the Child

**Article**

1. A child is a person under 18 years.
2. There must be no discrimination against children. Children must be protected from any form of discrimination.
3. All actions concerning the child must be taken in his or her best interests.
4. The state must do all it can to implement the rights contained in the Convention.
5. The state must respect the rights and responsibilities of parents and extended family to provide guidance for the child.
6. Every child has the right to life.

21. Adoption must only be carried out in the best interests of the child.
22. Children who are refugees are entitled to special protection.
23. Disabled children have the right to special care, education and training.
24. Children have the right to health and medical care.
25. Children in the care of the state have the right to be evaluated regularly.
26. Children have the right to social security.
27. Children have a right to a standard of living that is adequate for his or her physical, mental, spiritual,
7. The child has the right to a name at birth and a nationality, and to know his or her parents and be cared for by them.
8. The state must protect the child's identity.
9. The child has a right to live with his or her parents unless this goes against the child's interests.
10. Children and their parents have the right to leave and enter a country.
11. The state has an obligation to prevent kidnapping of children.
12. The child has the right to express an opinion freely on a matter affecting the child.
13. The child has the right to freedom of expression.
14. The child has the right to freedom of thought, conscience and religion.
15. The child has a right to freedom of association.
16. The child has a right to protection from interference with privacy, family and home.
17. The child has a right of access to information for his or her health and well-being.
18. Parents have joint responsibility for raising a child.
19. Children must be protected from abuse and neglect.
20. Children without a family must have special protection and alternative care provided.

The South African Bill of Rights

Chapter 2 of the South African Constitution is the Bill of Rights.

See Chapter 2: The Bill of Rights
See Section 8: Application of the Bill of Rights
See Section 36: Limitations on rights
See Section 37: States of emergency, about suspending rights
See Section 39: Interpreting the Bill of Rights
See Hearing cases about the Constitution

In this section we will look at the following aspects of the South African Bill of Rights:

- Creating a human rights culture in South Africa
- Rights and duties
- Conflicts in rights
- Protecting human rights:
  - Constitutional Court
  - Public Protector
  - South African Human Rights Commission
  - Commission on Gender Equality
  - Land Claims Commission and Land Claims Court

Creating a human rights culture in South Africa

A human rights culture means people in a society understand what their rights are and understand that they have a duty to respect and tolerate other people using their rights.

Our Constitution has a Bill of Rights which guarantees our rights and says we can defend our rights in court. This will go a long way towards creating a human rights culture. But building a human rights culture depends mostly on the attitudes of individuals, and the respect and tolerance that they show towards other people.
People are tolerant when they learn to accept and live with the differences in other people, whether it is their attitudes, actions, cultures, religions, sexual orientation (gay or lesbian), and so on. For example, a tolerant person will accept that other people have different opinions to their own, and they will allow them to express these without shouting at them or assaulting them.

So, tolerance means:

- to show respect towards other people
- to use negotiation and mediation when there is a problem between two or more people
- to be patient with other people
- to be a good listener
- to be slow to get angry

Rights and duties

For every right that a person has there is usually a duty that is connected to that right. There is a general duty to respect and be tolerant of other people's rights. The state also has duties in terms of rights. These are examples of some rights and duties:

- **The right to be equal before the law**

  Your duty: to respect other people even if they are different to you, and to accept that they are equal to you.
  The state's duty: to make laws apply equally to everyone regardless of their race, colour, gender and so on.

- **The right to life**

  Your duty: not to hurt someone so as to threaten their life.
  The state's duty: to pass a law to stop the death sentence.

- **Right to freedom and security of the person**

  Your duty: not to abuse your partner or children in the privacy of your home.
  The state's duty: to ban the use of torture to get information from people.

- **No slavery or forced labour**

  Your duty: not to allow your children to go to work when they are very young.
  The state's duty: to pass a law that sets a minimum wage and age for people who are working.

- **Right to privacy**

  Your duty: to knock on someone's door before entering their home.
  The state's duty: to keep people's information about themselves private and confidential, for example a woman who wants to have an abortion should know that this information will be kept private.

- **Freedom of assembly, demonstration, picket and petition**

  Your duty: not to carry a gun or dangerous weapon in a march or demonstration.
  The state's duty: to make it safe and secure for people who want to have a demonstration, for example by diverting traffic, and confiscating guns and weapons.

- **Freedom of movement and residence**

  Your duty: to accept anyone who comes and lives next door to you as your neighbour.
  The state's duty: to issue passports and identity documents to all citizens who apply.

- **Right to education**
Your duty: to send all your children to school.
The state's duty: to build enough schools and provide enough teachers so that everyone can go to school and get a proper education.

- Right of access to health care, food, water, social security

Your duty:
- to look after and care for public water pumps and to keep these in proper working order
- not to pollute rivers that people are using for drinking water
- to throw household litter in a proper place away from people's homes
- to pay rates and duties for services to the municipal council

The state's duty:
- to provide a rubbish removal service to all communities
- to provide clean running water to all communities
  - not to turn people away from hospitals if they need care

- Right to a clean environment

Your duty: not to throw rubbish on the ground.
The state's duty: to pass laws that stop factories from dumping their rubbish into our rivers.

Conflicts in rights

There are times when one person's right will clash with the rights of another person.

Example

1. A school which follows Hindu traditions and customs refuses to take a child into the school because the child is not a Hindu. The school says they have a right to practise their own religion, culture and belief. The parents of the child argue that it is their right to send their child to any school of their choice. They say their child has a right to education.

The conflict is about the right to education versus the right to practise your own religion, culture and beliefs.

2. In a rural community some people make a living by chopping down trees for firewood that they sell to the public. The Department of Forestry has appointed an official to protect the environment and to stop people from chopping the trees down.

The conflict is about the right to choose how to earn a living, versus the right to an environment that is protected so that people can always live there.

The Bill of Rights says it is acceptable in certain situations to limit rights, if it is reasonable to limit them in the situation, and it is justifiable in an open and democratic society that is based on equality and freedom. Where there is a conflict of rights and each person thinks their right is more important than the other person's right, then it will be the job of the courts to decide whose right is more important.

See Section 36: Limitations on rights

Example
Jon believes he is exercising his right to freedom of expression when he carries a poster around that says 'Jews go back to Israel'. But he is creating a conflict situation, because Jewish people have the right to protection against discrimination and they have the right and freedom to practise their own religion. The question is whether Jon has the right to carry this poster around because it is his right to say what he thinks. Jon's right could probably be limited because he is creating dislike or hatred for Jewish people by his actions, and this is not accepted by the Constitution.

How can we resolve conflicts of rights on our own?

It is important to remember when there is a conflict between two people’s rights, that it is acceptable to either limit one person’s rights or limit both people's rights.

One of the ways that people can avoid conflict is by being more tolerant of other people's rights and views. A tolerant person will accept that other people have different opinions to them and will allow them to express these without getting aggressive towards the person.

People should be encouraged to try and resolve their own conflicts before turning to the courts or other ways.

These are some examples of how people can resolve conflicts:

- Try and involve an outside party to come and mediate between the parties in conflict. Any person who is called in as a mediator should be respected by both parties.
- Go to your nearest parliamentary constituency office for advice.
- Get advice about your rights from a paralegal in an advice office.
- Report the problem to the local police if you think it is a problem that they can investigate.
- Speak to other people and if necessary form a lobby or pressure group.
- Report the problem to your local government representative.
- Report your case to a statutory body such as the Public Protector, South African Human Rights Commission or Commission on Gender Equality.

Protecting human rights

The protection mechanisms are also called the ‘state institutions supporting constitutional democracy’ in the Constitution. Chapter 9 of the Constitution creates 7 institutions for protecting peoples’ rights and for making sure that the government does its work properly. The institutions are:

- the Public Protector
- South African Human Rights Commission
- Commission on Gender Equality
- Office of the Auditor-General
- Independent Electoral Commission
- Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities
- Independent Communications Authority of South Africa

Other institutions that also protect people’s rights are:

- Constitutional Court
- Land Claims Commission and the Land Claims Court

People can also take cases about human rights abuses to the magistrate's courts and High Courts. If you take a case to the magistrate's court or High Court, then you can represent yourself but usually you would need to pay a lawyer to prepare the papers and to send them to court. This costs a lot of money. The protection mechanisms are free, and people can send in their complaint to be investigated without having to go to a lawyer.
The Public Protector

The Public Protector represents citizens and watches over the activities of government officials to stop them abusing their powers. The Public Protector is an independent official and is accountable to the Constitution. Public Protector officials must act in a transparent way and must send a report of their activities and findings to Parliament at least once a year.

One person is appointed by the government as the national Public Protector. He or she has a department with staff who do the work in the national office and in the provincial offices. Each province can have their own Public Protector.

How is the Public Protector appointed?

A parliamentary committee consisting of one member of each political party in Parliament nominates someone to be the Public Protector and the National Assembly and the National Council of Provinces must approve the nominations. The Public Protector will stay in office for 7 years but he or she can be removed from this position by the President on grounds of misbehaviour, incapacity or incompetence.

A provincial Public Protector is appointed by the provincial premier in consultation with the national Public Protector. The person who is nominated must be approved by a two-thirds majority of the provincial legislature.

A Public Protector must:

- be a South African citizen
- be a fit and proper person
- be a judge or legal person with 10 years legal experience
- have special knowledge of administration of justice or public administration

The functions of the Public Protector

These include:

- to investigate complaints about any of the following:
  - poor administration of government
  - government officials who abuse their powers
  - improper conduct of public officials
  - corruption of public funds by public officials
  - any act or omission (something that has not been done) by public officials that results in prejudice to a citizen
- to resolve disputes
- to refer matters to other agencies, for example the Attorney General to prosecute the person who is guilty of any misconduct

What can the Public Protector do?

The Public Protector has the power to do the following:

- order a person to attend a hearing
- order a person to give evidence or produce any document
- enter a person's home or a workplace if this is necessary for an investigation

A person who is being investigated by the Public Protector has the right to give their side of the story and to be represented at the hearing.

Making a complaint to the Public Protector

Any person can make a complaint to the Public Protector. If you want to make a complaint you must make an oral or written statement saying:
• what the complaint is about
• why the Public Protector must investigate the complaint
• any other information that may be relevant to the case

The services of the Public Protector are free.

**South African Human Rights Commission (SAHRC)**

The SAHRC promotes respect for human rights and protects human rights. It must educate people about human rights. It can investigate complaints about human rights abuses, it can arrange for someone to have a lawyer to defend their rights, and it can take cases to court.

The SAHRC is an independent body and is only accountable to the Constitution and Parliament. The SAHRC must send a report of its activities to Parliament at least once a year.

The SAHRC consists of a chairperson and 10 members. These members must be South African citizens, fit and proper people, and broadly representative of the South African community. The members are nominated and approved by the National Assembly and the National Council of Provinces. Members of the SAHRC can be commissioners for 7 years.

**Making a complaint to the SAHRC**

Anyone can make a complaint to the SAHRC. If you want to make a complaint you must do the following:

1. Write down the details of the person who the complaint is about. This must include the name of the person or department, and their address and telephone number.
2. Say what the complaint is about.
3. Include your own name, address and telephone number.
4. Post or fax this to the nearest SAHRC office.

See Resources for South African Human Rights Commission contact details

**Commission on Gender Equality (CGE)**

The CGE will protect men and women who complain that they have been discriminated against because of their gender or sex. The CGE will also advise lawmakers on laws that affect equality between men and women, and on the position of women as citizens.

The CGE is an independent body and is only accountable to the Constitution and to Parliament. The Commission must send a report of its activities to Parliament at least once a year. The CGE has been set up in terms of the 1996 Commission of Gender Equality Act 39.

The CGE consists of a chairperson and 7 to 11 members. The National Assembly and the National Council of Provinces nominate and approve members to the CGE. The members of the CGE stay in office for 7 years.

The Commission on Gender Equality Act makes no provision for provincial offices.

The functions of the CGE

These are to:

- monitor, evaluate, review and report on laws, policies and practices of different government bodies and private businesses that affect gender equality
- monitor international conventions to make sure that our laws and policies follow these
- do research about gender equality
- make recommendations to any legislature (in other words, any government body that makes laws) to adopt new laws to promote gender equality
- network with institutions and other bodies to promote gender equality
- educate civil society about gender equality
• investigate any gender-related issues if someone makes a complaint
• resolve disputes if someone has made a complaint
• refer any complaint that it can’t resolve to the Public Protector or the South African Human Rights Commission

What can the CGE do?

The CGE has the power to:

• order a person to attend a hearing
• order a person to give evidence or produce any document
• enter a person's home or a workplace, if this is necessary for an investigation

The CGE can request any level of government to assist them with an investigation or with any of their functions.

Making a complaint to the CGE

Anyone can make a complaint to the CGE. If you want to make a complaint you must do the following:

1. Write down the details of the person who the complaint is about. This must include the name of the person or department, and their address and telephone number.
2. Say what the complaint is about.
3. Include your own name, address and telephone number.
4. Post or fax this to the nearest CGE office.

The Auditor General

The Auditor General is the watchdog of all money that is given to the government and spent by them. The Auditor General checks the accounts of all national and provincial government departments and all local governments to make sure that money is being accounted for.

Independent Electoral Commission (IEC)

This commission has been set up to manage elections to make sure that they are free and fair.

Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (Cultural Commission)

This commission has been established to promote and protect the rights of different cultural, religious and language communities.

It must promote and develop peace, tolerance and national unity amongst these communities, on the basis of equality, non-discrimination and freedom of association.

This commission has not been set up yet.

Independent Communications Authority of South Africa (ICASA)

This commission used to be called the Independent Broadcasting Authority (IBA). ICASA exists to monitor all aspects of broadcasting in this country. For example, to make sure that radio and television broadcasts are fair and that they represent the views of South African society.

Constitutional Court

See The Constitutional Court's first hearing
Land Claims Commission (LCC)

The Commission on Restitution of Land Rights (the Land Claims Commission) was set up under Section 25 (7) and (8) of the Bill of Rights (the property rights section). This Section says that any person or community who lost their land after 1913 because of an apartheid law that discriminated against them, could claim their land back or be paid out for the land. (But land that was taken away under the Expropriation Act of 1975 cannot be reclaimed.) So, the government passed the Restitution of Land Rights Act which set up the Commission on Restitution of Land Rights and the Land Claims Court to look at people’s land claims. They can investigate, mediate and settle land claims.

The Land Claims Commission is an independent body that is only accountable to the Constitution and to Parliament. It must send a report of its activities and findings to Parliament at least once a year.

The Land Claims Commission consists of a Chief Land Claims Commissioner and 9 commissioners, one in each province. The Minister of Land Affairs appoints the Chief Land Claims Commissioner and the Provincial Commissioners. There are also Land Court Judges in the Land Claims Court. The President, on the advice of the Judicial Services Commission, appoints the Land Claims Court judges.

Time limit on land claims

All claims for land had to be given to the Land Claims Commission before 30 April 1998. This means it is now too late for someone with a land claim to make a claim under the Restitution of Land Rights Act.

The functions of the Land Claims Commission

Before 30 April 1998, the functions of the Land Claims Commission included helping people make a claim, and receiving claims. The Land Claims Commission’s other functions continue. These are to:

- investigate claims
- mediate and settle claims
- report on claims that have been settled
- advise and make recommendations to the Land Claims Court on claims that the Commission cannot settle
- monitor Land Claims Court orders and make sure they are carried out

The Commission investigates claims for restitution of land or compensation. It must first deal with land claims that were made by large groups of people. A commissioner mediates the claim if there are different claims to the same land. The services of the Commission are free.

If the commissioner cannot solve a dispute, the claim must be referred to the Land Claims Court. Anyone who does not agree with the decision of the commissioner can apply to the Land Claims Court and ask the court to reconsider the decision.

The functions of the Land Claims Court

The Land Claims Court is on the same level as a High Court of South Africa. Any appeals from the Land Claims Court are made to the Supreme Court, or to the Constitutional Court if it is appropriate.

The Land Claims Court hears disputes that cannot be resolved by the Land Claims Commission. So, if Commissioners can’t decide on claims then they will refer them to the Land Claims Court, which will make the final decision. The Court can order that people get their land back (this is called restitution of land) or get compensation for losing their land.

The Court will hold a pre-trial conference to find out what the claim is about and to hear all the evidence. Then it will make a court order about the land. The court can decide whether to give the land back to the person, or to give the person alternative land, or to pay the person compensation for the land.

The Land Claims Court can also hear disputes about the Land Reform (Labour Tenants) Act of 1966.

See LAND AND HOUSING, Land Claims Court
Resources

Constitutional Court

telefone  
(011) 403 8032  

fax  
(011) 403 6524  

postal  
Private Bag X32 Braampark  
Braamfontein 2017  

address  
2nd floor Forum 2  
Braamfontein Hoofd Street  
Johannesburg  

President  
The Honourable Justice A Chaskalson  

Chief Justice  
The Honourable Chief Justice I Mahomed (dead)  

Registrar of the Constitutional Court  
Ms M S Stander  
(011) 403 2946  

The Public Protector

telephone  
(012) 322 2916  
0800 112040  

fax  
(012) 322 5093  

postal  
Private Bag X677 Synodal Centre  
Pretoria 228 Visagie Street  
Pretoria 0001  

address  
PO Box 1854  
Port Elizabeth  
6001  

send statements to  
Advocate Selby Baqua  
There are no provincial Public Protector offices open at the moment.  

South African Human Rights Commission

Chairperson  
Dr Barney Pityana  

website  
www.sahrc.org.za  

Eastern Cape

telephone  
(041) 582 2611 or 582 4094  

fax  
(041) 582 2204  

postal  
PO Box 1854  
Port Elizabeth  
6001  

Free State
nThe office will open in March 2001.  

Gauteng

telephone  
(011) 484 8300  

fax  
(011) 484 1360  

postal  

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<tr>
<th>Address</th>
<th>Contact Information</th>
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</table>
| Private Bag X2700 Entrance 1, Isle of Houghton Boundary Road Houghton Johannesburg | **KwaZulu-Natal**
  - **telephone** (031) 304 7323/4/5
  - **fax** (031) 304 7323/4/5
  - **postal** PO Box 1456 Durban 4000
  - **address** street

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<tr>
<th>Address</th>
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| PO Box 55796 Pietersburg 0700 | **Northern Province**
  - **telephone** (015) 291 3500 or 291 3504
  - **fax** (015) 291 3505
  - **postal** PO Box 55796 Pietersburg 0700
  - **address** street

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| PO Box 3563 7th floor Volkskas Building Adderley Street Cape Town | **Western Cape**
  - **telephone** (021) 426 2277
  - **fax** (021) 426 2875
  - **postal** PO Box 3563 7th floor Volkskas Building Adderley Street Cape Town
  - **address** street

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<tr>
<th>Address</th>
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| PO Box 32175 10th floor Braamfontein Centre Braamfontein Johannesburg | **Commission on gender equality**
  - **website** [www.cge.org.za](http://www.cge.org.za)
  - **telephone** (011) 403 7182
  - **fax** (011) 403 7188
  - **postal** PO Box 32175 10th floor Braamfontein Centre Braamfontein Johannesburg
  - **address** street

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| PO Box 32175 10th floor Braamfontein Centre Braamfontein Johannesburg | **Auditor General**
  - **telephone** (012) 426 8000
  - **fax** (012) 426 8240
  - **postal** PO Box 32175 10th floor Braamfontein Centre Braamfontein Johannesburg
  - **address** street

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| PO Box 32175 10th floor Braamfontein Centre Braamfontein Johannesburg | **Independent Communications Authority of South Africa**
  - **website** [www.iba.org.za](http://www.iba.org.za)
  - **telephone** (011) 722 0000/29
  - **fax** (011) 444 1919 or 444 6310
  - **postal** PO Box 32175 10th floor Braamfontein Centre Braamfontein Johannesburg
  - **address** street
Land Claims Commission

See LAND AND HOUSING, Resources

Land Claims Court

See LAND AND HOUSING, Resources

Parliament

website

www.parliament.gov.za

telephone

(012) 403 2911

tax

(012) 426 8240

Provincial Governments

Look in the telephone directories of capital cities of provinces

Government Departments

Look in the back of the telephone directory

Publications

Constitution and Bill of Rights Education Project Resource

Manual

Democracy for All

Protecting Human Rights in a New South Africa

Human Rights: Questions and Answers

The Constitution of South Africa from a Gender Perspective

Lawyers for Human Rights and the National Paralegal Association

Street Law

Albie Sachs

Leah Levin, Unesco

edited by Sandra Liebenberg

Problems

PROBLEM 1: Taking a case to the Human Rights Commission

Joe Mkhize applies to go to Welmoed High School. The school is only two blocks away from where he lives with his parents. At Welmoed High School most of the students speak Afrikaans and all of the lessons are in Afrikaans. Joe speaks a different language from the language used at this school. He has a different religion and sometimes misses school because of his religious holidays. The School Board rejects his application. They say they only want Afrikaans-speaking people to come to Welmoed High School. They say it is their right to refuse to let him register. Joe’s parents feel they have a right to send Joe to the school.

What are his rights?

The Bill of Rights in the Constitution says Joe has a right to attend Welmoed High School. Section 9: Right to equality, clause number 3 says he has a right not to be discriminated against on the basis of his language or religion. Section 29 says he has a right to a basic education.
People do have a right to develop their own language and culture, but they cannot exclude people from a government school on the basis of their language or religion, or any other factor listed in the right to equality section of the Bill of Rights.

See Section 9: Right to equality
See Section 29: Education

What can you do?

You can help Joe and his parents to make a complaint to the South African Human Rights Commission.

See Making a complaint to the SAHRC
See Resources for South African Human Rights Commission contact details

PROBLEM 2: Making a complaint to the Public Protector

Mrs Jansen applied for her old age pension three years ago. She has still not received a penny of this pension. The pension officer says he doesn't know why this is so. Mrs Jansen finds out that other people have also waited years for their pension. She believes that some people don't have to wait so long for their pension. Mrs Jansen wants to take action because she is desperate for the pension payments.

What are her rights?

The Constitution says the Public Protector can investigate state officials and their conduct if people believe they are abusing their powers or not doing their job properly. This is a case of misconduct on the part of the pension officer.

See The Public Protector

Mrs Jansen has a right to have access to information held by the state that will help her exercise her rights. She also has the right to just administrative action and to be given reasons why her pension has taken so long to arrive.

See Section 32: Access to information
See Section 33: Just administrative action

What can you do?

You can help Mrs Jansen make a complaint to the Public Protector.

See Making a complaint to the Public Protector
See Resources for Public Protector contact details

PROBLEM 3: Taking a case to the Commission on Gender Equality

Maria Johannes is a farmworker. She is a member of the Farmworker's Union. When she falls pregnant her employer tells her to leave and he employs someone else in her place. Maria is angry and she discusses this with other women on the farm. Many of the women feel angry because they only get work when it suits the farmer. Only women are used for seasonal work. They cannot rely on having work all year round. They all agree that the farmer's actions are unfair and they decide to take further steps.

What are their rights?

The Constitution says there can be no discrimination on grounds of gender, sex and pregnancy. In this case Maria Johannes and the other female workers have been discriminated against.

See Section 9: Right to equality, clause 3

The Commission on Gender Equality will protect people (men and women) who complain that they have been discriminated against because of their gender or sex.
What can you do?

You can help Maria Johannes and the other female workers make a complaint to the Commission on Gender Equality.

PROBLEM 4: Lobbying local government

The Municipal Council of Maluti promised that it would provide electricity to the whole town before the end of 1996. It is now the end of 1997 and there is still no electricity in some parts of the town. In addition, the rubbish removal service only works sometimes and the rubbish is piling up and causing a health hazard. The residents of the town have been to see the Council but nothing seems to help. They say it is their right to have electricity and a proper rubbish removal service.

What are their rights?

The Constitution says people have the right to a clean and healthy environment.

What can you do?

People can lobby local government and put pressure on them to force them to provide the facilities and services. There are different ways of doing this and you can help them plan a campaign against the municipal council.

These are some of the ways to lobby for better services:

- Become informed and know what your rights are.
- Write to newspapers and build up a support base.
- Find out what other people are thinking by listening to people around you.
- Attend municipal council meetings that are open to the public and make your demands known.
- Organise a peaceful demonstration through the town to tell people what the council needs to do.
- Send around a petition for people to sign and take this to the council.
- Organise public meetings and ask local councillors to attend.
- Arrange for a delegation that is representative of the community to meet with councillors.
- Make a complaint to the South African Human Rights Commission based on the discrimination against your community, and your right to have access to a healthy and safe environment.
Checklists

1. **Human rights abuses**
   
   Report these to the South African Human Rights Commission.
   
   See PROBLEM 1: Taking a case to the Human Rights Commission

2. **Gender-specific human rights abuses (female and male)**

   Report these to the Commission for Gender Equality.

   See PROBLEM 3: Taking a case to the Commission on Gender Equality

3. **Complaining about government officials**

   Report these complaints to the Public Protector.

   See PROBLEM 2: Making a complaint to the Public Protector